

THE LAW-DICTIONARY;

EXPLAINING THE
RISE, PROGRESS, AND PRESENT STATE,
OF THE

ENGLISH LAW,
IN THEORY AND PRACTICE;

DEFINING AND INTERPRETING
THE TERMS OR WORDS OF ART;

AND COMPRISING COPIOUS INFORMATION,
HISTORICAL, POLITICAL, AND COMMERCIAL,

ON THE SUBJECTS OF OUR
LAW-TRADE, AND GOVERNMENT.

ORIGINALLY COMPILED

By *GILES JACOB*;

AND continued by Him, and other Editors, through TEN EDITIONS:

NOW GREATLY ENLARGED AND IMPROVED,
BY MANY MATERIAL CORRECTIONS AND ADDITIONS,
FROM the latest STATUTES, REPORTS, and other ACCURATE PUBLICATIONS;

By *T. E. TOMLINS*,

OF THE INNER TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. I.

LONDON!

PRINTED BY ANDREW STRAHAN,

LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR T. LONGMAN, B. LAW, C. DILLY, G. G. & J. ROBINSON, T. CADELL, A. STRAHAN, J. JOHNSON,
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P R E F A C E.

THE UTILITY of a Dictionary, containing not only a Definition and Explanation of the Terms used in the Science of the ENGLISH LAW, but also a general Summary of the Theory and Practice of the Law itself, having been so fully evinced by the success of *Ten Editions* of the Work on which the Volumes here presented to the Reader are founded; any observations upon that subject would be superfluous:—Something, however, is requisite to introduce the following Sheets; as due both to the Proprietors and the Editor of this *General Law-Dictionary*; which is offered to the attention and patronage, not only of THE PROFESSION, but of ALL who wish to obtain a knowledge of the Duties imposed upon them, and the Rights secured to them, by the Laws of their Country.

IT IS NOW more than Four Years since the Proprietors of JACOB'S *Law-Dictionary* (the last Edition of which was published in the year 1782) applied to the present Editor, to prepare the Work for republication. This he very cheerfully undertook; imagining at first that nothing more could be required than to employ his attention on such Statutes and Reports as the course of time had produced since that Edition: little aware that a thorough Revival of the whole had become absolutely necessary, from the numerous Improvements in our Law; which had by no means been sufficiently attended to, either in that, or even in the preceding Edition.

A CURSORY PERUSAL of *Jacob's Dictionary* soon convinced the Writer, that, to render the Work really useful to the Profession and the Public, in the present State of the Law, much Labour, Time, and Study must be employed; that unremitting Diligence alone could collect and digest the materials for such a Compilation, and that, strictly keeping in view JACOB'S original Plan, it would demand some Judgment so to arrange, simplify, and methodize the Information obtained, as to preserve the general Character of the Work, and yet to introduce every proper Correction and Improvement.

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TO THIS TASK then he seriously applied himself.—He first carefully examined the Text, as it stood in the *Tenth Edition*.—Here he found much sound Learning on the Origin and Antiquity of our Law, defaced with unskilful Interpolations: Innumerable Statutes, long repealed, detailed at large as *Existing Laws*,* : The other Statutes quoted throughout the Work, (by continued errors of the Press through various Editions,) incorrectly cited: Except in some few instances, a want of Method, and Poverty of Language, pervading the whole body of the Work: And the Improvements of our Law, during the last Thirty Years and more, either wholly passed over, or very superficially noticed.

HIS NEXT STEP, therefore, was to correct the Errors which appeared.—Solely to perform this was a long and tedious labour: Every Statute quoted has been examined; and it is by no means an exaggeration to say, that *many thousand Errors*, in this particular alone, have been detected and amended.—To erase whatever was superseded or contradicted by modern Laws or Determinations, was next requisite: And, when thus much was performed, a vast void remained, to be filled up with a Summary of the State of the Law, as at present existing.

IN MANY INSTANCES, where the Law relative to one Subject was scattered through the Book, the whole has been brought together under a single Title, consolidated, re-arranged, and enlarged; and the proper References made from Title to Title †. In some few others, it was found convenient to remove the whole of a Title, as it stood in the former Work; and to supply its place by a New Abridgment of the Law on that particular Subject ‡.—In no case, however, has any alteration been made, without mature consideration, and a sincere wish for the Improvement of the Work, and the Instruction of the Reader.

IN THE NEXT PLACE, The Editor considered himself called upon to introduce many *New Titles*; some on the Origin and Antiquity of our Law §; and several connected with the Commercial Concerns of the Country ||; which had for the most part been entirely omitted, or at best very slightly referred to, by JACOB or his Continuator.—These Additions, it is believed, do not make less than *One Fourth Part* of the present Volumes.

* Titles HIGHWAYS, TURNPIKES; and others.

† AWARD, ARBITRATION;—HOMICIDE, MURDER, MANSLAUGHTER;—EXECUTOR, ADMINISTRATOR;—ADVOWSON, PRESENTATION, USURPATION; and very many others.

‡ BANKRUPT, BILL OF EXCHANGE, HIGHWAYS, WILLS, &c.

§ TENURES, &c.

|| EAST INDIA COMPANY, NAVIGATION-ACTS, INSURANCE, &c. &c.

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TO ENABLE HIMSELF to perfect the Plan which his Mind soon formed, in the order above stated, The Editor has applied to all such Publications as seemed more immediately adapted to his purpose.

THE STATUTES have been perused with peculiar care and diligence: Almost all which are material, even to the end of the Session of Parliament in 1796, are introduced; and throughout the Work, it is believed, that none are omitted to be noticed which passed before the *Thirty-third* year of the present Reign. The long time which the Dictionary has taken in going through the Press, has therefore, it is hoped, on the whole, operated rather to the benefit than the prejudice of All who may have occasion to consult it.

TO THE excellent Series of modern TERM-REPORTS in the Courts of Westminster-Hall, which have appeared within the last ten years:—To the various new Editions of former Reports, and other Law-Books of long-established reputation; in alluding to which, it would be injustice not to particularise *The Coke upon Littleton, Peere Williams's Reports, and Hawkins's Pleas of the Crown*:—Together with many other smaller Volumes well deserving notice, as including Systems of particular branches of the Law:—To all these recourse has been had; and the Information contained in them has been applied to the present purpose, with a care and attention which, the Editor trusts, have not been totally fruitless.

BUT, above all, THE COMMENTARIES of the learned *Blackstone* have been fully and freely applied to, and the most material parts of them adopted; sometimes abridged; but more frequently enlarged by Additions from the various sources above alluded to. The Edition last published has been used, whenever the Term of its publication allowed; and many of the new Notes there introduced have been added to the mass of modern intelligence here presented to the Reader.

WHENEVER, in consulting any of the above Authorities, the Writer of this had occasion to question or differ from the positions there laid down, he intended to state his dissent, with modesty and candour.—To Error every Author is liable—*Opere in longo fas est*. Many mistakes have been silently corrected in all the Books consulted on this occasion. The Editor seeks only that Indulgence which he has bestowed, with a liberality more unbounded than can well be imagined.

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SYSTEMATICAL RULES, and their Exceptions, seem in general of more consequence than a multiplied variety of Cases : Rules give the effect of Cases, without the tediousness of their detail. It has been said by a very eminent Lawyer, “ That precedents are frequently rather apt to confound ; that every Case has its own peculiar circumstances, and therefore ought to stand on its own bottom.” On this Maxim chiefly are all the Additions to the Work compiled, and the whole re-digested : The Deviations from it, where they still occur, have frequently arisen, rather from a deference to the names of former Editors, and from a desire of not making alterations which might be thought merely capricious, than from a conviction of the necessity or propriety of such a mode of Compilation.

THE PRINCIPLE therefore of this Dictionary, thus enlarged and improved, is, to convey to the Uninformed a competent general Knowledge of every subject connected with the LAW, TRADE, and GOVERNMENT, of these Kingdoms : To show the Origin, Foundation, Progress, and present State of our POLICY and JURISPRUDENCE.—Information of this nature must interest every Man of liberal Education, in whatever sphere : To *Magistrates*, whether superior or subordinate, it will be found particularly useful : By *Lawyers* it will, doubtless, be applied to, as a Digest of Learning previously obtained ; and an Index to further Inquiries on the Theory and Practice of our Law, in all its various branches.

IN ENDEAVOURING to complete an Undertaking of such length and importance, The Editor is fully conscious that many Errors and Inadvertencies must, even yet, have escaped ;—Omissions, he hopes, there are now but few ;—and for the Inconsistencies which must inevitably appear, he relies for pardon on the good sense of all who are competent to judge on a Work so multifarious and extensive.

IT WAS impossible to enter into the great variety of Subjects contained in these Volumes, without being occasionally led into observations, which apply rather to the System of Politics, and the general Theory of Government, than to the confined Question of Law : This Licence was necessarily taken by former Editors of JACOB ; and was used, to some extent, by COWEL in his *Interpreter*.

THE TRUE INTEREST of Nations would best be consulted by preserving the greatest Harmony between those, whom it seems to be the business and the pleasure of political (at least of party) Writers,—“ *more studious to divide than to unite,*”—to set at variance. GOVERNMENT has no Rights, and the PEOPLE have no Duties, inconsistent with the true welfare of each other : The reciprocal conditions of their

Friendship

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Friendship and Security may be comprised in two words—PROTECTION and OBEDIENCE. It has been the constant wish of The Editor, in compiling the following Sheets, to place in the strongest light every Argument and Decision which may tend to show, what care the Laws and Constitution of GREAT BRITAIN have progressively taken to enforce *both* those Principles, and to guard Britons against the fatal consequences which must attend a violation of either.

THE INDULGENCE of the Reader is yet a little longer requested, to a few words, which *The Editor* hopes to be excused for stating, respecting *Himself*.

ANXIOUS, from very early youth, to become a Member of the Profession to which he has the honour to belong, it was his misfortune to be compelled, by certain untoward circumstances, to enter into that Profession, and into Life, prematurely; without either Education or Experience, sufficient to enable him to perform the Duties imposed upon him by such a situation. He very soon perceived his deficiencies, and endeavoured to supply them by diligent study and observation. A few years brought him near the point at which he aimed: But at the moment when assistance was most wanted, he was disappointed of receiving it; through his own neglect, in omitting to apply to those who were really capable and desirous to have afforded it. He retired, for awhile, from his public practice at the Bar; and betook himself to more silent, but not less laudable, Employments. He found Friends;—where indeed he least expected them! He has since succeeded in life beyond his merits—almost beyond his hopes. His former Literary Efforts have not been thought wholly unworthy approbation; on the present he rests with somewhat more confidence, though with no small portion of fear; since his future fate and pursuits may depend on its success. On the Candour of THE PUBLIC (more particularly of THE PROFESSION) he relies; and whether he shall retain the Pen, or resume the Gown, in public or in private, it shall be his unceasing study to deserve that Encouragement, which seldom fails to await on well-meant Endeavours, and honourable Exertions.

T. E. TOMLINS.

DOCTORS'-COMMONS,

Jan. 23, 1797.

Modern Law Dictionary;

CONTAINING

The PRESENT STATE of the LAW in THEORY and PRACTICE;

With a DEFINITION of its TERMS; and the

HISTORY of its RISE and PROGRESS.

ABA

AB, From the word *abbot*, in the beginning of the name of any place, shows that probably it once belonged to some *abbey*; or that an abbey was founded there. *Blount*.

ABACON. A cap of state wrought up in the form of two crowns; worn by our ancient British kings. *Chron. Angl.* 1463: *Spelm Gloss*.

ABACTORS, *abactores*, ab *abigendo*.] Stealers and drivers away of cattle by *herds*, or in great numbers. *Cowet*.

ABACUS. Arithmetick: from the *abacus*, or table strewed with dust, on which the ancients made their characters and figures. *Cowet*: *Du Fresnoe*. Hence

ABACISTA. An Arithmetician. *Cowet*.

ABANDUM, *abandonum*.] Any thing sequestered, proscribed or abandoned. *Abandon*, i. e. in *bannum res missa*; a thing banned or denounced as forfeited and lost; from whence, to abandon, desert, or forsake as lost and gone. See *Title Insurance*.

ABARNARE, from *Sax. Abarnian*.] To discover and disclose to a magistrate any secret crime. *Leg. Canoni*, c. 104.

ABATAMENTUM. An entry by interposition. *1 Inst.* 277. See the succeeding articles.

TO ABATE, from the *Fr. Abatre*.] To prostrate, break down, or destroy; and in law to *abate* a cattle or fort is, to beat it down. *Old Nat. Br.* 45: *Stat. Westm.* 1. c. 17. *Abatre maison*, to ruin or cast down a house, and level it with the ground; so to *abate a nuisance* is to destroy, remove, or put an end to it.

To *abate a writ*, is to defeat or overthrow it, by showing some error or exception. *Brit. c.* 48.—In the statute *de conjunctim scissatis*, it is said the writ shall be *abated*; i. e. disabled and overthrown. *Stat.* 34 E. 1. *ff.* 1.—So it is said an appeal shall *abate*, and be defeated by reason of covin or deceit. *Staundf. P. C.* 148.—And the justices shall cause the said writ to be *abated* and quashed. *Stat.* 11 H. 6. c. 2.

The word *abate*, is also used in contradistinction to *disseise*; for as he that puts a person out of possession of

ABA

his house, land, &c. is said to *disseise*; so he that steps in between the former possessor, and his heir, is said to *abate*; he is called an *abator*, and this act of intrusion or interposition is termed an *abatement*. *1 Inst.* 277 a: *Kitch.* 173: *Old Nat. Br.* 91, 115.

ABATEMENT. For its least usual meanings see the two preceding articles.

In its present most general signification it relates to writs or plaints; and means, the quashing or destroying the plaintiff's writ or plaint.

A *Plea in Abatement* is, a plea put in by the defendant, in which he shews cause to the court why he should not be impleaded or sued; or if impleaded, not in the manner and form he then is; therefore praying that the writ or plaint may *abate*; that is, that the suit of the plaintiff may for that time cease. *1 Inst.* 134 b, 277: *F. N. B.* 115: *Cowet & Gilb. H. C. P.* 186: *Terms de Ley* 1.

On this subject shall be considered

I. The various Pleas in Abatement.

1. To the Jurisdiction of the Court.
2. To the Person of the Plaintiff.
 - a. Outlawry.
 - b. Excommunication.
 - c. Alienage.
 - d. Attaint; and other Pleas in Abatement.
3. To the Person of the Defendant.
 - a. Privilege.
 - b. Misnomer.
 - c. Addition.
4. To the Writ and Action.
5. To the Count or Declaration.
6. On Account of;
 - a. The Demise of the King.
 - b. The Marriage
 - c. The Death
 of the Parties.

II. The Time and Manner of pleading in Abatement; and herein of pleading in Bar or Abatement.

III. The Judgment in Abatement.

B

L. I.

ABATEMENT I. 1.—2. c.

I. 1. The courts of *Westminster* have a superintendancy over all other courts, and may, if they exceed their jurisdiction, restrain them by prohibition; or, if their proceedings are erroneous, may rectify them by writs of error and false judgment. Nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged; so that where an action on promise is brought in such inferior court, not only the promise, but the consideration of it (*i. e.* the whole cause of action) must be alleged to arise within that jurisdiction; such inferior courts being confined in their original creation, to causes arising within the express limits of their jurisdiction; and therefore if a debtor who has contracted a debt out of such limited jurisdiction, comes within it, yet he cannot be sued there for such debt.

There are no pleas to the jurisdiction of the courts at *Westminster* in transitory actions, unless the plaintiff by his declaration shews that the cause of action accrued within a county palatine, or it be between the scholars of *Oxford*, or *Cambridge*. 4 *Inst.* 213: 1 *Sid.* 103.

There is a difference between a franchise to demand consuance, and a franchise *ubi breve domini regis non currit*. For in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand consuance; but in the other case the defendant must plead it to the writ. 4 *Inst.* 224. See Titles, *Franchise*, *Consuance*, *County Palatine*.

Where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at *Westminster* intrench on their privileges, they must demand consuance; that is, desire that the cause may be determined before them: for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally conveyed, and therefore he may plead it to the jurisdiction; but the creating a new franchise does not hinder the king's writ from running there as before, but only grants jurisdiction to the lord of the liberty. *Bacon's Abr.* tit. *Courts*. (D. 3.)

If the court has not a general jurisdiction of the subject, the defendant must plead to the jurisdiction, for he cannot take advantage of it on the general issue. And in every plea to the jurisdiction another jurisdiction must be stated. *Corp.* 172.

The pleas to the jurisdiction, are either that the cause of action, or the person of the party, is not the object of the jurisdiction of the court; of the first sort are pleas that the land is held in *Ancient demesne*, or that the cause of action arose in the *County Palatine*, or within the *Cinque Ports*, or other inferior courts, having peculiar local jurisdiction. Of the latter sort is the plea of *Privilege*; but which is generally considered rather as a plea to the person of the defendant. See this Dictionary under those titles; and *post*, Division 3. a. of the present head.

2. a. *Outlawry* may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, thereby loses its protection; but this is only a disability till the outlawry is reversed, or till he has obtained a charter of pardon. 1 *Inst.* 128: *Lit.* § 197: *Dy.* 23, 222: *Off.* 49: *Br. Nonability*, 25.

This disability is only pleadable when the plaintiff sues in his own right; for if he sues in *alter droit* as exe-

cutor or administrator, or as mayor with his commonalty, outlawry shall not disable him; because the person or body whom he represents has the privilege of the law. When the plaintiff brings a writ of error to reverse an outlawry, the outlawry in that suit or in any other shall not disable him. The outlawry itself must not be an objection, for that would be *exceptio ejusdem rei cujus petitur dissolutio*; and if a man were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them. 1 *Inst.* 128: *Doct. Plac.* 396, 7.

When outlawry is pleaded in abatement, the plaintiff shall not reply that the outlawry is erroneous, for it is good till reversed. 1 *Lutw.* 36.

As to the time and manner of pleading outlawry, see *post*, under Division II. of this title *Abatement*.

Outlawry in a county palatine cannot be pleaded in any of the courts of *Westminster*, for the plaintiff is only ousted of his law *within that jurisdiction*. *Gilb. Hist. C. P.* 200: *Fitz. Coron.* 233. It has been suggested, but surely without reason, that outlawry, in the county palatine of *Lancaster*, may be pleaded in the courts of *Westminster*; because that county was erected by act of parliament in the time of *E. 3*; whereas those of *Cheshire* and *Durham* are by prescription. 12 *E. 4.* 16: *Doct. Plac.* 396.

b. A person *excommunicated* is disabled to do any judicial act; as to prosecute any action at law; (tho' he may be sued;) be a witness, &c.

Excommunication is a good plea even to an executor or administrator, tho' they sue in *alter droit*; for an excommunicated person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses; also it is one of the effects of excommunication, that he cannot be a prosecutor or attorney for any other person, and therefore cannot represent the deceased. 1 *Inst.* 134: 43 *E. 3.* 13: *Thel.* 11.

But in an action brought by officers with their corporation, the defendant shall not plead excommunication in the officers; because a corporation cannot be excommunicated as such; and they sue and answer by attorney. *Thel.* 11: 30 *E. 3.* 4: 1 *Inst.* 134: 4 *Inst.* 340.

Excommunication is no plea in a *qui tam* action; the statute giving the informer ability to sue. 12 *Co.* 61.

When excommunication is pleaded in the plaintiff, he shall not reply that he has appealed from the sentence; for it is in force until repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. *Bro. Excom.* 3: 3 *Bulst.* 72: 20 *II* 6. 25: *Roll.* 226.

When prohibition is brought against a bishop and he pleads excommunication against the plaintiff, and in the excommunication there is no cause thereof shewn, this is not a good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. *Thel.* 10, 11: 28 *E. 3.* 27: 8 *Co.* 68.

c. *Alienage* is a plea in abatement, now discouraged and but seldom used; the following however appears to be still law on the subject.

It may be pleaded in abatement, in an action real, personal or mixed that the demandant or plaintiff is an alien,

ABATEMENT I. 3. a, b.

alien, if he be an alien enemy; and in an action real or mixed, that he is an alien, though he be in amity. But in an action personal it is no plea that he is an alien if he be in amity. 1 *Inst.* 129 b: *Aff. Ent.* 11: 9 *E.* 4. 7: *12lv.* 198: 1 *Bull.* 154: *Bro. tit. Denizen.* But see 1 *Ld. Raym.* 282.

Where the defendant pleads that the plaintiff is an alien, in abatement of the writ, it is triable where the writ is brought, and the replication must conclude to the country; but otherwise, it is said, where it is pleaded in bar, that the plaintiff is an alien, the replication must conclude with an *averment*. *Salk.* 2: *West.* 5: *Amb.* 394.

Where the defendant pleaded that the plaintiff was an alien, born at *Rouen* in the kingdom of *France*, within the ligeance of the king of *France*; the plaintiff replied that he was an alien friend, born at *Hamburg*, within the ligeance of the Emperor, and traversed that he was born at *Rouen*; *Holt* inclined that it was an ill traverse and offered an ill issue. *Comb.* 212. See title *Aliens*.

d. *Attain*; It may be pleaded in abatement, that the plaintiff is attainted of treason or felony; or attainted in a *præmunire*; or that he hath abjured the realm. 1 *Inst.* 128 a, 129 b, 130 a: *Noy.* 1: *Sbo.* 155.

Papish Recusancy, can no longer be considered as pleadable since the *stat.* 31 *Geo.* 3. c. 32. See tit. *Papist*.

Coverture; It is also pleadable in abatement to the person of the plaintiff that she is a *fine covert*. 1 *Inst.* 132 b. and that she is the wife of the defendant. 1 *Bro. Ent.* 63. And by the defendant that she is herself a *fine covert*. *Lutw.* 23: *Barnes* 334. See tit. *Baron and Feme*, and *post.* 6, b.

Joint Actions; Of pleas in abatement for want of proper parties. See *Com. Dig.* tit. *Abatement* (E. 8.) (F. 4.) See also tit. *Action*, *Joinder*, &c.

A defendant may plead in abatement to the person of the plaintiff, that there never was any such person in *reum naturâ*. See *Com. Dig.* tit. *Abatement* (E. 16.)

3. a. The officers of each court enjoy the privilege of being sued only in those courts to which they respectively belong; because of the duty they are under of attending those courts, and lest their clients' causes should suffer if they were drawn to answer to actions in other courts. 2 *Mod.* 297: *Vaugh.* 155: 2 *H.* 7. 2: 2 *Ro. Ab.* 272: 1 *Lutw.* 44, 639. So a baron of the *Cinque Ports*, is to be impleaded within that jurisdiction. See *Com. Dig.* tit. *Abatement*. (D. 3.) and this *Dict.* tit. *Cinque Ports*.

But this is to be understood when the plaintiff can have the same remedy against the officer in his own court, as in that where he sues him; for if money be attached in an attorney's hands by foreign attachment in the sheriff's court in *London*, the attorney shall not have his privilege; because in this case the plaintiff would be remediless. 1 *Saund.* 67, 8.

So if a writ of entry, or other real action be brought against an attorney of the king's bench, he cannot plead his privilege; for the king's bench hath not cognizance of real actions. 1 *Saund.* 67.

So if an attorney of the *Common Pleas* be sued in a criminal *appeal*, he shall not have his privilege; for his own court hath not cognizance of this action. 38 *H.* 6. 29 b: 9 *E.* 4. 35: *Cro. Car.* 585: 1 *Leon.* 189: 2 *Leon.* 156.

This privilege, which the courts indulge their officers with, is restrained to such suits only as they bring in their own right; for if they sue or are sued as executors or

administrators, they then represent common persons and are entitled to no privilege. *H. b.* 177.

So if an officer of one court sue an officer of another court, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as that of the defendant in his; and therefore the cause is legally attached in the court where the plaintiff is an officer. 2 *Mod.* 298: 2 *Lev.* 129: 2 *Ro. Ab.* 275, *pl.* 4: *Moor.* 556.

So if a privileged person brings a joint action, or if an action be brought against him and others, he shall not have his privilege; but if the action can be severed without doing any injury, the officer shall have his privilege. *Dy.* 377: *Godb.* 10: 2 *Ro. Ab.* 275: 2 *Lev.* 129: 1 *Vent.* 298, 9.

An officer shall not have his privilege against the king. *Bro. Superfed.* 1: 2 *Ro. Ab.* 274. But in a *qui tam* action, at the suit of an informer, he shall have his privilege. *Lil. Reg.* 7: 3 *Lev.* 398: *Lutw.* 193.

If a person who hath the privilege of being sued in another court, be in *actual custody* of the marshal of *K. B.* he cannot plead his privilege; but otherwise where he is bailed, and so only legally supposed in custody. 1 *Salk.* 1: *Comb.* 390.

The court of *K. B.* will take notice of the privilege of their own officers; as where a *filazer* of the king's bench was arrested by writ, he was discharged on common bail; being an immediate officer of the court where his attendance was absolutely necessary. *Salk.* 544. But where an attorney of the *common pleas* was sued by bill in the court of *K. B.* on motion for his being discharged the court denied it and put him to plead his privilege. 1 *Mod. Ent.* 26. See 1 *Wils.* 306: 2 *Black. Rep.* 1085.

After a *general imparlance* an officer cannot plead his privilege, because by imparling he affirms the jurisdiction of the court, but after a *special imparlance* he may plead his privilege. *Bro. Prio.* 25: 22 *H.* 6. 6, 22, 71: 1 *Ro. Rep.* 294: 1 *Sid.* 29: 2 *Ro. Ab.* 273, 9: *Hardr.* 365: 1 *Lutw.* 46: 1 *Salk.* 1. And now the common practice is to use a special imparlance. See further this *Dict.* tit. *Privilege*. Indeed no plea in abatement is good after a general imparlance. 4 *Term Rep.* 227.

b. *Misnomer*, is the using one name for another, the misnaming either of the parties. This may be pleaded in abatement by the defendant, whether the misnomer is in his own name, or in that of the plaintiff; and this in christian or surname, name of dignity, name of office or addition. See *post.* and *Com. Dig.* tit. *Abatement*. (E. 18.) (F. 17.)

But though a defendant may by pleading in abatement take advantage of a misnomer, yet in such plea he must set forth his right name, so as to give the plaintiff a better writ. *Finch.* 363: 9 *H.* 5, 1.—which is the intent of all pleas in abatement. 4 *Term Rep.* 227.

Where a defendant comes in *gratis*, or pleads by the name alledged by the plaintiff, he is elopped to allege any thing against it. *Str.* 410. Where one is misnamed in a bond, the writ should be in the right name, and the count show that defendant, by *such* a name made the bond. To a plea of misnomer the plaintiff may reply, that defendant was known by the name in the writ. 1 *Salk.* 6, 7.

One defendant cannot plead *misnomer* of his companion, for the other defendant may admit himself to be the person

ABATEMENT I. 3. c.—4.

person in the writ. 1 *Lutw.* 36. The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is the same person. *Gill. H. C. P.* 218.

Where an indictment for a capital crime is abated for *misnomer* of the defendant, the court will not dismit him, but cause him to be indicted *de novo* by his true name. 2 *Hawke. P. C.* 523. See further this Dist. title *Misnomer*.

c. *Addition*, is a title given to a man besides his christian and surname, setting forth his estate, degree, trade, &c. Of estate, as yeoman, gentleman, esquire, &c. Of degree as knight, earl, marquis, duke, &c. Of trade as merchant, clothier, carpenter, &c. There are likewise additions of place of residence as *London, York, Bristol*, &c. If one be both a duke and earl, &c. he shall have the addition of the most worthy (i. e. superior) dignity. 2 *Inst.* 669. But the title of duke, marquis, earl, &c. are not properly additions but names of dignity. *Terms de Ley* 20. The title of knight or baronet is part of the party's name [as is also clarencieux or king at arms, &c.] and ought to be exactly used; but the titles of esquire, gentleman, yeoman, &c. being no part of the names are merely additions. 1 *Lil.* 34. An earl of *Ireland* is not an addition of honour here in *England*, but such person must be called by his christian and surname with the addition of esquire only; so sons of *English* noblemen, though they have titles given them by courtesy in respect of their families, if they are sued, must be named by their christian and surnames, with the addition of esquire; as, *A. B. Esq.* commonly called Lord *A.* 1 *Inst.* 16 b: 2 *Inst.* 596, 666.

By the common law, if a man that had no name of dignity was named by his christian and surname in all writs it was sufficient. If he had an inferior name of dignity, as knight, &c. he ought to be named by his christian and surname, with the name of dignity; but a duke, &c. might be sued by his christian name only, and name of dignity, which stands for his surname. 2 *Inst.* 663, 6. By stat. 1 *H. 5. c. 5*, it is enacted that in suits or actions where process of *outlawry* lies, (See 1 *Salk.* 5,) additions are to be made to the name of the defendant to shew his estate, mystery, and place of dwelling; and that writs not having such additions shall be *abated*, if the defendant take exception thereto, but not by the court *ex officio*. See *Gro. Jac.* 610: 1 *Ro. Rep.* 780. If a city be a county of itself, wherein are several parishes, addition thereof, as of *London* is sufficient. But addition of a parish not in a city must mention the county, or it will not be good. 1 *Danv.* 237.

The name of earl if omitted abates the writ; *Dav. Rep.* 60 a; and it shall not be amended, *Hob.* 129: 1 *Vent.* 154. But if a person is created an earl pending the action, bill, or suit, it shall not *abate*. See stat. 1 *E. 6. c. 7. § 3*. But there must be an entry on the roll stating that after the last continuance, *ff.* on such a day and year, the king by his letters patent created, &c. setting them forth with a *profect in calid*, &c. which the said defendant doth not deny, &c. 1 *Mod. Ent.* 31, 32.

If there are two persons father and son, with the same name and addition, in an action brought against the son, he ought to be distinguished by the appellation of *the younger*, added to his other description, or the writ may be

abated; but in an action against the father he need not be distinguished by the appellation of *the elder*. See 2 *Hawke. P. C.* 187.

On the whole it is proper to observe as to *misnomers* and want of addition, that the courts of *Westminster* will not abate a writ for a trifling mistake; and will in all cases amend, if possible, see title *Amendment*.

4. The writ being the foundation of the subsequent proceedings, great certainty and exactness is requisite, to the end that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the register, or be defective in substance, the party may take advantage of it. See 5 *Co.* 12: 9 *H.* 7. 16: 10 *E.* 3. 1: *Hob.* 1, 51, 52, 80: *Cartb.* 172. But where the writ shall not abate for variance from the register, so that it be equivalent, see *Hob.* 1, 51, 52.

Where a demand is of two things, and it appears the plaintiff hath action only for one, the writ may not be abated in the whole, but shall stand for that which is good; but if it appear that tho' the plaintiff cannot have this writ which he hath brought for part, he may have another, the writ shall abate in the whole. 11 *Reg.* 45: 1 *Saund.* 285.

In case administration be granted, after the action brought, and this appears, the plaintiff's writ shall abate. *Hob.* 245.

It is a good plea in abatement that *another action* is depending for the same thing; for whenever it appears on record, that the plaintiff has sued out two writs against the same defendant, for the same thing, the second writ shall abate; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill, *ab initio*. But it must appear plainly to be for the same thing; for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. 4 *H. 6.* 24: 9 *H. 6.* 12: 5 *Co.* 61: *Doe. Pl.* 10.

In general writs, as *trespass, assize, covenant*, where the special matter is not alledged, and the plaintiff is non-suited before he counts, and the second writ is sued pending the other, yet the former shall not be pleaded in abatement; because it doth not appear to the court that it was for the same thing; for the first writ being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but when the first is a special writ, and sets forth the particular demand, as in a *precipe quod reddat*, &c. there the court can readily see that it is for the same thing; and therefore though the plaintiff be non-suited before he counts, yet the writ shall abate the second writ, it being apparently brought for the same thing. 5 *Co.* 61: *Doe. Pl.* 11, 12. In an action of debt, &c. another action depending in the courts of *Westminster* for the same matter is a good plea in abatement; but a plea of an action in an inferior court is not good, unless judgment be given. 5 *Co.* 86: and see 5 *Co.* 62.

If a second writ be brought tested the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. *Allen* 34.

If an action pending in the same court, be pleaded to a second action brought for the same thing, the plaintiff may

ABATEMENT I. 5.—6. c.

may pray that the record may be inspected by the court, or demand *oyer* of it, which if not given him in convenient time he may sign his judgment. *Dy. 227: Carth. 452, 517.*

In action of debt on a judgment, defendant cannot plead a writ of error brought and pending either in bar or abatement; but the court usually stays proceedings on terms till the error is decided. *1 Bac. Abr. 14.*

5. After the party suing has declared, the party impleaded may demand *oyer* of the writ; and then if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the party impleaded ought to shew it by his pleading. *Theb. lib. 10. c. 1. § 5: Fitz. Count. 27.*

Defendant may plead in abatement of a declaration where the action is by original; but if it be by bill he must plead in abatement of the bill only. *5 Mod. 144.* A little variance between the declaration and the bond pleaded will not vitiate the declaration; but uncertainty will abate it. *Plowd. 84.* The variance of the declaration from the obligation, or other deed on which it is grounded, will sometimes abate the action. *Hob. 18, 116: Moor. 645.* And if a declaration assign waste in a town not mentioned in the original writ, the writ of waste shall abate. *Hob. 48.*

Likewise where the declaration is otherwise defective, in not pursuing the writ, or not setting forth the cause of action with that certainty which the law requires, or laying the offence in a different county from that in which the writ is brought. *1 New Abr. 6.*

6. a. As to the *demise* of the king; at common law, all suits depending in the king's courts were discontinued by the death of the king; so that the plaintiffs were obliged to commence new actions, or to have re-summons or attachment on the former process, to bring the defendant in; but to prevent the inconvenience, expence and delay which this occasioned, the stat. 1 E. 6. c. 7, was made.

Proceedings on an information, in nature of a *quo warranto*, are not abated by the demise of the crown. *2 Stra. 782.* Where the king brings a writ of error in *quare impedit*, it abates by his death. *2 Stra. 543.*

b. With respect to the *marriage* of the parties; *coverture* is a good plea in *abatement*, which may be either before the writ sued, or pending the writ. By the first the writ is abated *de facto*, but the second only proves the writ abatable; both are to be pleaded, with this difference, that *coverture*, pending the writ, must be pleaded, after the last continuance; whereas *coverture* before the writ brought, may be pleaded at any time, because the writ is *de facto* abated. *Dougl. Pl. 3: 1 Leon. 108, 109: Vide 2 Ld. Raym. 1525: Comb. 449: Litt. 1639.*

If a writ be brought by A. and B. as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. *Fitz. Brief. 476.* If a writ be brought against a feme covert as sole, she may plead her *coverture*; but if she neglects to do it, and there is a recovery against her as a feme sole, the husband may avoid it by writ of error, and may come in at any time and plead it. *Latch. 24: Stile 254, 280: 2 Roll. Rep. 53:* If an action be brought in an infe-

rior court against a feme sole, and pending the suit she intermarries, and afterwards removes the cause by *habeas corpus*; and the plaintiff declares against her as a feme sole, she may plead *coverture* at the time of suing the *habeas corpus*; because the proceedings here are *de novo*; and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*. For though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he might be ousted of, and possibly by the same means of the debt. *1 Salk. 8.*

In ejectment against baron and feme, after verdict for the plaintiff, baron dies between the day of *Nisi prius* and the day in Bank; adjudged that the writ should stand good against the feme, because it is in nature of a trespass, and the feme is charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. *Cro. Jac. 356: Cro. Car. 509: 1 Roll. Rep. 14: Moor 469.*

If a feme sole plaintiff, after verdict, and before the day in Bank, takes husband, she shall have judgment, and the defendant cannot plead this *coverture*, for he has no day to plead it at. *Cro. Car. 232: 1 Bulst. 5.*

If an original be filed against a feme sole, and before the return she marries, you may declare against her without taking notice of her husband, for her intermarriage is no abatement of the writ in fact, but only makes it abatable. *Comb. 449: 1 Roll. Rep. 53.*

'Tis now in general held, that if a *feme sole* commences an action, and pending the same marries, the suit is abated; but that it is otherwise with respect to a feme sole defendant, as she shall not take advantage of her own act. See further, title *Baron and Feme*.

c. The general rule is, that whenever the death of any party happens pending the writ, and yet the plaintiff is in the same condition as if such party were living, there such death makes no alteration or *abatement* of the writ. *1 New Abr. 7.*

The death of a plaintiff did generally at common law *abate* the writ before judgment, till the stat. 8 & 9 W. 3. c. 11; which declares that neither the death of plaintiff or defendant after interlocutory judgment shall *abate* it, if the action might be originally prosecuted by and against the executors or administrators of the parties: and if there are two or more plaintiffs or defendants, and one or more die, the writ or action shall not *abate*, if the cause of action survives to the surviving plaintiff, or against the surviving defendant, but such death being suggested on record the action shall proceed. For the cases previous to this statute, see *Cro. Eliz. 652: 1 Inst. 139: Dr. 279: Hard. 151, 164: Stile 299: 3 Mod. 249: Cro. Car. 426: 1 Jun. 367: 1 Rel. Abr. 756: 1 Show. Rep. 186: 1 Vent. 34: 3 Mod. 249.*

But in a writ of error, if there be several plaintiffs, and one dies, the writ shall abate, because the writ of error is to set persons *in statu quo*, before the erroneous judgment given below; and they that are plaintiffs in error were *distinct* sufferers in the judgment, since there might be different executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, lest by a collusive persuasion, or by negligence or design he should hurt the representative of the deceased. *Bridg. 78: Yelv. 208: 10 Co. 1551: 1 Vent.*

ABATEMENT II.

34: 1 *Sid.* 419. *cont.* But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he only is to defend it. *Sid.* 419: *Yelv.* 208: 1 *L. Raym.* 439. If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in *abatement*; because it falsifies the writ; and because the right was in the survivors, at the time of suing the writ, and the writ not according to the case. 20 *Hen.* 6. 30: 18 *E.* 4. 1: 2 *H.* 7. 16: 1 *Brownl.* 3, 4: *Clift. Ent.* 6: *Rast. Ent.* 126.

By stat. 17 *Car.* 2. c. 8, (made perpetual by 1 *Jac.* 2. c. 17. § 5,) it is enacted, that the death of either of the parties between verdict and judgment, shall not be allowed for error, so as judgment be entered within two terms after such verdict. See 1 *Salk.* 8: 2 *Ld. Raym.* 1415: *Sid.* 385.—See tit. *Amendment*.

II. A plea in abatement must be put in within four days after the return of the writ, because the person coming in by the process of the court ought not to have time to delay the plaintiff. *Lutw.* 1181: 2 *Stra.* 1192.

But if a declaration be delivered against one in custody, he has the whole term to plead in abatement. *Salk.* 515.

If the declaration be delivered in the vacation, or so late in term, that defendant is not bound to plead to it that term, he may plead in abatement, within the first four days of next term.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them. First, by the statute of 4 & 5 *Ann.* cap. 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shewn to the court. Secondly, no plea in abatement shall be received after *respondeas osten*, for then they would be pleaded in *infinitum*. 2 *Saund.* 41. Thirdly, they are to be pleaded before imparlance. See *Yelv.* 112: 1 *Lutw.* 46, 178: 2 *Lutw.* 1117: *Doct. Pl.* 224: 4 *Term Rep.* 227. 520: Except where antient demesne is pleaded; for this may be done after imparlance, because the lord might reverse the judgment by writ of *disceit*, and it goes in bar of the action itself. For this see *Dyer in marg.* 210: *Stile* 30: *Latch.* 83: 5 *Co.* 105: 9 *Co.* 31. *Han. Ent.* 103.

A plea in abatement must be signed by counsel, and filed with the clerk of the papers; and without an affidavit annexed to it, judgment may be signed. *Impey's Instru. Cler.* K B.

With respect to pleas to the jurisdiction of the court, it is to be observed that the defendant must plead in *propria persona*; for he cannot plead by attorney without leave of the court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court; and if he put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 1 *New Abr.* 2.

The defendant must make but half defence, for if he makes the full defence *quando & ubi curia consideraverit*, &c. he submits to the jurisdiction of the court. *Lutw.* 9: 1 *Sborv. Rep.* 386.

If a plea is pleaded to the jurisdiction of the court, it ought to conclude with a prayer of judgment in this manner, *viz. The said defendant prays judgment, whether the court will take any further cognizance of the said plea.* 1 *Mod. Ent.* 34.

Pleas in disability of the plaintiff, may not be pleaded

after a general imparlance: 1 *Lutw.* 19. In pleading *outlawry* in disability in another court, the ancient way was to have the record of the outlawry itself *sub pede sigilli* by *certiorari* and *mittimus*; (See *Doct. Pl.* 393: *Stam.* 103: *Fitz. Coron.* 233;) but this being very expensive, it is now sufficient to plead the *capias uslagatum* under the seal of the court from whence it issues; for the issuing of execution could not be without the judgment; and therefore such execution is a proof to the court that there is such a judgment, which is a proof that the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore on shewing such execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in. *Co. Lit.* 128: *Doct. Plac.* See tit. *Outlawry*.

Outlawry may be pleaded in bar, after it is pleaded in abatement, because the thing is forfeited, and the plaintiff has no right to recover. 11 *H.* 7. 11: 2 *Lutw.* 1604.

Outlawry may be always pleaded in abatement, but not in bar, unless the cause of action be forfeited. *Co. Lit.* 128. b: *Doct. Pl.* 395.

In *personal actions*, where the damages are uncertain, *outlawry* cannot be pleaded in bar; but in *actions on the case*, where the debt to avoid the *law wager*, is turned into damages, there *outlawry* may be pleaded in bar, for it was vested in the king, by the forfeiture, as a debt certain, and due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed of. 2 *Lutw.* 1604: 3 *Lev.* 29: 2 *Vent.* 282: 3 *Leon.* 197, 205: *Cro. Eliz.* 204: *Owen* 22.

Where *excommunication* is pleaded, it is not sufficient to shew the writ *de excommunicato capiendo* under the seal of the court; for the writ is no evidence of the continuance of the excommunication, since he may be absolved by the bishop, and that will not appear in the king's court, because such absolution is not returned into the king's court from whence the *significavit* is sent.

Alienage may be pleaded either in bar or abatement: In the latter case to an alien in league; in the former to an alien enemy. 1 *Inst.* 129 b. See ante l. 2. c.

If a plea in abatement be pleaded to the person of the plaintiff, there it must conclude, *if he ought to be compelled to answer.* 1 *Mod. Ent.* 34.

In all pleas of abatement which relate to the person, there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. 1 *Bac. Abr.* 15.

If it be pleaded to the writ, then the plea concludes with the prayer of judgment of the writ, and that the writ may be *quashed*. When it is to the action of the writ, there he should shew that the party ought not to have that writ, but by the matter of his plea should intimate to him how he should have a better. *Latch.* 178. *Respondeo non debet* is a proper beginning to a plea to the jurisdiction of the court, but a plea of *ne unques executor*, ought to begin with *petit judic' de billa* 5 *Mod.* 132, 133. 146: 1 *Saund.* 283: 2 *Saund.* 97. 189, 190. 339: *Lutw.* 44: *Sborv.* 4.—In a replication to a plea in abatement where matter of fact is pleaded, the plaintiff must pray his damages; but where matter of law is pleaded, the plaintiff must only pray that his writ may be maintained. 1 *Ld. Raym.* 339. 594: 2 *Ld. Raym.* 1022.—If one pleads matter of abatement, and concludes in bar, *Et petit judicium si actionem*

actionem habere debet, though he begins in abatement, and the matter be also in abatement, yet the conclusion being in bar, makes it a bar; and the reason is, because you admit the writ by concluding specially against the action. 18 H. 6. 27: 32 H. 6. 17: 36 H. 6. 18: 22 H. 6. 536: 1 Show. 4. 2 Ld. Raym. 1018.—If a man pleads matter in bar, and concludes in abatement, it shall be taken for a plea in bar, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in bar. 37 H. 6. 24: 36 H. 6. 24: 2 Mod. 6.

The nature of a plea in abatement is to intitle the plaintiff to a better writ; See 4 Term Rep. 227; and it hath been expressly resolved, that where the plea is in abatement, and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 Roll. Rep. 64. *Sal-kill v. Shilton*. In short, whatever destroys the plaintiff's action, and disables him for ever from recovering, may be pleaded in bar. But the defendant is not always obliged to plead in bar, but may plead in abatement, as in *replevin* for goods, the defendant may plead property in himself, or in a stranger, either in bar or in abatement, and if the plaintiff cannot prove property in himself, he fails of his action for ever; and it is of no avail to him who has the property if he has it not. 1 Vent. 249. 2 Lev. 92: 1 Salk. 5. 94: Carth. 243.

Where matter of bar may be pleaded in abatement, vide 2 Ld. Raym. 1207, 1208.

If a defendant together with a plea in abatement plead also a plea in bar, or the general issue, he thereby waves the plea in abatement; and the plea in bar or general issue only shall be tried. 2 Hawk. P. C. 277, and the authorities there cited.

III. If issue be taken upon a plea to the writ, judgment against the defendant is *peremptory*; but if there be a demurrer, the judgment is then, only that the plaintiff answer over. Yelv. 12: Allen 66.

Whatever matters are pleaded in abatement of an appeal or indictment of felony, and found against the defendant, yet he may afterwards plead over to the felony. 2 Hawk. P. C. 277. But in criminal cases, not capital, on demurrer in abatement adjudged against the party, the court will give final judgment, and not *respondeas ouster*. Ibid. 471.

In appeals of mayhem and all civil actions (except *assizes of mort d'ancestor*, *novel disseisin*, *nuisance* and *juris utrum*) if a plea in abatement triable by the county be found against the defendant, he shall not be suffered afterwards to plead any new matter, but final judgment shall be given against him. 2 Hawk. P. C. 277; and see the authorities there cited.

Upon a judgment in waste for the damages recovered, the defendant demurs partly in abatement, and partly in bar, the court shall give judgment in chief. Show. 255. In debt, if the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given, the defendant makes default, judgment is final upon the default, though the plea was only in abatement. 10 E. 4. 7: Mod. Cases 5. The judgment for the defendant, on a plea in abatement, is *quod breve*, or *narratio cassetur*; if issue be joined on a plea in abatement, and it be found for the plaintiff, it shall be *peremptory* against the defendant, and the judgment shall be *quod recuperet*, be-

cause the defendant chusing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence, Yelv. 112: 2 Show. 42: Str. 532. and in this case the jury who try that issue shall assess the damages.

If there be two defendants and they plead two several pleas in abatement, and there be issue to one and demurrer to the other, if the issue be found for the defendant the court will not proceed on the demurrer; and *se vice versa*, for either way the writ is abated, and the other plea becomes useless. Hob. 250: 1 Bac. Abr. 15.

ABATOR, See Abate.

ABATUDA. Any thing diminished.—*Moneta abatuda*, is money clipped or diminished in value. *Cruel: Du Firsiue*.

ABBACY, *abbatia*.] The government of a religious house, and the revenues thereof, subject to an abbot; as bishoprick from bishop.

ABBAT, or Abbot; *abbas*, Lat.—*abbé*, Fr.—*abbud*, Sax. by some derived from the Syriac *abba*, *pater*.] A spiritual lord or governor, having the rule of a religious house. Of these abbots here in England some were elective, some presentative; and some were mitred, and some were not; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan; but the other sort of abbots were subject to the diocesan in all spiritual government. The mitred abbots were lords of parliament, and called *abbots sovereign*, and *abbots general*, to distinguish them from the other abbots. And as there were abbots, so there were also lords priors, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-six of these lords abbots and priors that sat in parliament. Sir Edw. Coke says, there were twenty-seven parliamentary abbots and two priors. 1 Inst. 97. In the parliament 20 R. 2, there were but twenty-five; but anno 4 Ed. 3, in the summons to the parliament at Winton more are named. And in *Monasticon Anglicanum* there is also mention of more, the names of which were as follow: abbots of St. Austin Canterbury, Ramsay, Peterborough, Croyland, Evesham, St. Bennet de Hildes, Thornby, Colchester, Leicester, Winchcomb, Westminster, Cirencester, St. Albans, St. Mary York, Shrewsbury, Selby, St. Peter's Gloucester, Malmesbury, Waltham, Thorney, St. Edmunds, Beaulieu, Abingdon, Hyde, Reading, Glastonbury and Osney.—And priors of Spalding, St. John's of Jerusalem, and Lewes.—To which were afterwards added the abbots of St. Austin's Bristol, and of Bardeny, and the priory de Sempringham. See also Spelman's Glossary. These abbots and priories were founded by our ancient kings and great men, from the year 662 to 1133. An abbot with the monks of the same house were called the *convent*, and made a corporation. *Terms de Ley* 4.—By stat. 27 H. 8. c. 28, all abbots, monasteries, priories, &c. not above the value of 200l. *per ann.* were given to the king, who sold the lands at low rates to the gentry. Anno 29 H. 8, the rest of the abbots, &c. made voluntary surrenders of their houses to obtain favour of the king; and anno 31 H. 8, a bill was brought into the house to confirm those surrenders; which passing, completed the dissolution, except the hospitals and colleges, which were not dissolved, the first till the 33d, and the last till the 37th of H. 8; when commissioners were appointed to enter and seize the said lands, &c.

ABBA-

ABBATIS. An avener or steward of the stables; an officer. *Spelm.*

ABROUCHMENT, *abbrocamentum.*] The forestalling of a market, or fair. *MS. Antiq.*

ABBUTTALS. See *Abutals.*

TO ABDICATE, *abdicare.*] To renounce or refuse any thing. *Terms de Ley* 5.

ABDICATION, *abdicatio.*] In general, is where a magistrate or person in office, renounces and gives up the same, before the term of service is expired. And this word is frequently confounded with resignation, but differs from it, in that *abdication* is done purely and simply; whereas *resignation* is in favour of some other person. *Chamb. Dict.* 'Tis said to be a renunciation, quitting and relinquishing, so as to have nothing further to do with a thing; or the doing of such actions as are inconsistent with the holding of it. On king James II's leaving the kingdom, and *abdicating* the government, the Lords would have had the word *desertion* made use of; but the Commons thought it was not comprehensive enough, for that the king might then have liberty of returning. The Scots called it a *forfeiture* (*forfeiture*) of the crown, from the verb *forficacio*.—This word was fully canvassed in the *Parliamentary Debates*, at that time.

ABDITORIUM. An abjutory or hiding place, to hide and preserve goods, plate, or money; and is used for a chest in which reliques are kept, as mentioned in the inventory of the church of York. *Mon. Ang.* p. 173.

ABREMURDER, *abremurdrum.*] Plain or downright murder; as distinguished from the less heinous crimes of man-slaughter and chance-medley. It is derived from the Saxon *abere*, apparent, notorious, and *murth*, murder; and was declared a capital offence, without fine or commutation, by the laws of *Canute*, cap. 93; and of *Hon.* 1. cap. 13. *Spelm.*

TO ABET, *abettare*, from the Saxon *a*, (*ad vel usque*) and *betan* or *beteren*, to stir up or incite.] In our law signifies to encourage or set on; the substantive *abetment* is used for an encouraging or instigation. *Staundf. Pl. Cr.* 105. An *abettor* (*abettator*) is an instigator or setter on; one that promotes or procures a crime. *Old Nat. Br.* 21. See Title *Accessory*.

ABEYANCE, or *abbayance*, from the Fr. *bayes*, to expect.] Is what is in expectation, remembrance, and intendment of law. By a principle of law, in every land there is a fee-simple in somebody, or it is in *abeyance*; that is, though for the present it be in no man, yet it is in expectancy, belonging to him that is next to enjoy the land. 1 *Inst.* 342. The word *abeyance* hath been compared to what the civilians call *hereditatem jacentem*; for as the civilians say lands and goods *jacens*, so the common lawyers say that things in like estate are in *abeyance*; as the logicians term it *in posse*, or in understanding; and as we say *in nubibus*, that is, in consideration of law. See *Plowd. Rep.* 547.

If a man be a patron of a church, and presents the thereto, the fee of the lands and tenements pertaining to the rectory is in the parson; but if the parson die, and the church become void, then the fee is in *abeyance*, until there be a new parson presented, admitted, and inducted; for the patron hath not the fee, but only the right to present, the fee being in the incumbent that is presented. *Terms de Ley* 6.

If a man makes a lease for life, the remainder to the right heirs of J. S. the fee-simple is in *abeyance* until J. S.

dies. 1 *Inst.* 342. If lands be leased to A. B. for life, the remainder to another person for years, the remainder for years is in *abeyance*, until the death of the lessee for life; and then it shall vest in him in remainder as a purchaser, and as a chattel shall go to his executors. 3 *Leon.* 23. Where tenant for term of another's life dieth, the freehold of the lands is in *abeyance* till the entry of the occupant. 1 *Inst.* 342 b.

Fee-simple in *abeyance* cannot be charged until it comes in *esse* so as to be certainly charged or aliened; though by possibility it may fall every hour. 1 *Inst.* 378.

The necessity there was in the old law, that there should always be some person to do the feudal duties, to fill the possession and to answer the actions which might be brought for the fief, introduced the maxim that the freehold could never be in *abeyance*. (See 2 *Wils.* 165.) But it was admitted there were some cases in which the inheritance when separated from the freehold might be so. But this *abeyance* or suspension of the inheritance could not but be considered with a very jealous eye, and it was agreed that it should be discountenanced and discouraged as much as possible, and allowed upon none but the most urgent occasions.—The chief reasons of this may be found in *Blackston's* argument in the case of *Perry* and *Biggs*; and Mr. *Hargrave's* observations on the rule in *Shelley's* case. To these reasons the modern law has added her marked and unremitted odium of every restraint upon alienation; it being clear that no restraint could be more effectual than the admission of a suspension of the inheritance. The same principles have in some degree given rise to the well known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence in some degree the doctrines respecting the destruction of contingent remainders. See 1 *Inst.* 216 a, and 342 b. and the notes there.

As to the *abeyance* of titles of honour, and their being revived by the royal nomination, see 1 *Inst.* 165 a; where Lord Coke says, that if an earl of *Chesler* die, leaving more daughters than one, the eldest shall not of right be a countess, but the king, may for the uncertainty, confer the dignity on which daughter he pleases. And this doctrine, says Mr. *Hargrave* in his note, is undoubtedly law, though our books furnish little matter on the subject; and there are many instances of an exertion of this prerogative. One of the most remarkable took place in the person of the late Mr. *Norborn Berkeley* who in 1764 was called to the House of Peers in right of the old barony of *Botetourt*, after an *abeyance* of several centuries, and was allowed to sit according to the antiquity of that barony. See *Cass. in Dom. Proc.* 1764. Another instance was in the case of Sir *Francis Dashwood*, late Lord *De Spencer*; for in 1763 he was called to the ancient barony of that name in right of his deceased mother, who was eldest sister and one of the co-heirs of an earl of *Westmorland*, on whose death that barony had become in *abeyance*, and being so summoned he took his seat as premier baron in place of Lord *Abergavenny*, who before possessed that distinction.

ABETTORIA, *abettorium.* The alphabet. *Mat. Westm.*—The Irish still call the alphabet *abhitten*.

ABIGEVUS, for *abigeus*. The same as *Abatir*, which see, and *Bract. Tract.* 1. l. 1. 3. cap. 6. 105. a.

ABILITY to inherit. See title *Alien*.

ABISHERING or **ABISHERSING.** Is understood to be quit of ameracements. It originally signified a forfeiture

Seizure or amercement, and is more properly *misfaring*, *misfaring*, or *misfaring*, according to *Optman*. It hath, since been granted a liberty or freedom; because where ever this word is used in a grant or charter, the persons to whom made, have the forfeitures and amercements of all others, and are themselves free from the controul of any within their fee. *Rafal's Abr: Terms de Ley* 7.

ABJURATION, *abjuratio*.] A forswearing or renouncing by oath: in the old law it signified a sworn banishment, or an oath taken to forsake the realm for ever. *Strandf. Pl. C. l. 2. c. 13.*

Formerly in king Edward the Confessor's time, and other reigns down to the 22 H. 8. (in imitation of the clemency of the Roman emperors towards such as fled to the church,) if a man had committed felony here, and he could fly to a church or church-yard before his apprehension, he might not be taken from thence to be tried for his crime; but on confession thereof before the justice, or before the coroner, he was admitted to his oath, to *abjure* or forsake the realm; which privilege he was to have forty days, during which time any persons might give him meat and drink for his sustenance, but not utter, on pain of being guilty of felony: See *Hern's Murd.* lib. 1. But at last, this punishment being but a perpetual confinement of the offender to some sanctuary, wherein (upon abjuration of his liberty and free habitation) he would chuse to spend his life, (as appears by the stat. anno 22 H. 8. c. 14.) this privilege was abolished by stat. 2 Jac. 1. cap. 28; and this kind of abjuration ceased. 2 Inst. 69.

As to the effect of abjuration, on the marriage tie, see tit. *Baron & Feme*.

In its modern and now more usual signification, it extends to the person as well as place; as for a man to *abjure* the Pretender by oath, is to bind himself not to own any regal authority in the person called the Pretender, nor ever to pay him any obedience, &c. See on this subject, tit. *Nonconformists; Oaths, Papists, Recusants, &c.*

ABOLITION. A destroying or effacing, or putting out of memory: it also signifies the leave given by the king, or judges, to a criminal accuser to desist from further prosecution. Stat. 25 H. 8. c. 21.

TO ABRIDGE, *abbreviare*, from the *Pr. abbreviare*.] To make shorter in words so as to retain the sense and substance. And in the common law it signifies particularly the making a declaration or count shorter, by severing some of the substance from it: a man is said to *abridge* his plaint in assize, and a woman her demand in action of dower, where any part is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-assize, joint-tenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. See *Brook. tit. Abridgment*, vide 21 H. 8. c. 3.

ABRIDGEMENT. A large work contracted into a narrow compass. See tit. *Books, Literary Property*.

ABROGATE, *abrogare*.] To disannul or take away any thing: to *abrogate* a law, is to lay aside or repeal it. Stat. 5 & 6 Ed. 6. c. 3.

ABSENTMENT, of *des absentment*. A parliament so called, was held at *Wells* 10 May, 8 Edm. 8. And mentioned in letters patent, dated 29 Hen. 8. 4 Inst. 354.

ABSOLVE. See *Affide*.

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ABSOLUTIONS, from *Rome*. See title *Papists*.
ARSONIARE. A word used by the *English Saxons* in the oath of fealty, and signifying to harm or avoid. As in the form of the oath among the *Saxons* recorded by *Somer*.

ABSQUE HOC. See title *Traverse*.

ABUTTALS, from the French *abutier* or *abouter*, to limit or bound. The buttings and boundings of lands, East, West, North or South, with respect to the places, by which they are limited and bounded. *Camden* tells us that limits were distinguished by hillocks raised in the lands called *Batunges*, whence we have the word *butting*. The sides on the breadth of lands are properly *adjacentes*, lying or bordering; and the ends in length *abuttantes*, *abutting* or *bounding*. The boundaries and *abuttals* of corporation and church lands, and of parishes, are preserved by an annual procession. Boundaries are of several sorts; such as inclosures of hedges, ditches and stones in common fields, brooks, rivers, and highways, &c. of manors and lordships.

ACCEPTARE, *acceptum*. To pay relief to lords of manors. *Capitali domino acceptare*. *Flota*, l. 2. c. 50.

ACCEDAS AD CURIAM. A writ to the sheriff where a man hath received false judgment in a hundred court, or court baron. It issues out of the Chancery, but is returnable into B. R. or C. B. And it is the nature of the writ *de falso judicio*, which lies for him that hath received false judgment in the county court. In the *Register of Writs*, it is said to be a writ that lies as well for justice delayed, as for false judgment; and that is a species of the writ *recedare*, the sheriff being to make record of the suit in the inferior court, and certify it into the king's court. *Reg. Orig.* 9. 56 & F. N. B. 18. *Dyer* 169.

ACCEDAS AD VICCOMITEM. Where a sheriff hath a writ called *Rene* delivered to him, but suppresseth it, this writ is directed to the coroner, commanding him to deliver a writ to the sheriff. *Reg. Orig.* 83.

ACCEPTANCE, *acceptatio*.] The taking and accepting of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been detected and avoided, were it not for such acceptance had.

As to the effect of acceptance of *Rene*, See titles *Rene*, *Dea* &c.

How far the acceptance of one Estate shall destroy another, See title *Estates*.

Where the acceptance of money shall discharge a Bond, See title *Bond*.

How far the acceptance of one thing shall be a good bar to the demand of another.

Where the condition of a bond is to pay money, acceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. *Dyer* 36: 10 Rep. 79. The acceptance of uncertain things, as customs, &c. made over, may not be pleaded in satisfaction of a certain sum due on bond. *Cro. Car.* 193. If a woman hath title to an estate of inheritance, as dower, &c. she shall not be barred by any collateral satisfaction or recompence: and no collateral acceptance can bar any right of inheritance or freehold, without some release, &c. 4 Rep. 1. When a man is entitled to a thing in gross, he is not bound to accept it by parcels; and if a lessor disfrain for rent, he is not obliged to accept part of it; nor in taking of a fine, part of the goods, &c. 3 Salk. 2.

C

Debt

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Debt upon bond conditioned for the obligor to make an assurance of such lands to such uses as in the condition mentioned; the defendant pleaded, that he had made a feoffment of the same lands to other uses than in the condition expressed, which the obligee had accepted; upon demurrer it was adjudged an ill plea; for the obligor ought not to vary from the uses set forth in the condition. 1 *Brownl.* 60.

Acceptance of a less sum may be in satisfaction of a greater sum, if it be before the day on which the money becomes due. 3 *Bullst.* 301. See title *Payment*.

ACCESSARY or ACCESSORY. *Accessorius, Particeps criminis.* One guilty of a felonious offence, not principally, but by participation; as by command, advice, or concealment, &c.

Abettors and *Accomplices* also come in some measure under the name, though the former not strictly under the legal definition, of *Accessories*. An *Abettor* is one who, stirs up, incites, instigates or encourages, or who commands, counsels or procures, another to commit felony; and in many, indeed in almost all cases, is now considered as much a principal as the actual felon, in some cases more, as in the case of murder. See *Leach's Hawk. P. C. l. 2. c. 29. § 7, 8: & c. 33. § 98—103*. An *Accomplice* is one of many equally concerned in a felony, and is generally applied to those who are admitted to give evidence against their fellow criminals, for the furtherance of justice which might otherwise be eluded; and this is done on the ancient principle of law relative to *Approvers*. See *Leach's Hawk. P. C. l. 2. c. 37. § 3, 7, & notes: 4 Comm. 329*.

The following extracts from *Blackstone's Commentaries*, (4 *Comm.* 34—40 & 323) with some slight additions inserted, seem to be most proper to give the reader a methodized general idea of the subject.—Consult also *Hale's Hist. P. C.* and *Hawk. P. C.* for fuller information.

I. Of Principals.—A man may be principal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. 1 *Hale's P. C.* 615—Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. *Foster* 350. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it, (*Keble* 52,) who is ignorant of its poisonous quality, (*Foster* 349,) or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. 3 *Inst.* 138. And the same reason will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared before-hand, and which probably could not fail of their mischievous effect. As by laying a trap, or pitfall, for another, whereby he is killed; letting out a wild beast, with an intent to mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessory, that necessarily presupposes a principal; and the poison, the pitfall, the beast, or the madman

cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree, for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist. 1 *Hale's P. C.* 617: 2 *Hawk. P. C.* 441, 2.

II. Of Accessories.—An *Accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will, examine 1st. What offences admit of accessories, and what not: 2. Who may be an accessory before the fact: 3. Who may be an accessory after it: 4. How accessories, considered merely as such, and distinct from principals are to be treated: 5. Of accessories or accomplices accusing principals.

1. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. 3 *Inst.* 138: 1 *Hale's P. C.* 613. Besides, it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact, since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in these, no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. *Foster* 342. In petit treason, murder and felonies with or without benefit of clergy, there may be accessories: except only in those offences, which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which therefore cannot have any accessories before the fact. 1 *Hale's P. C.* 615. So too in petit larceny, and in all crimes under the degree of felony, there are no accessories either before or after the fact: but all persons concerned therein, if guilty at all, are principals. 1 *Hale's P. C.* 613. the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that *accessorius sequitur naturam sui principalis*: 3 *Inst.* 139: and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder, though had he been present and assisting he would have been guilty, as principal, of petty treason, and the stranger of murder. 2 *Hawk. P. C.* 441, 2.

Though generally an act of parliament, creating a felony, renders (consequentially) accessories before and after, within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case. Thus the statute of 3 *Hen. 7. c. 2*, against taking away maidens, &c. makes the offence and the procuring and abetting,

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abetting, yea and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. 1 *Hale's P. C.* 614.

In what cases accessaries are excluded from clergy, see tit. *Felonies without Clergy*.

2. Sir *Matthew Hale* (5 *Hale's P. C.* 615, 616) defines *An accessory before the fact* to be one, who being absent at the time the crime was committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present he is guilty of the crime as principal. If *A.* then advises *B.* to kill another, and *B.* does, in the absence of *A.* now *B.* is principal, and *A.* is accessory in the murder. And this holds though the party killed be not *in rerum naturâ* at the time of the advice given. As if *A.* the reputed father, advises *B.* the mother of a bastard child, unborn, to strangle it when born, and she does so, *A.* is accessory to the murder. *Dyer* 186. And it is also settled, (*Foster* 125,) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other; as if *A.* commands *B.* to beat *C.* and *B.* beats him so that he dies, *B.* is guilty of murder as principal, and *A.* as accessory; but if *A.* commands *B.* to burn *C.*'s house, and he in so doing commits a robbery, now *A.* though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unsequential nature. 1 *Hale's P. C.* 617. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison *A.* he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of *A.* and the manner of its execution is a mere collateral circumstance. 2 *Hawth. P. C.* 443. By stat. 3 & 4 *W. & M. c.* 9, benefit of clergy is taken away from accessaries before the fact to *burglary*, by commanding, counselling, &c.

3. *An accessory after the fact* may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 1 *Hale's P. C.* 618. Therefore to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. 2 *Hawth. P. C.* 446. In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. 2 *Hawth. P. C.* 444, 5. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. And by stat. 11 & 12 *W. 3. c.* 7, the receiving a pirate or any vessel or goods piratically taken renders the receivers accessory to the piracy. But to relieve a felon in gaol with cloaths or other necessaries, is no offence: for the crime imputable to this species of accessory is, the hindrance of public justice, by assisting the felon to escape the vengeance

of the law. 1 *Hale's P. C.* 624. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the goods only, and not the felon. 1 *Hale's P. C.* 620. To remedy this the stat. 3 *W. & M. c.* 9; & 1 *Anne, c.* 9, were passed against such receivers; and now by the stat. 5 *Anne, c.* 31, and 4 *Geo. 2. c.* 11, all such receivers are made accessaries (where the principal felony admits of accessories) *Foster* 73; and may be transported for fourteen years; and in the case of receiving linen goods stolen from the bleaching-grounds, are by stat. 18 *Geo. 2. c.* 27, declared felons without benefit of clergy.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues, there is no felony committed. 2 *Hawth. P. C.* 447. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists the child or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony, the receivers become accessories, *ex post facto*. 3 *Inst.* 108: 2 *Hawth. P. C.* 320. But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she to discover her lord. 1 *Hale's P. C.* 621.

4. The general rule of the ancient law is, that accessories shall suffer the same punishment as their principals; if one be liable to death, the other is also liable. 3 *Inst.* 188. Why, then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons; 1st, To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2dly, Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them; accessories *after the fact* being still allowed the benefit of clergy in all cases (except horse-stealing, stat. 31 *Eliz. c.* 12; and stealing of linen from bleaching-grounds, stat. 18 *Geo. 2. c.* 27) which is denied to the principals, and accessories *before the fact*, in many cases; as among others in petit treason, murder, robbery, and wilful burning. 1 *Hale's P. C.* 615. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment. *Beccar. c.* 37. 3dly, Because no man formerly could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time

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time with him, though that law is now much altered 4thly, Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is a matter of some doubt, whether if a man be acquitted as principal, he can be afterwards indicted as accessory *before* the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. 1 *Hale's P. C.* 625, 626: 2 *Hawk. P. C.* 529, 530: *Foster* 361. But it is clearly held, that one acquitted as principal may be indicted as accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary, though the punishment is still much the same with regard to principals and such accessories as offend before the fact is committed.

By the old common law, the accessory could not be arraigned till the principal was attainted, unless he chose it, for he might waive the benefit of the law; and therefore principal and accessory might and may still be arraigned and plead, and also be tried together. But otherwise if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainer, the accessory in any of these cases could not be arraigned: for *non confititur* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible that a trial of the principal might be had *subsequent* to that of the accessory; and therefore the law still continues that the accessory shall *not* be tried so long as the principal remains liable to be tried *hereafter*. But by stat. 1 *Ann.* c. 9, if the principal be once convicted, and before attainer, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no *subsequent* trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact, as in point of law. *Foster* 365, &c. By the stat. 2 & 3 *E. 6.* c. 24, the accessory is indictable in that county where he was accessory, and shall be tried there, as if the felony had been committed in the same county; and the justices before whom the accessory is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainer. 1 *Hale's Hist. P. C.* 623.

Where the principal is not attainted, but discharged by being burnt in the hand only, the accessory after the

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fact ought to be discharged without burning in the hand, on being put to his book. *Cro. Car.* 566, pl. 3.

Where there are two principals, the attainer of one of them gives sufficient foundation to arraign the accessory. *Jenk. Cent.* 76.

5. The old doctrine of *approvements*, when one criminal appealed or accused his accomplices in order to obtain his pardon is now grown into disuse; but is fully provided for in the case of coining, robbery, burglary, house-breaking, horse-stealing and larceny, (from shops, warehouses, stables and coach-houses) by stat. 4 & 5 *W. & M.* c. 8: 6 & 7 *W. 3.* c. 17: 10 & 11 *W. 3.* c. 23: & 5 *Ann.* c. 31: which enact, that if any such offender, being out of prison, shall discover two who have committed the like offences, he shall on their conviction, in cases of burglary or house-breaking, receive the reward of 40 l. given to persons apprehending such felons; and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of them also in cases of coining; but under stat. 15 *Geo. 2.* c. 28. the pardon extends only to offences by coinage. And in cases of stealing iron, lead or other metals, the accomplice convicting receivers shall (under stat. 29 *Geo. 2.* c. 30) be pardoned all such offences. It is usual also for justices of peace to admit accomplices to other felonies, to be witnesses against their fellows; on an *implied confidence* that, in case of a complete discovery without prevarication or fraud, they shall receive a pardon; but to which they are not entitled of right. *Leach's Hawk. l. 2.* c. 37. § 7, and notes: 3 *Comm.* 330.

ACCOLA. An husbandman who came from some other parts or country to till the lands, *ex quod adveniens terram colat*. And is thus distinguished from *Incola*, viz. *Accola non propriam, propriam colit Incola terram*. Du Fresne.

ACCOLADE, from the *Fr.* *accoler*, *collum amplecti*.] A ceremony used in knighthood by the king's putting his hand about the knight's neck.

ACCOMPLICE. See *Accessory*.

ACCOMPT. See *Account*.

ACCORD. *Fr.*] Is an agreement between two or more persons, where any one is injured by a trespass, or offence done, or on a contract, to satisfy him with some recompence; which accord, if executed and performed, shall be a good bar in law, if the other party after the accord performed, bring an action for the same trespass, &c. *Terms de Ley*.

- I. In what cases
 - II. In what manner
- } Accord may be pleaded.

I. When a duty is created by deed in certainty, as by bill, bond, or covenant to pay a sum of money, this duty accruing by writing, ought to be discharged by matter of as high a nature; but when no certain duty arises by deed, but the action is for a tort or default, &c. for which damages are to be recovered, there an accord with satisfaction is a good plea. 6 *Rep.* 43. In accord, one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. 2 *Mod.* 44. Accord with satisfaction upon a covenant broken, is a good plea in satisfaction and discharge of the damages. *Lutw.* 359. And accord made before the covenant broken, hath been adjudged a good bar to an action of covenant, as it may be in satisfaction of damage to come. 1 *Danv. Abr.* 546.

ACCOUNT.

If a contract *without deed* is to deliver goods, &c. there money may be paid by *accord* in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligee cannot by *accord* give money in satisfaction thereof: though when one is bound to pay money, he may give goods or any other valuable thing in satisfaction. 9 Rep. 78: 1 Inst. 212. Where damages are uncertain, a lesser thing may be done in satisfaction, and in such case an *accord* and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 Mod. 88. *Accord* with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which suppose a wrong *vi & armis*, where a *capias* and *exigent* lie at the common law, in trespass and ejectment, detinue, &c. *accord* is a good plea: So in an appeal of maihem. But in real actions it is not a good plea. 4 Rep. 1, 9, 70: 9 Rep. 77. Of late it hath been held, that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an *accord* may be pleaded without execution, as well as an arbitrament. Raym. 450: 2 Jones 158. Acceptance of the thing agreed on in these *accords* is the only material thing to make them binding. Hob. 178: 5 Mod. 86.

Accord executed only is pleadable in bar, and executory not. 1 Mod. 69. See Com. Dig. title *Accord* (C) Also in pleading it, it is the safest by way of *satisfaction*, and not of *accord* alone. For if it be pleaded by way of *accord*, a precise execution thereof in every part must be pleaded: but, by way of satisfaction, the defendant need only alledge, that he paid the plaintiff such a sum, &c. in full satisfaction of the *accord*, which the plaintiff received. 9 Rep. 80. The defendant must plead, that the plaintiff accepted the thing agreed upon in full satisfaction, &c. And if it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond; which cannot be discharged but by writing under hand and seal. Cro. Jac. 254, 650. See further Com. Dig. tit. *Accord*. See tit. *Acceptance, Award, Bond, Estate, Lease, Rent, Payment*.

ACCOUNT or ACCOMPT; *computus*.] Is a writ or action which lies against a bailiff or receiver to a lord or others, who by reason of their offices and businesses are to render *acompt*, but refuse to do it. F. N. B. 116.

This action is now seldom used; but the most liberal, extensive and beneficial action is for money had and received by defendant to plaintiff's use, which will lie in almost (if not in every) case where one hath money of another's in his hands, which he ought to pay him. This form of action is equivalent to a bill in equity. An action on the case on *infinimul computassent* is also usual for the balance of a settled account. The action of account however lies in the following cases.

If a person receives money due to me upon an obligation, &c. I may either have an action of *acompt* against him as my receiver; or action of debt, or on the case, as owing me so much money as he hath received. 1 Lill. 33. If I pay money in my own wrong to another, I may bring an action against him for so much money received to my use; but then he may discharge himself by alledging it was for some debt, or to be paid over by my order to some other person, which he hath done, &c. 1 Lill. 30. But if a man have a servant, whom he orders to receive money, the master shall have *acompt*

against him, if he were his receiver. Co. Lit. 172. If money be received by a man's wife to his use, action of *acompt* lies against the husband, and he may be charged in the declaration as his own receipt. Co. Lit. 295. *Account* does not lie against an infant; but it lies against a man or woman, that is *guardian, bailiff, or receiver*, being of age and dis-covert; and though an apprentice is not chargeable in this action, for what he usually receives in his master's trade, yet upon collateral receipts he shall be charged as well as another. Co. Lit. 172: Roll. Abr. 117: 3 Leon 92.

As to other actions of *acompt*, they will not lie of a thing certain; if a man delivers 10*l.* to merchandize with, he shall not have *account* of the 10*l.* but of the profits, which are uncertain: and this is one reason why this action will not lie for the arrears of rent. 1 Darv. Abr. 215. Action of account may be brought against a factor that sells goods and merchandizes upon credit, without a particular commission so to do, though the goods are *bona peritura*. 2 Mod. 100. If there are two demands in a declaration, to which the defendant pleads an *acompt* stated, the plaintiff can never after resort to the original contract, which is thereby merged and discharged in the *acompt*: if A. sells his horse to B. for 10*l.* and there being divers other dealings between them, they come to an *acompt* upon the whole, and B. is found in arrear 5*l.* A. must bring his *infinimul computassent* for it; but if there be only one debt betwixt the parties, entering into an *acompt* for that would not determine the first contract. 1 Mod. Rep. 206: 2 Mod. 44. It has been held, that mutual demands on an *acompt* are not extinguished by settling it, and promise to pay the balance; wherefore *assumpsit* lies for the original debt. Fitzgib. 44. A man having received of another 100*l.* to be employed in merchandize abroad, covenants at his return to *acompt* to him; this doth not alter the case, but notwithstanding the covenant, action of *acompt* may be brought. 2 Bulst. 256. And if I deliver to another person goods or money beyond sea, to be delivered again to me in England at a certain place, and he delivers it not, -I may be relieved by this action. F. N. B. 18.

Acompt may be brought against the following persons:

If a man makes one his *bailiff* of a manor, &c. he shall have a writ of *acompt* against him as *bailiff*; where a person makes one *receiver*, to receive his rents or debts, &c. he shall have *acompt* against him as *receiver*, and if a man makes one his *bailiff* and also his *receiver*, then he shall have *acompt* against him in both ways. Also a person may have a writ of *acompt* against a man as *bailiff* or *receiver*, where he was not his *bailiff* or *receiver*; as if a man receive money for my use, I shall have an *acompt* against him as *receiver*; or if a person deliver money unto another to deliver over unto me, I shall likewise have *acompt* against him as my *receiver*: so if a man enter into my lands to my use, and receive the profits thereof I shall have *acompt* against him as *bailiff*. 9 H. 6: 36 H. 6: 10 R. 2: Fitz. *Acompt*. 6.

A judgment in *acompt*, as *receiver*, is no bar to action of *acompt* as *bailiff*; but 'tis said a *bailiff* cannot be charged as *receiver*, nor a *receiver* as *bailiff*; because then he might be twice charged. 2 Lev. 127: 1 Darv. Abr. 220, 221. The heir may have writ of *acompt* before or after his full age, against a guardian in socage; and if he sue the guardian for profits of his lands taken before

before he is fourteen years old, he must charge him as guardian; but if it be for taking the profits after that age, there he must sue him as bailiff. *Lit. 124: F. N. B. 118.* Where an heir sues a stranger that doth intermeddle with his land, he shall charge him in *account* as guardian. *F. N. B. 13.*

A man devises lands to be sold by his executors, and the money thence arising to be distributed amongst his daughters; action of *account* lies in this case, for the daughters against the executors. *Jenk. Cent. 215: 2 Roll. Abr. 285.* An action of *account* lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised by his care and industry, his reasonable charges and expences deducted. *Co. Lit. 172.* In this instance the action of *account* may be preferable to that for money had and received.—One merchant may have *account* against another, where they occupy their trade together; and if one charges me as bailiff of his goods *ad mercandizandum*, I must answer for the increase, and be punished for my negligence; but if he charges me as receiver *ad computandum*, I must be answerable only for the bare money or thing delivered. *F. N. B. 117: Co. Lit. 272: 2 Leon. Ca. 245.*

If a bailiff or receiver make a deputy, action of *account* will not lie against the deputy, but against him. *1 Leon. 32.*

Statutes.—In the writ of *account* the process by the common law was summons, attachment, and distress infinite. The statute of *Marlbridge* (52 H. 3. c. 23) gave attachment by the body, if the bailiff had no lands by which he might be distrained. *2 Inst. 380.*—By the stat. *Westm. 2.* (13 E. 1. §. 1.) c. 11, if the accountant be found in arrearages the auditors that are assigned to him have power to award him to prison.—In the process of outlawry, &c. the stat. 13 E. 3. c. 23, gives an action of *account* to the executors of a merchant; the statute 25 Ed. 3. c. 5, to executors of executors; the statute of 31 Ed. 3. c. 11, to administrators: and by the statute 3 and 4 Ann. c. 16, actions of *account* may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one jointenant, tenant in common, his executors and administrators against the other as bailiff, for receiving more than his share, and against their executors and administrators; and the auditors appointed by the court may examine the party on oath.

It may be proper to say something concerning the *Plea* and *Judgment* in *account*; and though the order may seem somewhat irregular, it will be necessary first to explain the nature of the judgment, which being rightly understood, the distinctions as to the method of pleading will be more easily conceived.

The usual judgment is *quod computet*, on which the defendant is taken by *capias ad computandum*; but there are two judgments in this writ; for if the defendant cannot avoid the suit by plea, judgment is first given, *That he do account*; and having done this before the auditors, there is another judgment entered, that the plaintiff shall recover of the defendant so much as is found in arrears. *11 Rep. 40.* The first judgment is but an award of the court, like a writ to enquire of damages; and these two judgments depend one upon another; for if judgment be to *account*, and the party die before he hath accounted, the executor cannot proceed in the action, but it must be

begun again; and no writ of error will lie upon the first till after the second judgment. *Ibid.*

With respect to the plea, the following distinctions are to be noticed:

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. *Cro. Car. 82, 161.* Some pleas are in bar of the *account*, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the *account*, *Dyer 21: 11 Rep. 8.* In *account* the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff; this was a good plea as well in bar of the action, as before auditors. *Winch. 9.*

The pleas in this action are, *quod nunquam fuit receptor; quod plene computavit*, &c. It is no plea by an *accountant* that he was robbed; unless he alleges it was without his default and negligence, and then it will be a good plea. *Co. Lit. 89.* That the defendant *never was bailiff*, is the general bar; and it is a good plea in bar, by claiming a property in the things to be accounted for. *29 E. 3. 47.* A defendant, as receiver, cannot wage his law, where he receives the money by another's hands: 'tis otherwise where he received it of the plaintiff himself. *1 Cro. 919.*

It may be proper to add, that the process in *account* is summons, *pone* and distress; and, upon a *nihil* returned, the plaintiff may proceed to outlawry. The statute of Limitations, 21 J. 1. c. 16, doth not bar a man who is a merchant from bringing action of *account* for merchandise at any time; but all other actions of *account* are within the statute.

In *Chancery* upon an *account* of fifteen or twenty years standing, the defendant may be allowed to prove, on his own oath, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when, &c. *1 C. Rep. 146.* And a defendant shall be discharged upon his oath of sums under 40s; though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. *2 C. Cas. 249: 1 Vern. 283.* See *Outb.* Vide *Comyn's Digest*, tit. *Accounts*.—*Kydd's Com. Dig.* Introduction to that title.

ACCOUNTANT-GENERAL. An officer in the court of *Chancery*, appointed by act of parliament, to receive all money lodged in court. He is to convey the money to the Bank, and take the same out by order; and he is only to keep the account with the Bank; for the Bank is to be answerable for all money received by them, and not the *Accountant-General*, &c. *stat. 12 Geo. 1. c. 32.* No fees shall be taken by this officer or his clerks, on pain of being punished for extortion; but they are to be paid salaries. The *Accountant-General* 650*l.* per annum, out of interest made of part of the suitors' money. See title *Chancery*.

Counterfeiting the hand of the *Accountant-General* is felony without clergy, by stat. 12 Geo. 1. c. 32. sec. 9.

ACCOUNTS PUBLIC. By statute 25 Geo. 3. c. 52, the patents formerly granted to Lord *Soules* and Lord *Mount Stuart* as auditors of the imprest are vacated, and the annual sum of 7000*l.* each is made payable to them during their respective lives. § 1. 3.

Under this act his Majesty appoints five commissioners by letters patent; two of whom are to be comptrollers of the army accounts; salaries are granted to each, paid out of

of the aggregate fund, not exceeding in the whole 4000*l*. These are filed. *The Commissioners for auditing the public accounts*; and hold their offices *quandiu se bene gesserint*, (except the comptrollers of army accounts who continue commissioners so long only as they are comptrollers) Before they act they take an oath before the chancellor of the exchequer "faithfully, impartially and truly to execute the powers and trusts vested in them." § 4.

The Treasury appoint officers, clerks, &c. for making up and preparing for declaration the public accounts of the kingdom, with salaries; and allow for all charges out of the aggregate fund to an amount not exceeding 6000*l*. *per annum*, which is in lieu of all fees and perquisites. § 5.

The commissioners under this act are ~~vested~~ with all the powers, and subject to the same duties and controul as the auditors of the imprest formerly were; except as altered by the act. The commissioners administer oaths to the officers and clerks for the performance of their duties. § 8; and to accountants. § 12, 13. For their mode of proceeding see the act.

ACCROCHE, from the Fr. *accrocher*, to hook or grapple unto.] It signifies to encroach, and is mentioned in the statute 25 Ed. 3. c. 8, to that purpose. The French use it for delay; as *accrocher un proces*, to stay the proceedings in a suit.

ACCUSATION, *accusatio*] The charging any person with a crime. By *Magna Charta* no man shall be imprisoned or condemned on any *accusation*, without trial by his peers, or the law. None shall be vexed upon any *accusation*, but according to the law of the land: and no man may be molested by petition to the king; &c. unless it be by indictment, or presentment of lawful men, or by process at common law. Stat. 25 Ed. 3. R. 5. c. 4: 28 Ed. 3. c. 3. None shall be compelled to answer an *accusation* to the king, without presentment, or some matter of record. Stat. 42 Ed. 3. c. 3. See stat. 38 E. 3. c. 9. By statute 5 and 6 E. 6. c. 11. § 12; and 1 P. and M. c. 10, 11, in treason there must be two lawful *accusers*. As to self accusation, see tit. *Evidence*. See tit. *Malicious Prosecution*.

ACEMANNES - CEASTER, *Acemanni Civitas*.] BATH. q. v.

ACEPHALI. The levellers in the reign of king Hen. 1; who acknowledged no head or superior. *Leges Hen. 1; Du Cange*.

ACETIAM BILLÆ:—*And also to a bill to be exhibited for 20*l*. debt, &c.*] Words in, or a clause of, a writ, where the action requires bail. The stat. 13 Car. 2. R. 2. c. 2, which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath ordained the adding of this clause in writs to the usual complaints of trespass, which latter gives cognizance to the court, while that of debt authorises the arrest. This ought not to be made out against a peer of the realm, or upon a penal statute; or against an executor or administrator, or for any debt under 10*l*. in the superior courts. Nor in any action of account, action of covenant, &c. unless the damages are 10*l*. or more; nor in action of trespass, or for battery, wounding or imprisonment; except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues. 1 Lill. Abr. 13. See *North's Life of Lord keeper Guildford*, fol. 99, 100.

Impey's Instructor Clericalis, K. B. and C. P. and this Dictionary tit. *Arrest, Bail*.

ACHAT, Fr. *Abet*.] A contract or bargain. Parveyors by stat. 34 Ed. 3. c. 2, were called *Achators*.

ACHERSET, An ancient measure of corn, conjectured to be the same with our quarter or eight bushels.

ACHOLITE, *Acholitus*.] An inferior church servant, who next under the subdeacon, followed or waited on the priest and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACKNOWLEDGEMENT-MONEY, Is a sum paid in some parts of England by the copyhold tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants.

ACQUIETANDIS PLEGIIS, A writ of *justicies*, lying for the surety against a creditor, who refuses to acquit him after the debt is satisfied. *Reg. of Writs*. 158.

ACQUIETANTIA DESHIRIS ET HUNDREDIS, To be free from suits and services in shires and hundreds.

ACQUIETARE, *quietum reddere*.] To acquit. *Dr. Wilk. Gloss*. It also sometimes signifies to pay. *Mon. Angl. tom. 1, fol. 199*.

ACQUITTAL, from the French word *Acquitter*, and the Latin compound *Aequi etare*.] To free or discharge. It signifies in one sense to be free from entries and molestations of a superior lord for services issuing out of lands; (See *Termes de la Ley*;) and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is discharged of a felony, is said to be *acquittatus de felonid*; and if he be drawn in question again for the same crime, he may plead *auter-foits acquit*; as his life shall not be twice put in danger for the same offence. 2 Inst. 385.

Acquittal in fact, is when a person is found Not guilty of the offence by a jury, on verdict, &c. But in murder, if a man is *acquitted*, appeal may be brought against him. 3 Inst. 273.

If one be *acquitted* on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time: here, notwithstanding that variance, the party may plead *auter-foits acquit*, by averring it to be the same felony; so where a person is indicted a second time, for robbery upon the same person, but at another vill, &c. 2 Hawk. P. C. Where a man is discharged on special matter found by the *grand jury*, yet he may be indicted *de novo* seven years afterwards, and cannot plead this *acquittal*; as he may upon the special matter found by the petty jury, and judgment given thereon. *Ibid*. 246. See also *Leach's Hawkins*, c. 25. § 64.

If a person is lawfully *acquitted* on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment; but it is usual for the judges of gaol delivery to deny a copy of an *acquittal* to him who intends to bring an action thereon, when there was probable cause for a criminal prosecution. *Cartb. Rep*. 421. See *Leach's Hawkins*, c. 23. § 142, &c. By stat. 3 Hen. 7. c. 1, if either principal or accessory be *acquitted* on an indictment for murder, the court may remit him to prison, or bail him, at their discretion till the year and day (for appeal) be passed.

ACQUITTANCE. *Acquittancia.*] Signifieth a discharge in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c. and the party to whom due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such a discharge in law, that he cannot demand and recover the sum or duty again, if the *acquittance* be produced. *Terms de Ley* 15: *Dyer* 6, 25, 51. An *acquittance* is a discharge and bar in the law to actions, &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; but an *acquittance*, without seal, is only evidence of satisfaction, and not pleadable.

'Tis observed, that a general receipt or *acquittance* in full of all demands, will discharge all debts, except such as are on specialty, viz. bonds, bills, and other instruments sealed and delivered; on which account those can be destroyed only by some other specialty of equal force, such as a general release, &c. There being this difference between that and the *general acquittance*. See *Cro. Jac.* 650.

But in some cases a court of equity will order accounts to be opened, even after an *acquittance* in full of all demands.

And now, in the superior courts of law, the producing an *acquittance* will not bar the action, if the plaintiff can by any means shew a mistake, and that he has not been paid, or paid so much as the *acquittance* is for.

In some cases payment may be refused, unless an *acquittance* is given. Thus the obligor is not bound to pay money upon a single bond, except an *acquittance* be given him by the obligee; nor is he obliged to pay the money before he hath the *acquittance*. But in case of an obligation with a condition, it is otherwise; for there one may aver payment. And by stat. 3 & 4 Ann. c. 16, if an action of debt is brought upon a single bill, and the defendant hath paid the money, such payment may be pleaded in bar of the action.

A servant may give an *acquittance* for the use of his master, where such servant usually receives his master's rents, &c. and a master shall be bound by it. *Co. Lit.* 112. The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the *acquittance* ought to be given accordingly.

ACRE, from the German *Acker, Ager.*] A quantity of land, containing in length 40 perches, and in breadth four perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the *acre* of land. It is commonly about 16 feet and a half, but in *Staffordshire* it is 24 feet. According to the statute 24 Hen. 8. c. 14, concerning the sowing of flax, it is declared that 160 perches make an *acre*, which is 40 multiplied by four; and the ordinance of measuring land, 33 Ed. 1. §. 6, agrees with this account. The word *acre* formerly meant an open ground or field; as *castle-acre*, *wolf-acre*, &c. and not a determined quantity of land.

ACRE, or ACRE-FIGHT; an old sort of duel fought by single combatants, *English* and *Scotch*, between the frontiers of their kingdoms, with sword and lance; this duelling was also called *camp-fight*, and the combatants, champions, from the open-field that was the place of trial.

ACTILIA, Military utensils. *See Castle.*

ACTION, *Actio,*] Is the form of a suit given by law for recovery of that which is one's due; or it is a legal

demand of a man's right. *Co. Lit.* 285. The learned *Bracton* thus defines it, *Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur.* *Actions* are either criminal or civil; criminal to have judgment of death, as appeals of death, robbery, &c. or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of maihem, &c. *Co. Lit.* 284: 1 *Inst.* 40. *Civil actions* are such as tend only to the recovery of that which by reason of any contract, &c. is due to us; as *action* of debt, upon the case, &c. 2 *Inst.* 61.

Under criminal *actions* may be classed *actions penal*; which lie for some penalty or punishment on the party sued, be it corporal or pecuniary. *Bract.*

Actions upon statute, brought upon the breach of any statute, where an action is given to the person injured that lay not before; as where one commits perjury to the prejudice of another, the party that is injured may have a writ upon the statute. Such action is now obsolete.

Actions popular, given on the breach of some penal statute, which every man hath a right to sue for himself and the king, by information, action, &c. And because this *action* is not given to one especially, but generally to any that will prosecute, it is called *action popular*; and from the words used in the process, (*qui tam pro domino rege sequitur quam pro se ipso*, who sues as well for the king as for himself,) it is called a *qui tam action*. See title *Information*.

Civil Actions are divided into *real*, *personal*, and *mixed*. *Action real* is that action whereby a man claims title to lands, tenements, or hereditaments, in fee, or for life: and these *actions* are possessory, or ancestral; possessory, of a man's own possession and seisin; or ancestral of the possession or seisin of his ancestor.

Action personal is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass; and it claims a debt, goods, chattels, &c. or damages for the same.

Action mixed is an *action* that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained: it seeks both the thing whereof a man is deprived, and a penalty for the unjust detention. But detinue is not an *action mixed*, notwithstanding the thing demanded and damages for withholding it be recovered; for it is an *action* merely personal, brought only for goods and chattels.

In a *real action*, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ; in *personal actions* several wrongs may be comprehended in one writ. 8 *Rep.* 87. A bar is perpetual in *personal actions*, and the plaintiff is without remedy, unless it be by writ of error or attain: but in *real actions*, if the defendant be barred, he may commence an action of a higher nature, and try the same again. 5 *Rep.* 33. *Action of waste* sued against tenant for life, is in the realty and personality; in the realty, the place wasted being to be recovered, and, in the personality, as treble damages are to be recovered. *Co. Lit.* 284.

Many *personal actions* die with the person. *Real actions* survive. If lessee for years commit waste, and dies, *action of waste* may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape, and afterwards dieth, no *action* will lie against his executors.

ACTION.

tors. This must be understood, of that kind of keeper, to whom the prison actually belongs, as the *marshal*, the *warden* of the Fleet, &c. not of a gaoler who acts as servant to a sheriff, &c. for in such case, the death of the gaoler, is not any bar to an action against the sheriff, to whom in fact, the prison actually belongs. *Co. Lit.* 33. Action of *debt* lies not against executors upon a contract for the eating and drinking of the testator. *9 Rep.* 87. But an action on the *case* on promises will lie against an executor or administrator on the promises of their testator or intestate. An executor cannot bring an appeal of larceny from the testator, for it is a mere personal action. *H. P. C.* 184: *S. P. C.* 50. And an appeal of death is a personal action given to the heir; and like others shall therefore die with the person. *2 Hawk. P. C.* 244.

In all actions merely personal arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the action dies with the person. *4 Inst.* 315; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors, (*March* 14,) being indeed rather actions against the property than the person. *3 Comm.* 302.

Again, actions are either *local* or *transitory*. *Actions real and mixed*, ejectment, waste, trespasses *quare clausum fregit*, &c. are to be laid in the same county where the land lieth: *personal* and *transitory* actions, as debt, detinue, assault and battery, &c. may be brought in any county. *Co. Lit.* 282. Except against justices and officers of corporations and parishes, (under stat. 21 *Jac.* 1. c. 12,) or against officers acting under particular acts of parliament; which frequently direct actions against them, to be laid in the respective counties, where the facts happen. *Actions transitory* may be laid in any county, although the statute 6 *R.* 2, enacted, That writs of debt, account, &c. should be commenced in the county where the contracts were made; for that statute was never put in use; and yet generally actions have been laid in the county where the cause of them was arising, except as above. If the cause of action arise in two counties, an action may be brought in either county; but if a nuisance be erected in one county, to the damage of a man in another, the assize must be brought in *confinio comitatum*. *Mich.* 8 *Ann.* *B. R.* By stat. 21 *Jac.* 1. c. 4. all suits on penal statutes shall be laid in the county where the offence was committed. See tit. *Venue*.

Actions likewise are said to be *perpetual* and *temporary*: *Perpetual*, those which cannot be determined by time; and all actions may be called perpetual that are not limited to time for their prosecution: *Temporary* actions are those that are expressly limited: and since the statute of limitations, (21 *Jac.* 1. c. 16,) all actions seem to be temporary; or not so perpetual, but that they may in time be prescribed against; a *real* action may be prescribed against within *five* years, on a fine levied, or recovery suffered. See tit. *Limitation of Actions*.

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Actions are also *joint* or *several*; *joint*, where several persons are equally concerned, and the one cannot bring the action, or cannot be sued, without the other; *several*, in case of trespass, &c. done, where persons are to be severally charged, and every trespass committed by many is several. *2 Leon.* 77.

As to joining several matters in one action the following is to be observed.

In personal actions, several wrongs may be joined in one writ; but actions founded upon a tort, and on a contract, cannot be joined, for they require different pleas and different process. *1 Keb.* 847: *1 Pent.* 366. So where there is a tort by the common law, and a tort by statute, they may not be joined; though where several torts are by the common law, they may be joined, if personal. *3 Salk.* 203.

Trover and assumpsit may not be joined; but in an action against a common carrier, the plaintiff may declare in case upon custom of the realm, and also upon trover and conversion: for not guilty answers to both. *1 Danv. Abr.* 4. Debt upon an *averciement*, and upon a *mutuatus*, may be joined in one declaration. *Will.* p. 1. 248. So case for a *miscefeasance* and negligence may be joined with a count in *trover*, in the same declaration. *1b. per.* 2. 319. Two counts may be joined in the same declaration, where there is the same judgment in both. *1b.* 321. And any action may be joined, where the plea of not guilty goes to all. *8 Rep.* 47. But, it seems, ejectment and battery cannot be joined; for *alter-verdict*, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. *1 Danv.* 3. If this is law, it shews that causes of action cannot in every instance be joined, where the same plea will go to the whole. The doctrine in *Danvers*, seems to be law, for supposing, *ejectment, assault, and battery*, &c. joined in one action, and a general verdict on not guilty for the plaintiff; a new execution on such a judgment must be framed. Indeed the joining two such actions, seems rather absurd. Although persons may join in the personality, they shall always sever in actions concerning the realty; and waste being a mixed action, favouring of the realty, that being more worthy, draws overs the personality with it. *2 Mod.* 62. A person cannot, as administrator, &c. join an action for the right of another, with any action in his own right; because the costs will be entire, and it cannot be distinguished how much he is to have as administrator, and how much for himself. *1 Salk.* 10. See a variety of cases, well selected and digested on this subject. *Com. Dig.* tit. *Action*.

It remains now to consider,

I. By whom, and against whom, Actions may be brought.

II. What particular Actions are adapted to particular Cases.

It may be previously observed that an action does not lie before a cause of action accrued; and if it be not pleaded in abatement, yet if it appears on the record, it may be moved in arrest of judgment; *2 Lev.* 197: *Carib.* 114: vide *Sho.* 147; or assigned for error; *Cro. Eliz.* 325. See further *Kyl's Com. Dig.* tit. *Abatement*, (G. 6.) and *Action*, (E.)

In some cases, certain things are required by act of parliament to be done by the plaintiff, previous to the commencement of an action, or he cannot recover; as in actions against justices of the peace, a month's notice must be given by stat. 24 *Geo.* 2. c. 44.—vide *Morgan's Vade Mec.* 20.

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I. In

ACTION II.

I. In all *actions* there must be a person able to sue; the party sued must be one sueable for the thing laid; and the plaintiff is to bring his right and proper *action* which the law gives him for relief. 1 *Shep. Abr.* 20. There are three sorts of *damages* or wrongs, either of which is a sufficient foundation for an *action*. 1. Where a man suffers damages in his *fame* and credit. 2. Where one has damage to his person, as by battery, imprisonment, &c. which respects his *liberty*. 3. Where a person suffers any damage in his *property*. *Curb. Rep.* 416.

A man attainted of treason or felony, convict of recusancy, an outlaw, excommunicated person, convict of *præmunire*, an alien enemy, &c. cannot bring an *action*, till pardon, reversal, absolution, &c. But executors or administrators, being outlawed, may sue in the right of the testator or intestate, though not in their own right. A *feme covert* must sue with her husband; and infants are to sue by guardian, &c. *Co. Lit.* 128. *Actions* may be brought *against* all persons, whether attainted of treason or felony, a convict recusant, outlawed or excommunicate, &c. and a *feme covert* must be sued with her husband. A *fine facinus*, or any writ to which the defendant may plead, or by which the plaintiff may recover, is an *action*, 6 *Rep.* 3: *Salk.* 5. See tit. *Abatement*.

II. There are various kinds of actions, suited to different cases, as actions of COVENANT, DEBT, DETINUE, TRESPASS, TROVER, &c. which see under their respective titles.

But where the law has made no provision, or rather, where no general action could well be framed before hand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special action on his own case. 1 *New Abr.* 44: *Co. Lit.* 56. a: 6 *Mod.* 53, 54.

This action is, in practice, become the most universal of any; as most of the other actions may, under particular circumstances, be resolved into this, which it will be necessary, therefore, to consider somewhat largely.

Action upon the *case* is a general *action* given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage; and (by stat. 19 *H.* 7. c. 9,) in *actions* upon the *case*, the like process is to be had as in *actions* of trespass or debt. It is called *action* on the *case*, because the whole cause or *case*, as much as in the declaration (except time and place) is set down in the writ; and there is no other action given in the *case*, save only where the plaintiff hath his choice to bring this or another *action*. Formerly, all actions were sued in the court of *Common Pleas*, and there the foundation of the suit is, a writ, called an *original*, whereupon the *capias* is grounded, and which *original* contains the nature of the plaintiff's complaint at large; and it is the same where suits are commenced in *B. R.* by *original* out of *Chancery*.

In all cases, where a man has a temporal loss, or damage by the *wrong* of another, he may have an action upon the *case* to be repaired in damages. But the particular damage must be specially alleged.

This action, as hath been intimated, lies in a great variety of instances, which are particularly enumerated in *COMMUN'S* Digest. Of these the chief are,

1. Action on the *case* for Words, which is brought for words spoken or written which affect a person's life, repu-

tation, office, or trade, or tend to his loss of preferment, in marriage or service, or to his disinherittance, or which occasion him any particular damage. This action therefore will lie for charging another with any capital or other crime. To say of another he is a traitor, *action* lies. 1 *Bulstr.* 145. But if one call another a seditious, traitorous knave, no *action* lieth; because the words imply an intention only, and not an unlawful act. 4 *Rep.* 19. Nor to say of a man he deserves to be hanged; nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue on record. 4 *Rep.* 15: *Danv.* 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held *actionable*. 1 *Rel. Abr.* 47. Though for saying such a one would have taken his purse on the highway, or have robbed him, an *action* lies not; for nothing is shewn to be done in order thereto. *Cro. Eliz.* 250. Likewise to say a man was in gaol for stealing any thing is not *actionable*, for the words do not affirm the theft. *Danv.* 140. But to say, I think *A. B.* committed such a felony; or, I dreamt he stole a horse, &c. these words are *actionable*. *Dal.* 144: 1 *Danv.* 105. If a felony be done, and common fame is, that such a person did it, although one may charge or arrest him on suspicion of that felony; yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirming it hath been held *actionable*. *Hob.* 138, 203, 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 *Vent.* 117: *Cro. Jac.* 489: *Sid.* 53: *Cro. Eliz.* 560, 823. Though *quare* if the party is proved alive? So words accusing of sodomy. 1 *Sid.* 373.

When such words are spoken of another maliciously, for which, if true, the party spoken of might be punished criminally, *action* lies; as, to say of a person, he hath perjured himself; or that he would prove him perjured; or that he was forsworn in the court of Chancery, Common Pleas, &c. are *actionable*; but not to call a person forsworn man, unless it be said in a court of record. 3 *Inst.* 163: *Danv.* 87, 89. To say a man hath forged an obligation, &c. and he will prove it; this is *actionable*. *Danv.* 130.

Some writers make a difference, where the subsequent words are introduced by the word *and*; as, you are a thief, *and* have stolen, &c. which are additional, and shall not correct; and the word *for*; as you are a thief, *for* you have, &c. *Hob.* 386: *Style* 115: *Godb.* 89. The words, He is a maintainer of thieves, and keeps none but thieves in his house, will not support an *action*, unless it be averred that he knew them to be thieves. *Cro. Eliz.* 746.

To say an alehouse-keeper keeps a bawdy-house, *action* lies. *Cro. Eliz.* 582. Though to say of an inn-keeper, that he harbours rogues, &c. is not *actionable*; for his inn is common to all guests. 2 *Roll. Rep.* 136. To say of another he hath the French pox, *action* will lie. *Cro. Jac.* 430: See *Noy*, 151. To call a man a whore-master, or a woman whore, no *action* lies; for these are merely spiritual offences. *Danv. Abr.* 80. But calling a woman whore in *London*, is *actionable*, as she is liable to be punished

aided by the custom of the city. See *Com. Dig.* *action upon the case for Detraction*. (D. 10.)

Words likewise are actionable which tend to the disgrace or detriment of a person in office, or of a man in the exercise of his profession or trade.

Calling an officer in the government, &c. Jacobites, hath been held actionable; not of a private person. 7 *Mod. Ca.* 107. To say a justice of peace doth not administer justice, is actionable. *Com. Plin.* 352. And so for other disgrace in his office. But words relating to a man's office, must have a plain and direct meaning, to charge him with some crime that is punishable; and be spoken of his office, or otherwise they are not actionable. 6 *Mod.* 200. Thus the plaintiff, being a justice of peace, the defendant said *Mr. Stutely coveteth and bideth felony, and is not worthy to be a justice of peace*; actionable, for though his office is not named, the words necessarily refer to it. 4 *Rep.* 16: See 1 *Leon.* 335: 1 *Vent.* 50.

Slander, &c. brought by a doctor of the civil law, who was also a justice of peace and chancellor of the bishoprick of Norwich, for these words, *he is not fit to be a chancellor or a justice of peace, he is a knave, a rascal, and a villain, he is not fit to practice, he ought to have his gown pulled over his ears*; actionable. 2 *Lutw.* 1288.

The defendant spoke to an officer, (*viz.*) *You have cozened the State of 20,000*l.* and I will prove it, for you have received 25,000*l.* of the office, and not compounded for it, and have feigned in words in the order of your commission*; actionable. *Style* 436.

In offices of profit, for such words as impute the want either of understanding, ability, or integrity to execute them, this *action* lies. But in offices of honour, words that impute want only of ability, are not actionable; as to say of a justice of peace, *He a justice of peace! he is an ass, and a beetleheaded justice*: the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonestly or corruption a *Salk.* 695. But if special damage can be proved, it is actionable; and indeed in every case, where special damage can be proved, an *action* will lie.

As to words tending to the disgrace or detriment of a man in his profession or trade; where the words are disgracing to a man's profession, they also must appear to be spoken precisely of it; for to say a person hath cozened one in the sale of certain goods, is not actionable; unless you shew that the party lived by such selling. 1 *Roll Abr.* 62.

To say of a doctor in divinity, *Doctor S. is robbing the church*; and at another time *Doctor S. hath robbed the church*; actionable. *Cro. Car.* 301, 417.

In *case*, &c. in which the plaintiff declared, that he was instituted and inducted into a parsonage in, &c. and that he executed the office of a pastor in that church for the space of four years, and that the defendant said of him, *You are a drunkard, a whore-master, a common sweaver, and a common liar, and you have preached false doctrine, and deserve to be degraded*; after a verdict for the plaintiff, it was objected, that the words are not actionable, because they import no civil or temporal damage to the plaintiff; but adjudged actionable; for, if true, he may be degraded, and so lose his freehold. *Allen*, 63.

These words spoken of a preaching parson, *Parrot is an adulterer, and had two children by B.G.'s wife, and I*

will prove it, is actionable; for it is a *probação* of adultery, and punishable in that court. *Cro. Car.* 502.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, *action* lies. 1 *Daru.* 113. And it is the same to say, he hath disclosed secrets in a cause.

To call a doctor of physic fool, ass, empirick, and mountebank, or say he is no scholar, are actionable. *Cro. Car.* 270. So to say of a schoolmaster, *pat not your son to him, for he will come away as very a duncie as he went* *Skil.* 71. Where one says of a midwife, that many have perished for her want of skill, an *action* will lie. *Cro. Car.* 211. If one calls a merchant bankrupt, *action* lies 1 *Leon.* 336. And to call a trading person bankrupt, or knave, is actionable. 1 *Daru.* 90. Also if one say of a merchant, that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway and dares not shew his face, by reason whereof he is disgraced and injured in his calling, these are actionable. *Raym.* 184.

Words tending to the loss of preferment in marriage, &c. are actionable. Thus to say that a woman hath a bastard, or is with child; or that a certain person hath had the use of her body, whereby she loses her marriage *action* lies, i. e. by reason of the special damage. If a man is in treaty with a woman to marry, and another tell him, she is under a pre-contract; this doth not imply a scandal, but yet, if false, an *action* will lie if she loses her marriage by means of those words. To say of a man that he lay with a certain woman, &c. by which he loses his marriage, is actionable; for in these cases there is a temporal damage. 1 *Daru.* 81.

As to words tending to a person's disinherittance, if one says of another that has land by descent, that he is a bastard; *action upon the case*, lies, as it tends to his disinherittance. *Co. Ent.* 28. But to say of a son and heir apparent, that he is a bastard, *action* lies not until he is disinherited, or is prejudiced thereby. 1 *Daru.* 83. To slander the title of another person to his lands is actionable; but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself; and who is not of counsel to him that pretends right. 4 *Rep.* 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath any, it is a counterfeit and forged deed, and he knows it to be so; in this case the words may be an *action*; but if there be any colour for what is said, they will not be actionable. *Cro. Jac.* 163: *Tilv.* 80, 88. And the party of whom the words are spoken must have, or be likely to have, some special damage by the speaking of them; as that he is hindered in the sale of his lands, or in his preferment in marriage, &c. without which it is said *action* doth not lie. 1 *Cro.* 99: *Cro. Jac.* 213, 397: *Poph.* 187: 2 *Bull.* 90. The affirming that another hath title to the land, where actionable, see 4 *Rep.* 175.

If A. says, that B. said that C. did a certain scandalous thing, C. shall have *action* against A. with averment that B. never said so, whereby A. is the author of the scandal. Supposing B. did not in fact say so. *Cro. Jac.* 406. See 1 *Roll Abr.* 64.

It is to be observed in general, that though scandalous

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words are spoken before a man's face, or behind his back, by way of affirmation, or report, when drunk, or sober; and although they are spoken in any other than the *English* language, if they are understood by the hearers, they are *actionable*; also words may be *actionable* in one county, which are not so in another, by the different construction, &c. 4 *Rep.* 14: *Hob.* 165, 236. But if the defendant can make proof of the words, he may, in an action for damages, plead a special justification. *Co. Ent.* 26. The words to maintain this *action* must be direct and certain, that there may be no intendment against them; but as some words separate, without others joined with them, are not *actionable*; so some words that are *actionable* may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 *Rep.* 17: 1 *Cro.* 327: *Moor Ca.* 174, 331. vide 4 *Rep.* 20: *Hob.* 126. Where words spoken are somewhat uncertain, they may by apt averments be made certain and *actionable*. 2 *Bull.* 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. *Cro. Jac.* 107. The thing charged by the words must be that which is possible to have been done; for if it be of a thing altogether and apparently impossible, no action lies. 4 *Rep.* 16. No action will lie for words spoken in pursuit of a prosecution in an ordinary course of justice; as where a lawyer, in pleading his client's cause, utters words according to his instructions; as saying of one he is a bastard, when this is to defend the party's own title where he himself doth claim to be heir of the land that is in question, these words will not bear an action. *Cro. Jac.* 90: 4 *Rep.* 13.

In this action the nature of the words must be set forth with the manner of speaking them, when and where spoken, and before whom, and the damage thereby to the plaintiff; that his credit was, and how, impaired, with the aggravating circumstances; but it matters not whether the plaintiff doth in his declaration set forth all the *circumstantial* words as they are spoken; so as to shew the very words that are *actionable*, and the substance of them, &c.

There is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcilable to their avowed principles, as this action on the case for words; many cases in the old authors are certainly not law, and the fairest observation on the subject is that "what words are *actionable* or not, will be more satisfactorily determined by an accurate application of the general principles, on which such actions depend, than by a reference to adjudged cases, especially those in old Authors." See the case of *Onslow v. Horne*, 3 *Wils.* 177; where the principles are well explained.

2. Action on the case likewise lies upon an *Assumpsit* or undertaking; and such action is founded on a contract either express or implied by law, and the verdict gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92: *Moor* 657. See tit. *Assumpsit*.

3. It has been premised, that a special action on the case lies in all instances wherein no general action could be framed; it will be necessary therefore to point out some of those particular cases in which it is most peculiarly applicable.

It was formerly held, that if my fire, by misfortune,

burnt the goods of another man, for this wrong he should have *action on the case* against me; and if my servant put a candle or other fire in any place in my house, and this burnt my house and the house of my neighbour, *action on the case* lay for him against me: 1 *Danv.* 10: But this action is now destroyed by stat. 6 *Ann. c.* 31. See tit. *Fire, Waste*.

Action on the case likewise lies against Carriers and others upon the custom of *England*. See tit. *Carrier*.

A common Inn-keeper is chargeable for goods stolen in his house. See tit. *Inns and Inn-keeper*.

This *action* lies for *Deceit* in contracts, bargains, and sales; if a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warranty, *action* lies. *Danv.* 173. So if a man sells a horse, and warrants him to be sound of his limbs, if he be not, *action on the case* lies. A person warrants a horse, wind and limb, that hath some secret disease known to the seller, but not to the buyer, this *action* may be brought; though if one sell a horse and warrant him sound, and he hath at the time visible infirmities, which the buyer may see, *action on the case* will not lie. *Yelv.* 114: *Cro. Jac.* 675. Where one sells me any wares or commodities, and is to deliver that which is good, but delivers what is naught; or sells any thing by false or deceitful weights and measures, with or without warranty, *action on the case* lies; and so where a man doth sell corrupt victuals, as bread, beer, or other thing for food, and knows it to be unwholesome. *Dyer* 75: 4 *Rep.* 18: *Cro. Jac.* 270. Yet if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no *action* can be maintained. 7 *H.* 4. 16. Nor will *case* lie upon a warranty of what is out of a man's power, or of a future thing; as that a horse shall carry a man thirty miles a day, or the like. *Finch* 188. If a man sells certain packs of wool, and warrants that they are good and merchantable, if they are damaged, *action on the case* lies against him. 1 *Danv.* 187. The bare affirmation by the seller of a particular sort of diamond, without warranting it to be such, will not maintain an *action*. *Cro. Jac.* 4. 106. But where a man hath the possession of a personal thing, the affirming it to be his own is a warranty that it is so; though it is otherwise in case of lands, where the buyer at his peril is to see that he hath title. 1 *Salk.* 210. If a person sells to another cattle or goods, that are not his own, *action on the case* lies; so if he warrants cloth to be of such a length, that is deficient of it. See tit. *Deceit*.

For *Neglect* or *Malefeasance*; as if a taylor, &c. undertakes to make a suit of clothes, and spoils them, *action* lies: and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls: or if he undertakes to build a house for me, and doth it ill, *action on the case* lies. 1 *Danv.* 32. If a surgeon neglects his patient, or applies unwholesome medicines, whereby the patient is injured, this *action* lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause miscarries, *action* lies against him: so if after retainer, he become of counsel to the adversary against the plaintiff. 11 *H.* 6. 18.

Where a smith promises to shoe my horse well, if he pricks him, *action on the case* lies; and so when he refuses to shoe him, on which I travel without, and my horse is damaged. For stopping up a water-course or way;

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by knocking down a party wall; stopping of ancient lights; and for any private nuisance to a man's water, light, or air, whereby a person is damaged, this *action* lieth. *Cro. Eliz.* 427: *Fab.* 259.

Where any one perfonates another, for cheating at gaming, where a surety is not saved harmless, *Id.* 2 *Inf.* 195.

If I lend another my horse to ride so far; and he rides further, or forward and backward, or doth not give him meat, this *action* lieth. *Cro. Eliz.* 141. And where one lends me a horse for a time; if he take him from me within that time, or disturb me before I have done what I hired him for, *action on the case* lies: and though I ride the horse out of the way in my journey, he may not take him from me. 8 *Rep.* 146. See tit. *Bailment*. This *action* lies for keeping a dog accustomed to bite sheep, if the owner knew the vicious quality of the dog. But not for a man's dog running at my sheep, though he kills them, if it be without his consent, and he did not know that the dog was accustomed to bite sheep. Vide 1 *Danv. Abr.* 19: *Hist.* 171.

Action on the case will lie against a Gaoler for putting irons on his prisoner; or putting him in the stocks, or not giving sufficient sustenance to him, being committed for debt. *F. N. B.* 83. The master may in many cases have this *action* against his servant, steward, or bailiff, for any special abuse done to him, and for negligence, &c. Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. *Lane* 68: *Cro. Eliz.* 777: 1 *Shep. Abr.* 58, 59. A servant is trusted with goods and merchandize consigned to him by a merchant, to pay the customs for them, and dispose of them to profit; if he deceive the merchant, and have allowance for it on his account, and to defraud the king, lands some of the goods without paying the customs, by which they are forfeited, *action on the case* lieth. *Lane* 65: *Cro. Jac.* 266.

If I trust one to buy a lease or other thing for me, and he buyeth it for himself, or doth not buy it, this *action* lies against him; but if he doth his endeavour it sufficeth. *Bro.* 117. Where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; a steward is hindered in the keeping of his courts; a keeper of a forest disturbed in taking the profits of his office; a bailiff in distraining for an amercement, or the like; *action on the case* will lie. *Bendl.* 89: *Lib. Intr.* 5: *Moor* 987. An *action on the case* lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term in *esse*. 3 *Lev.* 360. Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this *action* lies. *Cro. Jac.* 478: 2 *Inf.* 650. And for setting up a new mill on a river, to the prejudice of another who hath an ancient mill, an *action* will lie. *Lib. Intr.* 9.

Action on the case likewise lies for and against commoners, &c. for injuries done in commons. *Sy.* 164: *Sid.* 106: *Cro. Jac.* 165: 2 *Inf.* 474. See tit. *Common*.

Action on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, *action on the case* lies for unjust vexation: And for falsely and maliciously arresting a person for more than is due to the plaintiff, whereby the defendant is imprisoned, for want of bail; or if it be on purpose to

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hold him to bail, *action on the case* will lie, after the original *action* is determined. 1 *Lev.* 360: 2 *Balk.* 15. An *action* likewise lies against sheriffs for default in executing writs; permitting escapes, &c.

Actions on the case likewise lie for conspiracy, escape and rescue, nuisances, &c. which see under the several titles. And for a general abridgment of the law on this subject, see *Cow. Dig.* tit. *Actions*.

ACTION PREJUDICIAL, (otherwise called preparatory, or principal) is an action which arises from some doubt in the principal; as in case a man sues his younger brother for lands descended from his father, and it is objected against him that he is a bastard; now this point of bastardy is to be tried before the cause can any further proceed: and therefore it is termed *prejudicialis, quia prius judicanda*. *Bract. lib.* 3. c. 4. numb. 6: *Cowel*.

ACTION OF A WRIT, is a phrase of speech used, when one pleads some matter, by which he shews the plaintiff had no cause to have the writ he brought, yet it may be that he may have another writ or action for the same matter. Such a plea is called a *plea to the action of the writ*; whereas, if by the plea it should appear that the plaintiff hath no cause to have an action for the thing demanded, then it is called a *plea to the action*. *Cowel*; *Termes de la Ley*.

ACTIONARE, i. e. *In jus vocare*, or to prosecute one in a suit at law. *Tiborn's Chron.*

ACTO, *Action*, *Aketon*, *Fr. Hauqueton*.] A coat of mail. *Du Fresno*.

ACTON BURNEL. The statute of 11 *Ed. 1. ann.* 1283, ordaining the *statute merchant*: it was so termed from a place named *Acton-Burnel*, where it was made; being a castle formerly belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropshire*. *Cowel*: *Termes de la Ley*.

ACTOR. The proctor or advocate in civil courts or causes. *Actor dominicus*, was often used for the lord's bailiff or attorney. *Actor ecclesie* was the ancient forensick term for the advocate or pleading patron of a church. *Actor villa* was the steward or head bailiff of a town or village. *Cowel*.

ACTS DONE, Are distinguished into *acts of God*, the *acts of the law*, and *acts of men*. The *act of God* shall prejudice no man: as where the law prescribeth means to perfect or settle any right or estate; if by the *act of God* the means, in some circumstances, become impossible, no party shall receive any damage thereby. *Co. Lit.* 123: 1 *Rep.* 97. As in an action on the case a bargeman may justify, by pleading that there were several passengers in his barge, and a sudden tempest arising, all the goods in the barge were thrown overboard to save the lives of the passengers. See tit. *Carrierr*.

The acts of the law are esteemed beyond the acts of man: and when to the perfection of a thing divers acts are required, the law hath most regard to the original act. 8 *Rep.* 78. The law will construe things to be lawfully done, when it standeth indifferent whether they should be lawful or not: but whatsoever is contrary to law is accounted not done. *Co. Lit.* 42: 3 *Rep.* 74. Our law doth favour substantial more than circumstantial acts; and regards deeds and acts more than words: and the law doth not require unnecessary things. *Plowd.* 10.

As to *acts of men*; that which a man doth by another, shall be said to be done by himself; but personal things cannot be done by another. *Co. Lit.* 153. A man cannot

not do an *act* to himself, unless it be where he hath a double capacity; no person shall be suffered to do any thing against his own *act*; and every man's *acts* shall be construed most strongly against himself. *1 Inst.* 140. But if many join in an *act*, and some may not lawfully do it, it shall be adjudged the *act* of him who might lawfully do the same. *Dyer* 192. *Acts* that men are forced by necessity and compulsion to do, are not regarded: and an *act* done between persons shall not injure a stranger not party or privy thereto. *Plow.* 17: 6 *Rep.* 16.

Where mutual *acts* are to be done, who is to do the first *act*, see tit. *Condition*.

ACTS OF PARLIAMENT. See tit. *Statute*.

ACTUARY, *actuarius*.] A clerk that registers the *acts* and constitutions of the Convocation.

AD CREDULITARE. To purge one's self of an offence by oath. *Legis Inc.* c. 36.

ADDITION. The title or estate, and place of abode given to a man besides his name. See tit. *Abatement*. I. 3. (c.)

ADELING, *Ethling* or *Edling*, from the Saxon *ædelan*, noble or excellent.] A title of honour amongst the *Anglo-Saxons*; properly belonging to the king's children; it being usual for the *Saxons* to join the word *king* to the paternal name, signifying a son, or the younger. King *Edward the Confessor* having no issue, and intending to make *Edgar*, his nephew, the heir of the kingdom, gave him the title and title of *Adeling*. It was also used among the *Saxons* for the nobles in general. *Spelm. Gloss.* *Lamb.*

ADEMPTION. A taking away of a legacy. See *Legacy*.

AD INQUIRENDUM. A judicial writ commanding enquiry to be made of any thing relating to a cause depending in the king's courts. It is granted upon many occasions for the better execution of justice. *Reg. Judic.* See tit. *Writ of Inquiry*.

ADJOURNMENT, *adjournamentum*. *Fr.* *adjournement*.] A putting off until another time or place. As *adjournment* in eyre, (by stat. 2 *E.* 3. c. 11. & 25 *E.* 3. c. 18.) is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be *adjourned*; and the substance of the *adjournment* of courts is to give licence to all parties that have any thing to do in court to forbear their attendance, till such a time. Every last day of the term, and every eve of a day in term, which is not *dies juridicus*, or a law day, the court is *adjourned*. 2 *Inst.* 26. The terms may be *adjourned* to some other place, and there the *King's Bench* and other courts at *Westminster* be held: and if the king puts out a proclamation for the *adjournment* of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &c. 1 *And.* 279: 1 *Lev.* 176. Though by *Magna Charta* the court of *Common Pleas* is to be held at *Westminster*, yet necessity will sometimes supersede the law, as in the case of a plague, a civil war, &c. In the first year of *Charles I.* a writ of *adjournment* was delivered to all the justices, to *adjourn* two returns of *Trinity* term: and in the same year *Michaelmas* term was *adjourned* until *crastino* *animum* to *Reading*; and the king by proclamation signified his pleasure, that his court should be there held. *Cro. Car.* 13, 27. In the 17th of *Charles II.* the court of *B. R.* was *adjourned* to *Oxford*, because of the plague; and from thence to *Winchester*; and afterwards to *Westminster* again. 1 *Lev.* 176, 178.

On a foreign plea pleaded in *assise*, &c. the writ shall be *adjourned* into the *Common Pleas* to be tried; and after *adjournment*, the tenant may plead a new plea pursuant to the first; but if he pleads in abatement a plea triable by the *assise*, on which it is *adjourned*, he cannot plead in bar afterwards, &c. 1 *Danv. Adv.* 249. The justices of *assise* have power to *adjourn* the parties to *Westminster*, or to any other place; and by the express words of *Magna Charta*, (cap. 12.) they may *adjourn*, &c. into *C. B.* before the judges there. *Dyer* 132.

If the judges of the court of *King's Bench*, &c. are divided in opinion, two against two, upon a demurrer or special verdict (not on a motion) the cause must be *adjourned* into the *Exchequer Chamber*, to be determined by all the judges of *England*. 3 *Mod.* 156: 5 *Mod.* 335.

ADIRATUS, Strayed, lost. See *Brati. l. 3. tract. 2. c. 32.*

AD JURA REGIS. A writ brought by the king's clerk presented to a living, against those that endeavour to eject him, to the prejudice of the king's title. *Reg. of Writs*, 61.

AD LARGUM, At large: It is used in the following and other expressions: *title* at large, *assise* at large, *verdict* at large; to *vouch* at large, &c.

ADLEGIARE, or *alcier* in *Fr.*] To purge himself of a crime by oath. See the laws of king *Alfred*, in *Brompt. Chron.* cap. 4 & 13.

ADMEASUREMENT, Writ of, *admesuratio*.] Is a writ brought for remedy against such persons as usurp more than their share. It lies in two cases; one is termed *admeasurement of dower*, (*admesuratio dotis*), where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her: and the other is *admeasurement of pasture*, (*admesuratio pasturæ*), which lies between those that have common of pasture, where any one or more of them surcharge the common. *Reg. Orig.* 156, 171. In the first case the heir shall have this writ against the widow whereby she shall be *admeasured*, and the heir restored to the overplus; and in the last case it may be brought against all the other commoners, and him that surcharged; for all the commoners shall be *admeasured*. *Termes de Ley.* 23. See tit. *Common and Dower*.

ADMINICLE, *adminiculum*.] Aid, help, or support. See stat. 1. *E.* 4. c. 1.

ADMINISTRATOR, *Lat*] He that hath the goods of a man dying intestate committed to his charge by the Ordinary, for which he is accountable when thereunto required. For matters relating to this title, and to Administration in general, see tit. *Executor*.

ADMINISTRATRIX, *Lat*] She that hath goods and chattels of an intestate committed to her charge, as an *administrate*.

ADMIRAL. *Admiratus*, *admirallus*, *admiralis*, *capitaneus* or *custos maris*, from the *French* *amiral*, or from the *Saxon*, *æn mearl*, over all the sea; and in ancient time the office of the *admiralty* was called *custodia maritimæ Angliæ*. *Co. Lit.* 260. Many other fanciful derivations are recapitulated in *Spelman's Glossary*, and see *Com. Dig.* tit. *Admiralty*.—The term appears to have been first used temp. *E. 1.* and the first *Admiral of England*, by name, was *Richard Fitz Alan* Earl of *Arunel* 10 Ric. 2.] A High Officer or magistrate, having the government of the king's navy; and (in his court of *Admiralty*) the determining of all causes belonging to the sea and offences committed thereon.—The office is now usually executed by Commissioners who, by stat. 2 *W. & M. stat. 2. c. 2.*, are declared

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declared to have the same authorities jurisdictions and powers as the *Lord High Admiral*, who is usually understood by this term in law, not adverting to the naval distinctions.

Under this head therefore shall be included all that relates as well to such ADMIRAL as to the COURT OF ADMIRALTY.

The warden of the *Cinque Ports* has the jurisdiction of Admiral within those ports exempt from the admiralty of *England*, 4 *Inst.* 223; 2 *Inst.* 556; 2 *Jon.* 67; 1 *Jenk.* 85. It appears that antiently the *Admirals of England* had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of *Oleron* and other sea laws. 4 *Inst.* 75. In the time of king *Ed. 1.* and king *John*, all causes of merchants and mariners, and things arising upon the main sea, were tried before the lord *Admiral*: but the first title of *Admiral of England*, expressly conferred upon a subject, was given by patent of king *Rich. 2.* to the earl of *Arundel* and *Surry*. In the reign of *Ed. 3.* the court of admiralty was established, and *Ric. 2.* limited its jurisdiction.

By the statute 13 *Rich. 2.* c. 5, it is enacted, that upon complaint of encroachments made by the admirals and their deputies, the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea. For the construction of this statute, see 2 *Bulstr.* 323; 3 *Bulstr.* 205; 13 *Co.* 52.

By stat. 15 *Ric. 2.* c. 3, it is declared, that all contracts, pleas and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no cognisance, but they shall be tried, &c. by the law of the land; but of the death of a man, and if mayhem done in great ships, being in the main stream of great rivers beneath the points near the sea, and in no other place of the same river, the admiral shall have cognisance, and also to arrest ships in the great shotes, for the great voyages of the king and the realm, sacred to the king his forfeitures; and shall have jurisdiction in such shotes during such voyages, only saving to lords, &c. their liberties.

By the statute 2 *Hen. 4.* c. 11, reciting the 13 *R. 2.* c. 5, it is enacted, that he that finds himself aggrieved against the form of the statute, shall have his action by writ grounded upon the case against him that so pursues in the admiralty, and recover double damages against him, and he shall incur the pain of *tol.* if he be attainted.

By stat. 27 *H. 8.* c. 4, All offences of piracy, robbery, and murder done on the sea, or within the admiral's jurisdiction, shall be tried in such places of the realm as shall be limited in the king's commissions, directed to the lord admiral and his lieutenant and deputies and other persons to determine such offences after the common course of law, as if the same offences had been done on land.

By the statute 28 *Hen. 8.* cap. 15, "all treasons, felonies, robberies, and murders, &c. upon the sea, or within the admiralty jurisdiction, shall also be tried in such shires and places in the realm, as shall be limited by the king's commission, as if done on land, and the consequences of the offences are the same. See 3 *Inst.* 111, 112. But in cases which would be manslaughter at land the jury is always directed to acquit. *Foster* 288.

It was held, *Telv.* 134, That by force of this statute, accessories to robbery, &c. could not be tried; but this is

remedied by 11 & 12 *W. 3.* cap. 7; by which their aiders and comforters, and the receivers of their goods are made accessories, and to be tried as pirates by 28 *Hen. 8.* cap. 15; also the said statute 11 & 12 *W. 3.* directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of *England*.—See title *Piracy*.

By the statute 5 *Eliz.* cap. 5, several offences in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and without the precinct jurisdiction and liberties of the cinque-ports, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of *oyer and terminer*, according to the statute of 28 *H. 8.* c. 15.

By the statute 1 *Ann.* cap. 9, captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 *H. 8.* c. 15. The statute 10 *Ann.* cap. 10, directs how the trial shall be had of officers and soldiers, that either upon land out of *Great Britain*, or at sea, hold correspondence with a rebel enemy. See tit. *Piracy, Treason*.

And by the statute 4 *Geo. 1.* cap. 11, all persons who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 *W. 3.* may be tried and judged for every such offence according to the form of 28 *H. 8.* c. 15, and shall be excluded from the benefit of clergy.

The jurisdiction of the lord admiral therefore is confined to the main sea, or coasts of the sea, not being within any county. Thus, the admiralty hath cognisance of the death or maim of a man, committed in any ship riding in great rivers, beneath the bridges thereof, next the sea: but by the common law, if a man be killed upon any arm of the sea, where the land is seen on both sides, the coroner is to enquire of it, and not the admiral; for the county may take cognisance of it; and where a county may inquire, the lord admiral hath no jurisdiction. 3 *Rep.* 107.

All ports and havens are *infra corpus comitatus*, and the admiral hath no jurisdiction of any thing done in them: between high and low water mark, the common law and admiral have jurisdiction by turns; one upon the water and the other upon the land. 3 *Inst.* 113. By the statutes for disciplining the navy, every commander, officer and soldier of ships of war, shall observe the commands of the admiral, &c. on pain of death or other punishment. See tit. *Navy*.

Under these statutes the lord admiral hath power to grant commissions to inferior vice-admirals, &c. to call courts martial, for the trial of offences against the articles of war; and these courts determine by plurality of voices, &c. See tit. *Navy*.

The Admiralty is said not to be a court of record, by reason it proceeds by the *Civil* law. 4 *Inst.* 135. But the admiralty has jurisdiction where the common law can give no remedy; and all maritime causes, or causes arising wholly upon the sea, it hath cognisance of. *Fide* as to the jurisdiction of the admiralty, 1 *Com. Dig.* tit. *Admiralty*. The admiralty hath jurisdiction in cases of freight, mariners wages, breach of charter-parties, though made within the realm; if the penalty be not demanded: and likewise in case of building, mending, saving, and victualling ships, &c. so as the suit be against the ship, and

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and not against the parties only. 2 *Cro.* 216. Mariners' wages are contracted on the credit of the ship, and they may all join in suits in the *admiralty*; whereas at common law they must all sever: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the *admiralty* for his wages. 1 *Salk.* 33. It is allowed by the common lawyers and civilians, that the lord *admiral* hath cognizance of seamens wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c. And of contracts, and other things done beyond sea, relating to navigation and trade by sea. *Wood's Inst.* 218. But if a contract be made beyond sea, for doing of an act or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; for where part belongs to the common law, and part to the *admiral*, the common law shall be preferred. And contracts made beyond sea may be tried in *B. R.* and a fact be laid to be done in any place in *England*, and so tried here. 2 *Bulfr.* 322.

Where a contract is made in *England*, and there is a conversion beyond sea, the party may sue in the *admiralty*, or at common law. 4 *Leon.* 257. An obligation made at sea, it has been held, cannot be sued in the *admiral's* court, because it takes its course, and binds according to the common law. *Hob.* 12. The court of *admiralty* can not hold plea of a matter arising from a contract made upon the land, tho' the contract was concerning things belonging to the ship: but the *admiralty* may hold plea for the seamens wages, &c. because they become due for labour done on the sea; and the contract made upon land, is only to ascertain them. 3 *Lev.* 60. Though where there is a special agreement in writing, by which seamen are to receive their wages, in any other manner than usual; or if the agreement at land be *under seal*, so as to be more than a parol contract, it is otherwise. 1 *Salk.* 31. See *Hob.* 79.

If the master pawns the ship on the high sea out of necessity for tackling or provision, without the consent of the owners, it shall bind them; but 'tis otherwise where the ship is pawned for the master's debt: the master can have no credit abroad, but upon the security of the vessel; and the *admiralty* gives remedy in these cases. 1 *Salk.* 35. The master hath a right to hypothecate the ship, for any debt, incurred on her account. *Vide Co. Lit.* 134, 140. Tho' the agreement is made, and the money lent at land. 1 *Lord Raym.* 152. *Benson v. Jefferies*. Sale of goods (taken by piracy) in open market, is not binding by the *admiralty* law, the owner may therefore retake them; but at common law the sale is binding, of which the *admiralty* must take notice. 1 *Roll. Abr.* *Vide* 2 *Vent.* 308.

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of *S.* and there he pays it with money borrowed, and gives bond for the money, he may sue in the *admiralty* for the 50*l.* because the original cause arose upon the sea, and what followeth was but accessory and consequential. *Hard.* 183.

If goods delivered on ship-board are imbezilled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the

cause is to be tried in the *admiralty*. 1 *Lill.* 368. By the custom of the *admiralty*, goods may be attached in the hands of a third person, *in causa maritima & civili*, and they shall be delivered to the plaintiff, after defaults, on caution to restore them, if the debt, &c. be disproved in a year and a day; and if the party refuse to deliver them, he may be imprisoned *grossus*, &c. *March Rep.* 204.

The court of *admiralty* may cause a party to enter into bond in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or of the body, &c. not of the lands. *Guth.* 260: 1 *Sbep. Abr.* 129: See 1 *Salk.* 33: *T. Rep.* 75: 2 *Lord Ray.* 1286: *Fitz.* 197.

A person in execution, on judgment in the *admiral's* court, upon a contract made on the land in *New England* was discharged, being out of the *admiralty* jurisdiction. 3 *Cro.* 603: 1 *Cro.* 685. And where sailors' cloaths were bought in *St. Katherine's* parish near the Tower, *London*, which were delivered in the ship; on a suit in the *admiralty* for the money, prohibition was granted; for this was within the county: so of a ship lying at *Blackwall*, &c. *Owen* 122: *Hughes's Abr.* 113. But the *admiralty* may proceed against a ship, and the sails and tackle, when they are on shore, although alledged to be detained at land; yet upon alledging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 *Shew.* 179.

If there be a war with the *Dutch*, and an *Englishman*, having letters of mark, takes an *Offender* for a *Dutch* ship, and brings it into a haven, and libels against it to have it condemned as a prize; but sentence be given that it is no prize; the *Offender* may libel in the *admiralty* against the captain, for the damage the ship received while it lay in the port; for the original taking being at sea, the bringing it into the port, in order to have it condemned, is but a consequence thereof. 1 *Lev.* 243: 1 *Sid.* 367.

If an *English* ship takes a *French* ship, the *French* being in enmity with us, and such ship is libelled against, and after due notice on the *exchange*, &c. declared a lawful prize, the king's proctor may exhibit a libel in the *admiralty* court, to compel the taker (who converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of *admiralty* cannot hold plea. *Carth.* 399.—[This must be understood of a capture without the authority of letters of marque or reprisal.]

If the owner of a ship victuals it and furnishes it to sea, with letters of reprisal, and the master and mariners when they are at sea commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the *admiralty* law, and our law ought to take notice thereof. 1 *Roll. Abr.* 530. But see 1 *Roll. Rep.* 285.

By the civil law, and custom of merchants, if the ship be cast away, or perish through the mariners' defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. 1 *Sid.* 179: 1 *Mod.* 93: 1 *Vent.* 146.

The *admiralty* court may award execution upon land; tho' not hold plea of any thing arising on land. 4 *Inst.*

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141. And upon letters missive or request, the *admiralty* here may award execution on a judgment given beyond sea, where an *Englishman* flies or comes over hither, by imprisonment of the party, who shall not be delivered by the common law. 1 *Roll. Abr.* 530. When sentence is given in a foreign *admiralty*, the party may libel for execution of that sentence here; because all courts of *admiralty* in *Europe* are governed by the civil law. *Sid.* 418. Sentences of any *admiralty* in another kingdom are to be credited, that ours may be credited there, and shall not be examined at law here; but the king may be petitioned, who may cause the complaint to be examined; and, if he finds just cause, may send to his ambassador where the sentence was given, to demand redress, and, upon failure thereof, will grant letters of marque and reprisal. *Raym.* 473.

If one is sued in the *admiralty*, contrary to the statutes 13 R. 2. stat. 1. c. 5; & 15 R. 2. c. 3, he may have a *superfedeas*, to cause the judge to stay the proceedings, and also have action against the party suing. 10 *Rep.* 75. A ship being privately arrested by *admiralty* process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be recovered. 1 *Salk.* 31, 32.

By stat. 8 *Eliz.* c. 5, if an erroneous judgment is given in the *admiralty*, appeal may be had to delegates appointed by commission out of chancery, whose sentence shall be final. See 4 *Inst.* 339. But from the prize court (see *post*) appeal lies to commissioners consisting of the privy council. *Doug.* 614. Appeals may be brought from the inferior *admiralty* courts to the lord high *admiral*: but the lord warden of the *cinque ports* hath jurisdiction of *admiralty* exempt from the *admiralty* of *England*. A writ of error doth not lie upon a sentence in the *admiralty*, but an appeal. 4 *Inst.* 135, 339. There are also vice-*admiralty* courts in the king's foreign dominions, from which (except in case of prizes) appeals may be brought before the courts of *admiralty* in *England*, as well as to the king in council. 3 *Comm.* 69.

The *Admiral*, of right, had anciently a tenth part of all prize goods, but which is taken away by stat. 13 *Geo.* 2. c. 4; which vests the property of all ships taken, and condemned as prize in the *admiralty* courts, in the *admirals*, *captains*, *sailors*, &c. being the captors, according to proportions to be settled by the king's proclamation. This statute also enables the *admiralty* to grant letters of marque. (See tit. *Privateers*.) For the mode of proceeding in condemning prizes, see the *st.* & *Doug.* 614: 4 *Term Rep.* 382, as to the commissioners of Appeal.

By the stat. 22 *Geo.* 2. c. 3, his majesty's commission to all the privy councillors then and for the time being, and to the lord chief baron of the court of *exchequer*, the justices of the king's bench and common pleas, and barons of the said court of *exchequer*, then and for the time being, for hearing and determining appeals from sentences in causes of prizes pronounced in the courts of *admiralty*, in any of his majesty's dominions, declared valid, although such chief baron, justices and barons are not of the privy council. But no sentence shall be valid, unless the major part of the commissioners present be of the privy council. See *Kyd's Com. Dig.* tit. *Admiralty*.

ADMISSION, *admissio*.] Is properly the ordinary's declaration that he approves of the parson presented to

AD QUOD, &c.

serve the cure of any church. *Co. Lit.* 344. a. When a patron of a church has presented to it, the bishop upon examination admits the clerk by saying *admitto te habilem*. *Co. L.* 344. a. Action on the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons (as for any crime or impediment, illiterature, &c.) but the remedy is by writ *quare non admiste*, or *admittendo clerico* brought in that county where the refusal was. 7 *Rep.* 3. As to the causes of refusal by the ordinary to admit to a benefice, see tit. *Parson*; *Quare impedit*.

ADMITTANCE. See *Copyhold*.

ADMITTENDO CLERICO. Upon the right of presentation to a benefice being recovered in *quare impedit*, or on assize of *darrein presentment*, the execution is by this writ; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff. 3 *Comm.* 412; *Reg. Orig.* 31, 33. See tit. *Parson* & *Quare Impedit*.

If a person recovers an advowson, and six months pass; yet, if the church be void, the patron may have a writ to the bishop; and if the church is void when the writ comes to the bishop, the bishop is bound to admit his clerk. *Vide Hut.* 24; *Hob.* 152, 4; 2 *Inst.* 273, and 3 *Com. Dig.* Where a man recovers against another than the bishop, this writ shall go to the bishop; and the party may have an *alias* and a *pluries*, if the bishop do not execute the writ, and an attachment against the bishop, if need be. *New Nat. Br.* 84. In a *quare impedit* betwixt two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop, for the king.

ADMITTENDO IN SOCIUM. A writ for associating certain persons to justices of assize. *Reg. Orig.* 206. knights and other gentlemen of the county are usually associated with judges, in holding their *assizes* on the circuits.

ADNICHILED, from the Latin *nihil*, or *nichil*.] Annulled, cancelled, or made void. Stat. 28 *Hen.* 8.

AD QUOD DAMNUM. A writ to enquire whether a grant intended to be made by the king will be to the damage of him or others. *F. N. B.* 221, 2; and it ought to be issued before the king grants certain liberties; as a fair, market, &c. which may be prejudicial to others: it is directed to the sheriff, *Terms de Ley* 25.

Stat. 27 *Ed.* 1. stat. 2. § 1, ordains, that such as would purchase new parks shall have writs out of chancery to enquire concerning the same. In like manner they shall do that will purchase any fair, market, warren, or other liberty. § 4.

This writ is likewise used to enquire of lands given in mortmain to any house of religion, &c. And it is a damage to the country, that a freeholder who hath sufficient lands to pass upon assizes and jury, should alien his lands in mortmain, by which alienation his heir should not have sufficient estate after the death of the father to be sworn in assizes and juries. *F. N. B.* 221.

The writ of *ad quod damnum* is also had for the turning and changing of ancient highways; which may not be done without the king's licence obtained by this writ, on inquisition found that such a change will not be detrimental to the public. *Terms de Ley* 26; *Vaugh. Rep.* 341. Ways turned without this authority are not esteemed highways, so as to oblige the inhabitants of the hundred

to make amends for robberies; nor have the subjects an interest therein to justify going there. 3 *Cro.* 267. If any one change an highway without this authority, he may stop the way at his pleasure. See tit. *Highway*.

The river *Thames* is an highway, and cannot be diverted without an *ad quod damnum*; and to do such a thing ought to be by patent of the king. *Noy* 105.

If there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the king to make a new trench, and to stop the ancient trench, &c. they ought first to sue a writ of *ad quod damnum*; to enquire what damage it will be to the king or others. *F. N. B.* 225. *E.*

And if the king will grant to any city the *assise of bread and beer*, and the keeping of weights and measures, an *ad quod damnum* shall be first awarded, and when the same is certified, &c. then to make the grant. *F. N. B.* 225. *E.*

It appears by the writs in the register, that in ancient times, upon every grant, confirmation, &c. or licence made by the king, a writ *ad quod damnum* was to be first awarded, to enquire of the truth thereof; and what damage the king might have by the same; but now the practice is contrary; and in the patents of common grants of licence, a dispensation by *non obstante* is inserted.

ADRECTARE, *addressare*, i. e. *ad rectum ire, restituer.*] To do right, satisfy, or make amends. *Geru. Doctores. anno* 1170.

AD TERMINUM QUI PRETERIIT. A writ of entry, that lay for the lessor or his heirs, where a lease has been made of lands or tenements, for term of life or years; and after the term is expired, the lands are withheld from the lessor by the tenant, or other person possessing the same. *F. N. B.* 201.

Now by stat. 4 *Geo.* 2. c. 28, tenants wilfully holding over, after demand and notice in writing for delivering possession, shall pay double the yearly value. See tit. *Ejectment*.

ADVENT, *adventus.*] A time containing about a month preceding the feast of the nativity (the advent or arrival) of our Saviour. It begins from the Sunday that falls either upon St. *Andrew's* day, being the 30th of *November*, or next to it, and continues to the feast of *Christ's* nativity, commonly called *Christmas*. Our ancestors shewed great reverence and devotion to this time, in regard to the approach of the solemn festival: for *in adventu domini nulla assisa debet capi*. But the statute *West.* 1. (3 *E.* 1.) c. 51, ordained that, notwithstanding the usual solemnity and times of rest, it should be (in respect of justice and charity, which ought to be times to be regarded) to take assises of *novel disseisin*, and *ancestor*, &c. in the time of *Advent*, *Septuagesima*, and *Lent*. This is also one of the seasons, from the beginning of which to the end of the octaves of the *Epiphany*, the solemnizing of marriages is forbidden, without special licence, as we may find from these old verses,

*Conjugium adventus prohibet, Hilarique relaxat;
Septuagena vetat, sed Paschæ octava reducit;
Rogatio vetitat, concedit Trina potestas.*

AD VENTREM INSPICIENDUM. See *Ventre*, *Inspiciendo*.

ADVERTISEMENTS. Under stat. 9 *Anne*, c. 6. § 5; and 10 *Anne*, c. 26. § 109, 100*l.* penalty is imposed on all persons (the latter particularly mentioning *Printers*) publishing the keeping of any office for illegal insurances on marriage, &c. or offices established under the pretence of improving small sums. The several penalties also imposed under the *Lottery* acts, (see this Dictionary, tit. *Lottery*.) extend to printers and publishers of news-papers in setting the advertisements of illegal lottery adventurers; and to distributors of hand-bills, &c. 4 *Term Rep.* 414; and several printers of papers who had incurred such penalties ignorantly, were indemnified by stat. 32 *Geo.* 3. c. 61.

By stat. 25 *Geo.* 2. c. 36. s. 1, any person publicly advertising a reward with no questions asked, for the return of things stolen or lost, or making use of words in such advertisement, purporting that such reward shall be given without seizing, or making enquiry after, the person producing such thing so stolen or lost, or promising in any such advertisement to return to any person, who may have bought, or advanced money upon such thing the money so paid or advanced, or any reward for the return of such thing; and any person (such as the printers of news-papers, &c.) printing or publishing such advertisement shall forfeit 50*l.*

By stat. 21 *Geo.* 3. c. 49, any person advertising or causing to be advertised any public entertainment or meeting for debating on the Lord's day to which persons are to be admitted by money or tickets sold, and any person printing or publishing any such advertisement, shall forfeit 50*l.* for each offence. § 3.

AD VITAM AUT CULPAM. An office is expressed to be so held, which is to determine only by the death or delinquency of the possessor; or which, in other words is held *quandiu se bene gesserit*. See stat. 28 *Geo.* 2. c. 7, on Scotch Jurisdictions.

ADULTERY, *adulterium, quasi ad alterius thorum;* *Anno* 1 *Hen.* 7. cap. 7, and in divers old authors termed *advoltery*.] The sin of incontinence between two married persons; or if but one of the persons be married, it is nevertheless *adultery*: but in this last case it is called single *adultery*, to distinguish it from the other, which is double. This crime is severely punished by the laws of God, and the ancient laws of the land: (See the laws of King *Edmund*, c. 4: *Laws of Canute*, par. 2. c. 6, 50: *Leg. H.* 1. c. 12.) the *Julian law*, among the old *Romans*, made it death; but in most countries at this time the punishment is by fine, and sometimes banishment: in *England* it is punished ecclesiastically by penance, &c. It is a breach of the peace, and as such anciently indictable, but not now. *Salk.* 552. The usual mode of punishing adulterers at present is by action of *crim. con.* (as it is commonly expressed,) to recover damages; which are assessed by the jury, in proportion to the heinousness of the crime, and are frequently very heavy and severe.

Before the stat. 22 & 23 *Car.* II. c. 1. which makes malicious maiming felony, it was a question, whether cutting off the privy members of a man, taken in *adultery* with another man's wife, was felony or not? And it is now held that such provocation may justify the homicide of the adulterer by the injured husband, in the moment of injury. 1 *Hale* 488. See tit. *Baron & Feme.* III.

ADVOCATE. The patron of a cause assisting his client with advice, and who pleads for him: it is the same in

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in the Civil and Ecclesiastical law, as a counsellor at the common law. The ecclesiastical, or church *advocate*, was originally of two sorts; either an *advocate of the causes* and interest of the church, retained as a counsellor and pleader of its rights; or an *advocate, advocatus, an Advowee or Avowee*. Blount: *Fleta* lib. 5. c. 14: *Britt.* c. 29. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them.—But when the patrons grew negligent in their duty, or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. *Vide* Spelman.

ADVOCATIONE DECIMARUM, A writ that lies for tithes, demanding the fourth part, or upwards, that belong to any church. *Reg. Orig.* 29.

ADVOW, or *Avow*, *advocate*.] To justify or maintain an act formerly done, see *Avowry*; it also signifies to call upon or produce; antiently when stolen goods were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found, and he in whose possession they were found, was bound *advocate*, i. e. to produce the seller to justify the sale; and so on till they found the thief. Afterwards the word was taken for any thing which a man acknowledged to be his own, or done by him, and in this sense it is mentioned in *Fleta*, lib. 1. cap. 5. par. 4.

ADVOWSON, *Advocatio*.] The right of presentation to a church or benefice: and he who hath this right to present is styled *patron*: because they that originally obtained the right of presentation to any church, were maintainers of, or benefactors to, the same church: it being presumed that he who founded the church will *avow* and take it into his protection, and be a patron to defend it in its just rights. When the Christian religion was first established in England, kings began to build cathedral churches, and to make bishops: and afterwards, in imitation of them, several lords of manors founded particular churches on some part of their own lands, and endowed them with glebe; reserving to themselves and their heirs a right to present a fit person to the bishop, when the same should become void. See 2 *Comm.* 21—3.

Under this head shall be considered,

- I. The several kinds of *advowson*.
- II. How *advowsons* may lapse.
- III. How they may be gained by usurpation.
- IV. Of the right of presentation.

For the law relating to appropriations and impropriations of benefices, see tit. *Appropriation*.

I. *Advowsons* are of two kinds; *appendant*, and *in gross*: *Appendant*, is a right of presentation dependant upon a manor, lands, &c. and passes in a grant of the manor as incident to the same; and when manors were first created, and lands set apart to build a church on some part thereof, the *advowson* or right to present to that church became *appendant* to the manor. *Advowson* in *gross* is a right subsisting by itself, belonging to a person, and not to a manor, lands, &c. So that when an *advowson appendant* is severed by deed or grant from the corporeal inheritance to which it was appendant, then it becomes an *advowson* in *gross*. *Co. Lit.* 121, 122.

If he that is seised of a manor, to which an *advowson* is appendant, grants one or two acres of the manor, together with the *advowson*; the *advowson* is appendant to such acre; especially after the grantee hath presented. *Watson's Compleat Incumbent*, c. 7.

But this feoffment of the acre with the *advowson* ought to be by deed, to make the *advowson* appendant; and the acre of land and the *advowson* ought to be granted by the same clause in the deed; for if one, having a manor with an *advowson* appendant, grant an acre parcel of the said manor, and by another clause in the same deed grants the *advowson*; the *advowson* in such case shall not pass as appendant to the acre; but if the grant had been of the intire manor, the *advowson* would have passed as appendant. So if a husband, seised in right of his wife of a manor to which an *advowson* is appendant, doth alien the manor by acres to divers persons, saving one acre; the *advowson* shall be appendant to that acre. Or if a lessee for life of a manor to which an *advowson* belongs, alien one acre, with the *advowson* appendant, the *advowson* is thereby appendant to that acre. *Watf.* c. 7.

The right of *advowson*, tho' appendant to a manor, castle or the like, may be severed from it in other ways, and being severed, becomes an *advowson in gross*; and this may be effected divers ways: as, 1. If a manor or other thing to which it is appendant is granted, and the *advowson* excepted. 2. If the *advowson* is granted alone, without the thing to which it was appendant. 3. If an *advowson* appendant is presented to by the patron, as an *advowson* in *gross*. *Gibb.* 757.

A disappendency may also be temporary; that is, the appendancy, tho' turned into *gross*, may return; as, 1. If the *advowson* is excepted in a lease of a manor for life; during the lease, it is in *gross*, but when the lease expires it is appendant again. 2. If the *advowson* is granted for life, and another enfeoffed of the manor with the appurtenances; in such case at the expiration of the grant it shall be appendant; and so in other cases.

But with respect to the king, by the statute of *prærogativa regis*, 17 Ed. 2. c. 15, *When the king gives or grants land or a manor with appurtenances; without he make express mention in his deed or writing, of advowson, the king reserveeth to himself such advowsons, albeit that among other persons it hath been observed otherwise.*

Yet when he restoreth, as in case of the restitution of a bishop's temporalities; then *advowsons* pass without express mention, or any words equivalent thereto. 10 Co. 64.

The law, in the case of a common person, is thus set down by Rolle, out of the antient books: If a man seised of a manor to which an *advowson* is appendant, aliens that manor, without saying with the appurtenances (and even without naming the *advowson*) yet the *advowson* shall pass; for 'tis parcel of the manor. 2 *Rol. Abr.* 60.

An *advowson* being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery; but may be granted by deed, or by will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited.

But this general rule, with regard to *advowsons* in *gross*, next avoidances, and the like, is to be understood with two limitations.

First, That it extends not to ecclesiastical persons of any kind or degree, who are seised of *advowsons* in the right of their churches; nor to masters and fellows of colleges,

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colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 *Eliz. cap. 19*, and the rest by the 13 *Eliz. cap. 10*.) from making any grants but of things *corporeal*, of which a rent or annual profit may be reserved; and advowsons and next avoidances, which are *incorporeal* and lie in grant, cannot be of that sort; and therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors (as bishop, dean, mailer, or guardian) during their own times.

Secondly, A grant of the next avoidance may be assigned before the avoidance happens. 2 *Rel. Ab. 45*, &c. But an avoidance cannot be granted by a common person after it is fallen: while the church is absolutely void. *Mo. 89: Dy. 129 b. : 26 a. : 283 a. : & see 2 Wiff. 197*; and a grant of the *advowson* made after the church is actually fallen vacant is equally void; not as is said in the old books, because it is a chose in action; but because such grants might (indeed inevitably would) encourage simony. 2 *Burr. 1510*, 1. See tit. *Simony*, and see *Kyd's Com. Dig. tit. Advowson*.

If two have a grant of the next avoidance, and one release all right and title to the other while the church is void: such release is void. But the king's grant of a void turn hath been adjudged to be good. 3 *Leon. 196: Dy. 283, a. : Hob. 140*.

If one be seised of an advowson in fee, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but to his executor. *Watf. c. 9*.

But if the incumbent of a church be also seised in fee of the advowson of the same church, and die; his heir, and not his executors, shall present; for altho' the advowson doth not descend to the heir at the death of the ancestor, and by his death the church become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and vested in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. *Watf. c. 9. fo. 72*. See *Watkins on Deceaseds*, p. 62: 3 *Lrv. 47*.

Tenant by the curtesy may be of an advowson, when the wife dies before avoidance. 1 *Inst. 29. a*.

By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, tho' he die incumbent; for altho' the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime. And so it is, tho' he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man. *Watf. c. 10*.

Advowsons are either *presentative*, *collative*, or *donative*.

An advowson *presentative* is, where the patron does present or offer his clerk to the bishop of the diocese, to be instituted in his church.

This may be done either by word or writing. The king may present by word, or in writing under any seal, who otherwise cannot do any legal act, but by matter of record; or by letters patent under the great seal. But

where a *corporation aggregate* doth present, it must be under seal. The presentation to a vicarage doth of common right belong to the parson. If a *feme covert* hath title to present, the presentation must be by husband and wife and in both their names, except in case of the queen consort. *Wood's Inst. 155*, &c.

A guardian by *focage* or by nurture cannot present to a vacant living in right of the infant heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practised, and made good by time. Therefore the infant shall present of whatsoever age. *Vide Co. Lit. 17 b*. If a common patron presents first one clerk, and then another, the bishop may institute which he pleases; unless he revokes the presentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of presentation in another, to the same benefice; he that has the right of nomination is the true patron, and the other is obliged to present the clerk which is nominated. 1 *Inst. 156*.

An advowson *collative* is that advowson which is lodged in the bishop; for *collation* is the giving of a benefice by a bishop, when he is the original patron thereof, or he gains a right by *lapse*.

Collation differs from institution in this; that institution is performed by the bishop upon the presentation of another, and *collation* is his own act of presentation; and it differeth from a common presentation, as it is the giving of the church to the parson; and presentation is the giving or offering the parson to the church. But collation supplies the place of presentation and institution; and amounts to the same as institution, where the bishop is both patron and ordinary. 1 *Lit. Ab. 273*.

A bishop may either neglect to collate, or he may make his collation without title; but such a wrongful collation doth not put the true patron out of possession; for after the *collatee* of the bishop is instituted and inducted, the patron may present his clerk; collation in this case being to be intended only as a privisional incumbency to serve the church. 1 *Inst. 344*.

Where a bishop gives a benefice as patron, he collates by writ *jure pleno*; when by *lapse*, *jure devoluto*. The collation by *lapse* is in right of the patron. *F. N. B. 31*. See post, *Lapse II*.

An advowson *donative* is, when the king or other patron (in whom the advowson of the church is lodged) does, by a single donation in writing, put the clerk into possession, without presentation, institution, or induction. Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurisdictions, so that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel *donative* doth once present to the ordinary, and his clerk is admitted and instituted, it becomes a church *presentative*, and shall never have the privilege of a *donative* afterwards. Yet if a stranger presents to such a *donative*, and institution is given, all is void. 1 *Inst. 153*.

The right of *donation* descends to the heir (the ancestor dying seised, where the church became void in his lifetime) and not to the executor; which it would had it been a *presentative* benefice. 2 *Wilson 150*, 1.

There is not any case in the books to exclude the heir of a *donative* from his turn in this case. And a patron of a *donative* can never be put out of possession by an *usurpation*. *Id. ibid*.

II. A *Lapse* is a title given to the ordinary, to collate to a church, by the neglect of the patron to present to it within six months after avoidance. Or a *lapse* is a devolution of a right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the king. The term in which the title by *lapse* commences from one to the other successively is six months, or half a year according to the calendar, not accounting twenty-eight days to the month, as in other cases, because this computation is by the Ecclesiastical law; and because *tempus semestre*, in the Stat. of West. 2. chap. 5, is intended of half a year, the whole year containing 365 days; which being divided, the half year for the patron to present is 182 days. The day in which the church becomes void is not to be reckoned as part of the six months. *Wood's Inst.* 160: *Hob.* 30: 4 *Rep.* 17: 6 *Rep.* 62.

Where a patron presents his clerk before the bishop hath collated, the presentation is good, notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the *lapse*: and so if the patron makes his presentation before the archbishop hath collated, although twelve months are past; but if the bishop collates after twelve months, this bars not the archbishop. 2 *Roll. Ab.* 369: 2 *Inst.* 273. If a bishop doth not collate to benefices of his own gift, they *lapse* at the end of six months to the archbishop; and if the archbishop neglects to collate within six months to a benefice of his gift, the king shall have it by *lapse*. *Dr. & Stud.* c. 36. And if a church continues void several years by *lapse*, the successor of the king may present. *Cro. Car.* 258. But if the king hath a title to present by *lapse*, and he suffers the patron to present, and the presentee dies, or resigns before the king hath presented, if the presentation is real, and not by covin, he hath lost his presentation; for *lapse* is but for the first and next turn, and by the death of the incumbent, a new title is given to the patron; though it hath been adjudged that the king in such case may present at any time as long as that presentee is incumbent. 2 *Cro.* 216: *Moor* 244. When the patronage of the church is litigious, and one party doth recover against the other in a *quare impedit*, if the bishop be not named in the writ, and six months pass while the suit is depending, *lapse* shall incur to the bishop: if the bishop be named in the writ, then neither the bishop, archbishop, or king can take the benefice by *lapse*: and yet it is said, if the patron within the six months brings a *quare impedit* against the bishop, and then the six months pass without any presentation by the patron, *lapse* shall incur to the bishop. 2 *Roll. Ab.* 365: 6 *Rep.* 52: 1 *Inst.* 344: *Hob.* 270.

Where the bishop is a disturber, or the church remains void above six months by his fault, there shall be no *lapse*. 1 *Inst.* 344. A clerk presented being refused by the bishop for any sufficient cause, as illiterature, ill life, &c. he is to give the patron notice of it, that another may be presented in due time, otherwise the bishop shall not collate by *lapse*; because he shall not take advantage of his own wrong, in not giving notice to the patron as he ought to do by law. *Dyer* 292. And if an avoidance is by *resignation*, which must necessarily be to the bishop, by the act of the incumbent, or by deprivation, which is the act of the law; *lapse* shall not incur to the bishop, till six months after notice given by him to the pa-

tron: When the church becomes void by the death of the incumbent, &c. the patron must present in six months without notice from the bishop, or shall lose his presentation by *lapse*. *Dyer* 293, 327: 1 *Inst.* 135: 4 *Rep.* 75. And it is expressly provided, by Stat. 13 *Eliz.* c. 12, that no title conferred by *lapse* shall accrue upon any deprivation *ipso facto*, but after six months' notice of such deprivation, given by the ordinary to the patron.

In the cases of deprivation and *resignation* where the patron is to have notice before the church can *lapse*, the patron is not bound to take notice from any body but the bishop himself, or other ordinary, which must be personally given to the party, if he live in the same country; and such notice must express in certain the cause of deprivation, &c. If the patron live in a foreign county, then the notice may be published in the parish church, and affixed on the church door. *Cro. Eliz.* 119: *Dyer* 328. And this notice must be given, even though the patron himself prosecute the incumbent to deprivation. 6 *Rep.* 29.

There are avoidances by act of parliament, wherein there must be a judicial sentence pronounced to make the living void: if a man hath one benefice with cure, &c. and take another with cure, without any dispensation to hold two benefices, in such case the first is void by the statute 21 *H. 8.* c. 13; if it was above the value of 8*l.* During an avoidance, it is said that the house and glebe of the benefice are in *abeyance*: but by the stat. 28 *H. 8.* c. 11, the profits arising during the avoidance are given to the next incumbent towards payment of the first fruits; tho' the ordinary may receive the profits to provide for the service of the church, and shall be allowed the charges of supplying the cure, &c. for which purpose the churchwardens of the parish are usually appointed.

If a clerk is instituted to a benefice of the yearly value of 8*l.* and before induction accepts another benefice with cure, and is instituted, the first benefice is void by the stat. 21 *H. 8.* c. 13: for he who is instituted only, is properly said to have accepted a benefice within the words of the act. 4 *Rep.* 78.

But if he is induced into a second benefice, the first is void *in facto & jure*, and not voidable only, *quoad*, the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. *Cro. Car.* 258.

In cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby *lapse* would come to the king if it had been given: here the *lapse* arises not to the king, where no title arose to the inferior ordinary. *Dyer* 340. And it has been adjudged, that *lapse* is not an interest, like the patronage, but an office of trust reposed by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron: and it cannot be granted over; for the grant of the next *lapse* of a church, either before it falls, or after, is void. *F. N. B.* 34. Also if *lapse* incurs, and then the ordinary dies, the king shall present, and not the ordinary's executors, because it is rather an administration, than an interest. 25 *E.* 3. 4. A *lapse* may incur against an infant or feme covert, if they do not present within six months. 1 *Inst.* 246. But there is no *lapse* against the king, who may take his own time; and plenary shall be no bar against the king's title, because

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because *nullum tempus occurrit regi*. 2 *Inst.* 273: *Dyer* 351. By presentation and institution, a lapse is prevented; though the clerk is never inducted: and a donative cannot lapse either to the ordinary or the king. 2 *Inst.* 273: See 2 *Comm.* 276, and 4 *Comm.* 102.

III. The *Usurpation* of a church benefice is when one that hath no right presents to the church; and his clerk is admitted and instituted into it and hath quiet possession six months after institution before a *quare impedit* brought. It must commence upon a presentation, not a collation, because by collation the church is not full; but the right patron may bring his writ at any time to remove the usurper. 1 *Inst.* 227: 6 *Rep.* 30.

No one can usurp upon the king; but an usurpation may dispossess him of his presentation; so as he shall be obliged to bring a *quare impedit*. 3 *Salk.* 389. One coparcener or joint-tenant cannot usurp upon the other; but where there are two patrons of churches united, if one presents in the other's turn, it is an usurpation. *Dy.* 259. A presentation which is void in law, as in case of simony or to a church that is full, makes no usurpation. 2 *Rep.* 93.

In this case of usurpation the patron lost, by the common law, not only his *turn of presentation*, but also the perpetual inheritance of the advowson; so that he could not present again upon the next avoidance, unless in the mean time he recovered his right, by a real action, viz. a writ of right of advowson. 3 *Comm.* 243. See further tit. *Darrein Presentation: Quare impedit*.

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by stat. *Westm.* 2. (13 E. 1.) c. 5. § 2, "that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation;" which gives back to him the seisin of the advowson. Yet still if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted by statute 7 *Anne*, c. 18, "that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened." So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months, it is only a species of disturbance. 3 *Comm.* 244.

IV. *Advowsons* were formerly most of them appendant to manors, and the patrons parochial barons; the lordship of the manor, and patronage of the church were seldom in different hands till *advowsons* were given to religious houses; but of late times the lordship of the manor and the *advowson* of the church have been divided; and now not only lords of manors, but mean persons have, by

purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is a real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements: for *advowsons* are a temporal inheritance, and lay fee; they may be granted by deed or will, and are assets in the hands of heirs or executors. *Co. Lit.* 119. A recovery may be suffered of an *advowson*; a wife may be endowed of it; a husband tenant by the curtesy; and it may be forfeited by treason or felony. 1 *Rep.* 56: 10 *Rep.* 55. If an *advowson* descends to coparceners, and the church after the death of their ancestors, becomes void, (by stat. *Westm.* 2. (13 E. 1.) stat. 1. c. 5,) the eldest sister shall first present. And when coparceners, jointenants, &c. are seized of an *advowson*, and partition is made, to present by turns; by stat. 7 *Anne*, c. 18, each shall be seized of their separate estate.

Presentation is properly the act of a patron offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift, which is void. 2 *Lit. Abr.* 351.

An alien-born cannot present to a benefice in his own right; for if he purchases an advowson, and the church becomes void, the king shall present after office found that the patron is an alien. 2 *Nels.* 120. And by stat. 7 R. 2. c. 12, no alien shall purchase a benefice in this realm, nor occupy the same, without the king's licence, on pain of a *præmunire*.

Papists are disabled to present to benefices, and the Universities are to present, &c. But a Popish recusant may grant away his patronage to another, who may make presentation, where there is no fraud: See stat. 3 *Jac.* 1. c. 5 § 18, 19: 1 *W. & M.* c. 26: 12 *Anne*, c. 14: *Ed.* 1 *Jon.* 19. But by stat. 11 *Geo.* 2. c. 17. § 5, *Grants of advowsons* by papists are void, unless made for a valuable consideration to a protestant purchaser, and only for the benefit of protestants; and *devises of advowsons*, by papists are also void.

All persons who have ability to purchase or grant, have likewise ability to present to vacant benefices: but a dean and chapter cannot present the dean; nor may a clergyman who is patron present himself, though he may pray to be admitted by the ordinary, and the admission shall be good.

Coparceners are but as one patron, and ought to agree in the presentation of one person; if they cannot agree, the eldest shall present first alone, and the bishop is obliged to admit his clerk, and afterwards the others in their order shall prefer their clerks; jointenants and tenants in common, must regularly join in presentation, and if either present alone, the bishop may refuse his clerk; as he may also the clerk presented by the major part of them; but if there are two jointenants of the next avoidance, one may present the other, and two jointenants may present a third, but not a stranger.

If a rector is made bishop, the king shall present to the rectory unless he grant to the bishop, before he is consecrated, a dispensation to hold it with his bishoprick; but if an incumbent of a church is made a bishop, and the king presents or grants that he should hold the church in *commendam* which is quasi a presentation, a grantee of the next avoidance or presentation hath lost it, the king having the next presentation. See 2 *Str.* 841, that this presentation is not confined to the life-time of the bishop promoted.

promoted. If the king *present* to a church by *lapse*, where he ought to *present pleno jure*, and as patron of the church, such a *presentation* is not good; for the king is deceived in his grant, by mistaking his title, which may be prejudicial to him; the *presenting* by lapse entitling only that *presentation*: The lord chancellor *presents* to the king's benefices under 201. *Ec.* 2 *Rel. Ab.* 354: 3 *Inst.* 156: *Co. Lit.* 186: 2 *Nels. Ab.* 1288, 1290: 2 *Lil.* 351.

The king may repeal a *presentation* before his clerk is inducted; and this he may do by granting the *presentation* to another, which, without any farther signification of his mind, is a revocation of the first *presentation*. *Dyer* 290, 360.

If two patrons present their clerks to a church, the bishop is to determine who shall be admitted by a *ius patronatus*, &c. *Moor* 499.

A clerk may be refused by the bishop, if the patron is *excommunicate*, and remains in contempt 40 days. 2 *Ro. Ab.* 355. As to refusal for the insufficiency of the clerk presented, see tit. *Parson*.

If the bishop refuses to admit the clerk presented, he must give notice of his refusal, with the cause of it, forthwith; and on such notice the patron must present another clerk, *within six months from the avoidance*, if he thinks the objection against his first clerk contains sufficient cause of refusal; but if not, he may bring his *quære impedit*, against the bishop. 2 *Ro. Ab.* 364. See ante, *Lapse* II.

If a defendant, or any stranger, presents a clerk pending a *quære impedit*, and afterwards the plaintiff obtains judgment, he cannot, by virtue of that judgment, remove him, who was thus presented; but he is to bring a *scire facias* against him to shew cause *quære executionem non habet*; and then, if it be found that he had no title, he shall be removed. The way to prevent such a *presentation*, is to take out a *nd admittas* to the bishop; and then the writ *quære incumbra* lies, by virtue whereof the incumbent shall be removed, and put to his *quære impedit*, let his title be what it will; but if a *nd admittas* be not taken out, and another incumbent should come in by good title *pendente lite*, he shall hold it. *Sid.* 93: *Cro. Jac.* 93.

When a bishop hath a *presentation* in right of his bishoprick, and dies, neither his executor, nor heir, shall have the void turn, but the king; in whose hands are the temporalities; and he hath a right to present on an avoidance after the seizure, on death of the bishop.

Tenant in tail of an advowson, and his son, and heir joined in the grant of the next *presentation*, tenant in tail died; this grant was held void as to the son and heir, because he had nothing in the advowson at the time he joined with his father in the grant. *Hob.* 45.

If a *presentation* itself bears date while the church is full of another clerk, it is void; and where two or more have a title to present by turn, one of them presents, his clerk is admitted, instituted and inducted, and afterwards deprived, he shall not present again, but that *presentation* shall serve his turn: though where the admission and institution of his clerk is void, there the turn shall not be served; as if after induction he neglects to read the thirty-nine articles, &c. his institution is void by the stat. 13 *Eliz.* and the patron may present again, *F. N. B.* 33: 5 *Rep.* 102.

The right of *presenting* to a church, may pass from one seized of the same by the patron's acknowledging of a statute, &c. which being extended, if the church becomes void, *during the consue's estate*, the consuee may present. *Owen* 49.

Where a common person is patron, he may present by parol, as well as by writing to the bishop; *Co. Lit.* 120. A *presentation* doth not carry with it the formality of a deed; but it is in the nature of a *letter missive* by which the clerk is offered to the bishop; and it passeth no interest, as a grant doth, being no more than a recommendation of a clerk to the ordinary to be admitted. But where a plaintiff declared upon a grant of the next *presentation*, and on oyer of the deed it appeared to be only a letter written by the patron to the father of the plaintiff, that he had given his son the next *presentation*; adjudged that it would not pass by such letter, without a formal deed. *Owen* 47.

Right of *presentation* may be forfeited in several cases; as by attainder of the patron, or by outlawry, and then the king shall present: and if the outlawry be reversed where the advowson is forfeited by the outlawry, and the church becomes void after, the *presentation* is vested in the crown; but if at the time of the outlawry, the church was void, then the *presentation* was forfeited as a *chattel*, and on reversing the same, the party shall be restored to it. By *appropriation* without licence from the crown, right of *presentation* may be forfeited; tho' the inheritance in this case is not forfeited, only the king shall have the *presentation* in nature of a *disfranchisement*, till the party hath paid a fine for his contempt. By alienation in fee of the advowson by a grantee for life of the next avoidance, a *presentation* is forfeited; and after such alienation the grantor may present, but then he must enter for the forfeiture of the grantee, *in the life-time* of the incumbent, to determine his estate before the *presentation* vests in him on the incumbent's death. And by simony it may be likewise forfeited and lost. *Moor* 269: *Plowd.* 259: 2 *Roll. Ab.* 352: stat. 31 *Eliz.* c. 6. § 5: See *Simony*, &c.

ADVOWSON OF THE MOIETY OF THE CHURCH, *advocatio medietatis ecclesie*.] Is where there are two several patrons and two several incumbents in one and the same church, the one of the one moiety, the other of the other moiety thereof. *Co. Lit.* 17 b. — *Medietas advocacionis*, a moiety of the advowson, is where two must join in the *presentation*, and there is but one incumbent. But see stat. 7 *Anne*, c. 18, mentioned in tit. *Advowson* IV.

ADVOWSON OF RELIGIOUS HOUSES. Where any persons founded any house of religion, they had thereby the advowson or patronage thereof, like unto those who built and endowed parish churches. And sometimes these patrons had the sole nomination of the abbot, or prior, &c. either by investiture or delivery of a pastoral staff: or by direct *presentation* to the diocesan; or if a free election were left to the religious, a *compé d'essire*, or licence for election, was first to be obtained of the patron, and the elect confirmed by him. *Kennet's Paroch. Antiq.* 147, 163.

AERIE, *aeria accipitrum*.] An airy of goshawks, is the proper term for hawks, for that which of other birds we call a nest. And it is generally said to come from the French word *aire*, a hawk's nest. *Sjelman* derives it from Sax. *eghe*, an egg, softened into *eye*, (used to express a brood of pheasants;) and thence *eyrie*, or as above *aerie*, a place

a place or repository for eggs. The liberty of keeping these *eries* of hawks was a privilege, granted to great persons: and the preserving the *eries* in the king's forests was one sort of tenure of lands by service.

ESTIMATIO CAPITIS, *pretium hominis*] King *Abelstane* ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by estimation of their heads. *Cress. Ch. Hist.* 834: *Leg. Hen.* 1.

ETATE PROBANDA.] A writ that lay to enquire, whether the king's tenant holding in chief by chivalry, was of full age to receive his lands into his own hands. It was directed to the escheator of the county; but is now disused, since wards and liveries are taken away by the statute. *Reg. Orig.* 294.

AFFEERERS, *afferatores*, from the *Fr. affer*, to affirm,] Are those who in courts-leet upon oath, settle and moderate the fines and amercements; and they are also appointed for moderating amercements, in courts-baron. See *tit. Lect.*

AFFIANCE, from the Latin *Affidare*, *i. e. fidem dare.*] The plighting of troth between a man and a woman, upon agreement of marriage. *Lit. foli.* 39.

AFFIDARE, To plight one's faith, or give or swear fealty, *i. e.* fidelity. *Affidari* to be mustered and enrolled for soldiers. *M. S. Dom. de Farndon* 22, 55.

AFFIDATIO DOMINORUM, An oath taken by the lords in parliament, *anno* 3 *Hen.* 6. *Rot. Parl.*

AFFIDATUS, A tenant by fealty.

AFFIDAVIT, An oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath: and the true place of habitation and true addition of every person who shall make an *affidavit*, is to be inserted in his *affidavit*. 1 *Lill. Abr.* 44, 46. *Affidavits* ought to set forth the matter of fact only, which the party intends to prove by his *affidavit*; and not to declare the merits of the cause, of which the court is to judge. 21 *Car. I. B. R.* The plaintiff or defendant (having authority to take *affidavits*) may take *affidavits* in any cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. 1 *Lill.* 44. When an *affidavit* hath been read in court, it ought to be filed, that the adverse party may see it, and take a copy. *Pasch.* 1655. An *affidavit* taken before a master in Chancery will not be of any force in the court of King's Bench, or other courts, nor ought to be read there; for it ought to be made before one of the judges of the court wherein the cause is depending, or a commissioner in the country, appointed for taking *affidavits*. *Sty.* 455: By *Stat.* 29 *Car. II. c. 5.* The judges, &c. of the courts at Westminster by commission may empower persons in the several counties of England to take *affidavits* concerning matters depending in their several courts, as masters in Chancery extraordinary used to do. Where *affidavits* are taken by commissioners in the country according to the statute 29 *Car. II.* and 'tis expressed to be in a cause depending between two certain persons, and there is no such depending, those *affidavits* cannot be read, because the commissioners have no authority to take them; (and for that reason the party cannot be convicted of perjury upon them); but if there is such a cause in court and *affidavits* taken concerning some collateral matter, they may be read. *Salk.* 461.

Affidavits are usually for certifying the service of process, or other matters touching the proceedings in a cause; or in support of, or against motions, in cases, where the court determines matters, &c. in a summary way.

If a person exhibits a bill in equity for the discovery of a deed, and ~~proves~~ belief thereupon, he must annex an *affidavit* to his bill, that he has no such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without shewing any probable cause why he should sue in equity. 1 *Chan. Ca.* 11, 231: 1 *Vern.* 59, 180, 247.

But if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such *affidavit* to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill, if he had the deed in his possession. 1 *Vern.* 180, 247.

In bills of interpleader, the party who prefers it must make *affidavit* that he does not collude with either of the other parties. 1 *New Abr.* 66.

An *affidavit* must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New Abr.* 66.

And therefore on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on further time given. 7 *Mod.* 121: *Comb.* 421, 422.

There being one *affidavit* against another relating to a judgment, the matter was referred to a trial at law upon a feigned issue, to satisfy the conscience of the court as to the fact alledged. *Comberb.* 399.

See *Stat.* 17 *Geo. II. c. 7.* for taking and swearing *affidavits* to be made use of in any of the courts of the county palatine of Lancaster.

The *Stat.* 12 *Geo. I. c. 29.* requires the cause of action to be *sol.* to hold to special bail; and both the statute and the established rules of the court require a *positive affidavit* to be made of the debt; and not couched in words of reference, except in the case of executors, assignees, &c. 1 *Term Rep.* 83: 4 *Term Rep.* 176. and they must swear to their belief of the debt.

The *affidavit* must be made by a person competent to be a witness, therefore a person convicted of felony is not admissible. 5 *Mod.* 74: *Salk.* 261. Nor a pick-pocket returned from transportation. *Barnes* 79. *Affidavits* made by illiterate persons should be perfectly explained to them. See 4 *Term Rep.* 284.

Where there is a good cause of action and a proper *affidavit*, defendant may be held to bail; and the court (of K. B.) will not go out of the *affidavit* or prejudge the cause, by entering into the merits. 1 *Salk.* 100. Plaintiff therefore must stand or fall by his *affidavit*, it being the constant and uniform practice not to receive a supplemental or explanatory *affidavit* on the part of plaintiff; nor a counter or contradictory one on the part of defendant. 2 *Str.* 1157: 1 *Wils.* 335.

But in C. P. where the first *affidavit* is defective, yet it is allowed to be supplied by another, on shewing cause against a common appearance. *Barnes* 100: 2 *Wils.* 224: 2 *Black. Rep.* 850.

See further *tit. Abatement; Bail; & Impey's Instructor Cler.* in K. B. & C. P.

AFFINAGE, Fr. *affinage*.] Refining of metal, *purgatio metalli*; hence, fine and refine.

To **AFFIRM**, *affirmare*.] To ratify or confirm a former law or judgment: so is the substantive *affirmance* used stat. 8 Hen. 6. c. 12. And the verb itself by *West. Symbol.* part 2. tit. *Fines* &c. 1. c. 7. cap. 20. See also the next word.

AFFIRMATION, An indulgence allowed by law to the people called *Quakers*, who in cases where an oath is required from others, may make a solemn *affirmation* that what they say is true. See *Quakers*.

AFFORARE, To *affeer* (which fee); to set a value or price on a thing. *Du Cange*.

AFFORATUS, Appraised or valued, as things vendible in a fair or market. *Cartular. Glasston. M. S. fol. 58.*

AFFORCIAMENT, *afforciamentum*.] A fortress, strong hold, or other fortification. *Pryn. Animad. on Coke, fol. 184.*

AFFORCIARE, To add, to increase or make stronger. *Bar. lib. 4. c. 19. viz.* in case of disagreement of the jury, let the assize be increased.

AFFOREST, *afforestation*.] To turn ground into a forest. *Chart. de Forest. c. 1.* When forest ground is turned from forest to other uses, it is called *disafforested*. *Vide Forest.*

AFFRAY, Is derived from the Fr. word *effrayer*, to affright, and it formerly meant no more; as where persons appeared with armour or weapons not usually worn, to the terror of others. See stat. 2 Ed. 3. c. 3. But now it signifies a skirmish or fighting between two or more, and there must be a stroke given, or offered, or a weapon drawn, otherwise it is not an *affray*. 3 Inst. 158. *An affray is a public offence to the terror of the king's subjects; and so called, because it affrighteth and maketh men afraid.* 3 Inst. 158.

From this last definition it seems clearly to follow, that there may be an *assault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an *affray*; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may at the request of the party threatened, carry the person who threatens to beat him before a justice in order to find sureties.

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. See on this subject *Leach's Hawkins*, i. cap. 63, & ii. cap. 10. § 17; c. 13. § 8; c. 14. § 8.

But admitting that bare words do not, in the judgment of law, carry in them so much terror as to amount to an *affray*, yet it seems certain, that in some cases there may be an *affray*, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute 2 Ed.

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3. c. 3. See tit. *Riding armed*. To make an *affray* in any of the king's inferior courts of justice is highly punishable. 3 Inst. 141: 12 Co. 71.

As to the power of constables and others in cases of *affray*, see this Dictionary, tit. *Constable* III. 1.

A justice of peace may commit *affrays*, until they find sureties for the peace. And there is no doubt but that a justice of peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do: but it is said, that he cannot without a warrant authorize the arrest of any person for an *affray* out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. See *Leach's Hawkins*, P. C. i. cap. 63.

It is inquirable in the court leet; and punishable by justices of peace in their sessions, by fine and imprisonment. And it differs from *assault*, in that it is a wrong to the public; whereas *assault* is of a private nature. *Lamb. lib. 2.* yet indictment lies, as being a breach of the public peace.

AFFREIGHTMENT, *affretamentum*.] The freight of a ship, from the French *fret*, freight. *Pat. 11. Hen. 4.* See *Charter-party*.

AFFRI, vel *Affra*, Bullocks, or horses or beasts of the plough.—*Mon. Angl. par. 2. f. 291.* And in the county of *Northumberland*, the people to this day call a dull or slow horse, a false *avel* or *affri*. *Spelm. Gloss.*

AFRICAN COMPANY. In the ninth year of King William III. the trade to a great portion of *Africa*, was in the hands of *The Royal African Company*, which under a charter from Charles II. enjoyed an exclusive trade from the port of *Sallee*, in *South Barbary* to the *Cape of Good Hope*, both inclusive, with all the islands near adjoining to those coasts. A new arrangement of this trade was made by stat. 9 & 10. W. III. c. 26; by which the trade was opened; but this act continued in force only 13 years; and not being renewed, the whole trade reverted again to the exclusive claim of the company.

This *African* trade was put on a new footing by stat. 23 Geo. II. c. 31; which made it lawful for all the king's subjects freely to trade between the port of *Sallee* in *South Barbary* and the *Cape of Good Hope*. Thus was the trade taken out of the hands of the *Royal African Company*. The act then goes on to provide, that all persons trading to that coast between *Cape Blanco* and the *Cape of Good Hope*, should be a body corporate by the name of *The Company of Merchants trading to Africa*; the admission to which company was made very easy, namely by the payment of only 40*s*. The trade between the port of *Sallee* and *Cape Blanco* was left open to all persons whatsoever. By stat. 25 Geo. II. c. 40, (see stat. 24 Geo. II. c. 49) all the forts castles and factories on the coast, from the port of *Sallee* to the *Cape of Good Hope*, belonging to the old company, were transferred to, and vested in the new company; for the like purpose of protecting and facilitating the trade. By stat. 4 Geo. III. c. 20, the fort of *Senegal* lately ceded by *France* to *Great Britain* was in like manner vested in the new company.

The fort of *Senegal* had been ceded to *France* by the peace of 1763, and the French King guaranteed to *Great Britain* the possession of *Fort James* and the river *Gambia* both lying between the fort of *Sallee* and *Cape Rouge*. On that occasion it was thought more beneficial for the trade,

trade, that the forts, settlements and factories between those ports which, by stat. 5 Geo. 3. c. 44, (repealing the above act of 4 Geo. 3. c. 20) had been vested in the King, should be reverted in the company; this was accordingly done by stat. 23 Geo. 3. c. 65. The same freedom of trading there was, notwithstanding, continued to all the king's subjects.

By stat. 27 Geo. 3. c. 19. § 11, 12. which regards this trade, some regulations were made as to importing from *Gibraltar*, merchandize the produce of the Emperor of *Morocco's* dominions.

AFRICAN SLAVE-TRADE. See this Dict. tit. *Slaves*.

AGALMA. The impression or image of any thing on a seal. *Chart. Edg. Reg. pro Westmonast. Eccl. anno 698.*

AGE, *ætas*, Fr. *âge*.] In common acceptation signifies a man's life from his birth to any certain time, or the day of his death: it also hath relation to that part of time wherein men live. But in the law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before through want of years and judgment they are prohibited to do. As for example; a man at twelve years of age ought to take the oath of allegiance to the king: at fourteen, which is his age of discretion, he may consent to marriage, and chuse his guardian: and at twenty-one he may alien his lands, goods and chattels: a woman at nine years of age is dowable; at twelve she may consent to marriage; at fourteen she is at years of discretion, and may chuse a guardian; and at twenty-one she may alienate her lands, &c. *Co. Lit.* 78.

There are several other ages mentioned in our ancient books, relating to aid of the lord, wardship, &c. now of no use. *Co. Lit.* The age of twenty one is the full age of man or woman; which enables them to contract and manage for themselves, in respect to their estates, until which time they cannot act with security to those who deal with them; for their acts are in most cases either void or voidable. *Perk.*

Fourteen is the age by law to be a witness; and in some cases a person of nine years of age hath been allowed to give evidence. 2 *Hawk. P. C.* c. 46. § 27. None may be a member of parliament under the age of twenty-one years; and no man can be ordained priest till twenty-four; nor be a bishop till thirty years of age. See tit. *Infant*; also tit. *Baron & Feme*; *Dower*; *Pleading*.

AGE PRIER, *ætatem precari*, or *ætatis precatio*.] Is when an action being brought against a person under age for lands which he hath by descent, he by petition or motion shews the matter to the court, and prays that the action may stay till his full age, which the court generally agrees to. *Terms de Ley* 30. See *Parol Demurrer*.

AGENFRIDA. The true lord or owner of any thing. *Leg. Ine.* c. 50. *apud Brompt.* c. 45.

AGENHINE. See *Third-Night-Avon-binde*.

AGENT AND PATIENT. When the same person is the doer of a thing, and the party to whom done: as where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retain so much of the goods of the deceased as will satisfy his debt; and by this retainer he is *agent and patient*, that is, the party to whom the debt is due, and the person that pays

the same. But a man shall not be judge in his own cause, *quia iniquum est aliquem sue rei esse judicem.* 8 Rep. 118, 138.

AGILD, free from penalties, not subject to the customary fine or imposition. Sax. *a gild, sine multa.* *Leges Aluredi*, cap. 6.

AGILER. From the Sax. *a gilt*. (without fault) an observer or informer. *Blount.*

AGILLARIUS, Anciently an hey-ward, herd-ward or keeper of cattle in a common field, sworn at the lord's court by solemn oath.—There were two forts, one of the town or village, the other of the lord of the manor. *Corvel.* See *Kennet's Paroch. Antiq.* 534, 576.

AGIST, (from the Fr. *giste*, a bed or resting place) Signifies to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same. *Chart. de Foresta.* 9 H. 3. c. 9. The officers appointed for this purpose are called *agisters*, or *gift-takers*, and are made by the king's letters patent: there are four of them in every forest wherein the king hath any pawnage. *Mantw. Forest-Laws*, c. 11 to 80. They are also called *agistors*, to take account of the cattle *agisted*.

AGISTMEN [*agistamentum*] Is where other men's cattle are taken into any ground, at a certain rate per week: it is so called, because the cattle are suffered *agiste*, that is, to be levant and couchant there: and many great farms are employed to this purpose. 2 *Inst.* 643. Our graziers call cattle which they thus take into keep *gismen*; and to *gise* or *juice* the ground, is when the occupier thereof feeds it not with his own stock, but takes in the cattle of others to *agist* or pasture it. *Agistment* is likewise the profit of such feeding in a ground or field; and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson. There is *agistment of sea-banks*, where lands are charged with a tribute to keep out the sea. *Terræ agistatæ* are lands whose owners are bound to keep up the sea-banks. *Spelm. in Remuy-Marsb.* See tit. *Tithes*.

AGITATIO ANIMALIUM IN FORESTA. The drift of beasts in the forest. *Leg. Forest.*

AGIUS, Gr. *i. e.* holy. *Mon. Angl.* p. 15, 17.

AGNUS DEI. A piece of white wax in a flat oval form, like a small cake, stamped with the figure of the lamb, and consecrated by the pope. By stat. 13 Eliz. c. 2, *Agnus Dei*, crosses, &c. are not permitted to be brought into this kingdom, on pain of *præmunire*.

AGREEMENT, *agreementum*, *aggregatio mentium*.] A joining together of two or more minds in any thing done, or to be done. *Plowd.* 17. The joint consent of two or more parties to a contract or bargain; or rather, the effect of such consent.

On this subject free use has been made of the new edition (1793) of "A Treatise of Equity," vol. 1, with the very copious and useful marginal notes and references, by Mr. *Fonblanque*. The Editor of this Dictionary had only an opportunity, on the present occasion, of applying to the first volume of that very useful performance. The subject seems to divide itself in the following manner:

- I. Who may be parties to, or bound by an agreement.
- II. The various kinds of agreements; and of the assent and disagreement of parties.

AGREEMENT I—III.

III. Of the operation of the statute of frauds; and herein evidence to explain agreements.

IV. Of compelling the performance of agreements; and herein of fraud in making them.

I. A person *non compos* is not capable of entering into any agreement. See tit. *Idiots and Lunatics*.

Also an infant, for the same reason, is generally incapable of contracting, except for necessities; &c. See tit. *Infant*.

A wife during the intermarriage is incapable of entering into any agreement in *pair*, being under power of her husband. See tit. *Baron and Feme*.

The ancestor seized in fee may by his agreement bind his heir; therefore if A. agrees to sell lands, and receives part of the purchase money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor; especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 *Vern.* 215: *Abr. Eq.* 265. But if tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity; for equity cannot set aside the statute *de donis*; which says, 'That voluntas donatoris observetur; nor can the court set up a new manner of conveyancing, and thereby supersede fines and recoveries; for thereby the king would lose the perquisites by fines, or the writs of entry and fines for alienation. *Hob.* 203: 1 *Chan. Ca.* 171: 1 *Lev.* 239: 2 *Vent.* 350. Yet

If there be tenant in tail in equity as of a trust, or under an equitable agreement, and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute *de donis* doth not extend to it, being an entail in equity and a creature of the court. 1 *Chan. Ca.* 234: 2 *Chan. Ca.* 4: 1 *Vern.* 13 440: 2 *Vern.* 33, 583, 72

II. On this head shall be considered,

1st, An Agreement executed already at the beginning; as where money is paid for the thing agreed, or other satisfaction made. 2dly, An agreement after an act done by another; as where one doth such a thing, and another person agrees to it afterwards, which is executed also: and 3dly, An agreement executory, or to be performed in futuro. This last sort of agreement may be divided into two parts; one certain at the beginning, and the other when, the certainty not appearing at first, the parties agree that the thing shall be performed upon the certainty known. *Terms de Ley* 31. See tit. *Condition; Contract; Covenant*.

Every agreement ought to be perfect, full and compleat, being the mutual consent of the parties; and should be executed with a recompence, or be so certain as to give an action or other remedy thereon. *Plowd.* 5. Any thing under hand and seal which imports an agreement will amount to a covenant: and a proviso, by way of agreement, amounts likewise to a covenant; and action may be brought upon them. 1 *Lev.* 155.

If any estate in possession or reversion be made to me, I must agree to it, before it will be settled; for I may refuse, and so avoid it: a release, deed, or bond, is made and delivered to another to my use, this will vest in me

without any agreement of mine; but, if I disagree to it, I make the deed void. *Dyer* 167. And regularly where a man hath once disagreed to the party himself, he can never after agree: and obligation being made to my use, and tendered to me, if I refuse it, and after agree again and will accept it; now this agreement afterwards will not make the obligation good, that was void by the refusal. *Co. Lit.* 79: 5 *Rep.* 119.

An agreement may be as well in the party's absence, as in his presence; but a disagreement must be to the person himself to whom made. 2 *Rep.* 69. When an estate is made to a *feme covert*, it is good, till disagreement, without any agreement of the husband: though a new estate granted to the wife where she hath an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband agree to it. *Hob.* 204.

That an assent on the part of the person who takes, is also essential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary; See 2 *Ventr.* 198: 2 *Salk.* 618: 2 *Leon.* p. 72. pl. 97: 5 *Vin. Ab.* 508. pl. 1. See *Thompson v. Leach*, 2 *Ventr.* 198, in which this subject is very elaborately discussed by *Ventr.* 198, 199. See also *Butler and Baker's* case, 3 *Co.* 26.

III. Besides the bare words of an agreement, the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of relieving bare parol agreements for lands, not signed by the parties nor any money paid; (2 *Freem.* 216;) although they would sometimes give the party satisfaction for the loss he had sustained. And now by the stat. of 29 *Car.* 2. cap. 3, commonly called the Statute of Frauds, if an agreement be by parol, and not signed by the parties, or somebody lawfully authorized by them, (*Pre. Ch.* 402,) if such agreement be not confessed in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away the necessity of proving it. (*Pre. Ch.* 208, 374: 1 *Vex.* 221, 441: *Amb.* 586.) So if it be carried into execution by one of the parties, (2 *Vern.* 455: *Pre. Chan.* 519: 2 *Freem.* 268: *Amb.* 586: 2 *Str.* 783: *Bunb.* 65, 94: 9 *Mod.* 37: 1 *Vex.* 82, 221, 297, 441: 3 *Atk.* 4: 1 *Bro. Rep.* 404: 2 *Bro. Rep.* 566. *MSS.* 4th July, 1786,) as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed: See 2 *Bro. Rep.* 566. And it is unconscionable, that the party that has received the advantage, should be admitted to say, that such contract was never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good. *Pre. Ch.* 526: 5 *Vin. Ab.* 521. pl. 31: 1 *Vern.* 296. And although parol agreements are bound by the statute, and agreements are not to be part parol, and part in writing;

AGREEMENT III.

yet a deposit, or collateral security for the performance of the written agreement, is not within the purview of the statute 2 *Vern.* 617: 1 *Bro. Rep.* 269: 19th April, 1785, *MSS.* See *Treatise of Equity*, i. 164—175.

It was determined, very soon after the passing of the statute of frauds, that an agreement signed by one of the parties, should be binding on the party signing it. 2 *Ch. Ca.* 164: And in *Sir James Lowther v. Carill*, 1 *Vern.* 221, the court appears to have thought, that one of the parties making alterations in the draft, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord *Macclesfield's* decree in *Hawkins v. Holmes*, 1 *P. Wms.* 770; by which his lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it; and that to put a different construction upon it would be to repeal it; and his lordship therefore held, that the defendant having altered the draft with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of *Stokes v. Moore*, at *Serjeant's Inn Hall*, March 1, 1786, in which case the court delivered their opinions that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; as in the formal introduction to a will. [Thus, "This is the last will and testament of me A. B."—written with the testator's own hand has been deemed a sufficient signing.] But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; [Thus, in notes of an agreement, "Mr. A. to do so and so," tho' written by A. himself, not a sufficient signing:] upon which, as well as upon another ground, the bill was dismissed. See *Mr. Cox's* note (1) to *Hawkins v. Holmes*, 1 *P. Wms.* 770.

If a defendant confesses the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute, in bar of the performance of it? See *Treatise of Equity*, p. 168. note (d) where this subject is very accurately and ably discussed. To allow a statute, having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, in part performed, is not within the provisions of the statute. See *Whitchurch v. Bewis*, 2 *Bro. Rep.* 566.

As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory, or an-

cillary to it. *Gunter v. Halsey, Amb.* 386: *Whitbread v. Brockhurst*, 1 *Bro. Rep.* 412. The giving of possession is therefore to be considered as an act of part performance. *Stewart v. Denton, MSS.* 4th July, 1786; but giving directions for conveyances, and going to view the estate, are not. *Clerk v. Wright*, 1 *Atk.* 12: *Whaley v. Bagnal*, 6 *Bro. P. C.* 45. Payment of money is also said to be an act of part-performance; *Lacon v. Martins*, 3 *Atk.* 4. But it seems that payment of a sum, by way of earnest, is not; *Seagood v. Meale, Pre. Ch.* 560: *Lord Pengall v. Rofs*, 2 *Eq. Ca. Ab.* 46. pl. 12: *Simmons v. Cornelius*, 1 *Ch. Rep.* 128: But see *Foll v. Smith*, 3 *Ch. Rep.* 16, and *Avon. 2 Freem.* 128.

In the case of *Seagood v. Meale, Pre. Ch.* 561, it is said, that "where a man on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards to execute the lease; because it was executed on the part of the lessee." This dictum is sanctioned by the spirit of equity, and seems to do away the decisions which require, even under the circumstance of premises being improved, an averment of its being part of the parol agreement that it should be reduced into writing.

A letter not only takes an agreement in consideration of marriage out of the statute, but also, agreements respecting lands, &c. *Ford v. Compton*, 2 *Bro. Rep.* 32: *Tawney v. Crowther*, 2 *Bro. Rep.* 318. But whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read. *Ford v. Compton*. It must also distinctly furnish the terms of the agreement. *Seagood v. Meale, Pre. Ch.* 560: *Strat.* 426: *Clark v. Wright*, 1 *Atk.* 12; or it must at least refer to some written instrument, in which the terms are set forth; *Tawney v. Crowther*. It must likewise appear, that the other party accepted such terms, and acted in contemplation of them.

Where an agreement in writing is executed, it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of parol evidence, for the purpose of adding to, or varying the terms of the agreement. 2 *Atk.* 383: 3 *Atk.* 8: *Bunb.* 65: 3 *Wils.* 275. But if it be alledged, that some material part of the agreement was omitted, by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed, in such cases, it seems, evidence will be admissible, even tho' the agreement be executed. 2 *Atk.* 203: 2 *Vern.* 98: 2 *Vern.* 547: 2 *Ch. Ca.* 180: *a fortiori*, such evidence will be admissible where the agreement is executory. 3 *Atk.* 388: 1 *Vez.* 456. It may be material to observe, where evidence *dehors* the deed is admitted to shew what was the consideration of the agreement, that the consideration to be proved must be consistent with the consideration stated. 3 *Term Rep.* 474: *Fulbeck's Parallel*, p. 9. And if the deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. 2 *P. Wms.* 204: 1 *Vez.* 128: Nor, if the consideration fail, can evidence be admitted to support the conveyance as a gift. 2 *Vez.* 627: 1 *Atk.* 194: 3 *Bro. Rep.* 156; and though the deed specify a particular consideration and other considerations, generally, no consideration but that expressed shall be intended. *Cro. Eliz.* 343: but *qu.* whether other considerations might not be proved.

IV. It has been said that where the contract is good at law, equity will carry it into execution; but this proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts, where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interpose. See *Errington v. Annisley*, 2 Bro. Rep. 341; *Cudd v. Rutter*, 1 P. Wms. 570; *Copper v. Harris*, Bumb. 135.

It is assuredly a general rule, that courts of equity will, under certain circumstances, enforce the specific performance of agreements, for the non-performance of which the party would be entitled to damages at law: but as the decreeing of specific performance is in the discretion of the court, it must not be considered as an universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance; though perhaps, he might at law be subject to damages for not completing his purchase. See *Marlow v. Smith*, 2 P. Wms. 198; *Shapland v. Smith*, 1 Bro. Rep. 75; *Cooper v. Deane* 21st July 1792. MSS.

Qu. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, (but not executed,) varying the terms expressed in the letter? See *Coke v. Mafcall*, 2 Vern. 34. Or if the terms be varied by parol. See *Jordan v. Saxvins*, 3 Bro. Rep. 388. And as a letter setting forth the terms of an agreement, takes the agreement out of the statute, it being a sufficient signing; so, it seems, it is a sufficient signing, if a person, knowing the contents, subscribe the deed as a witness only. *Welford v. Braxley* 3 Atk. 503.

In the civil law, counter-letters, and all secret acts which make any change in agreements, are of no manner of effect with respect to the interest of a third person. 1 Vern. 240, 348, 475: 2 Vern. 466: 1 P. Wms. 768: 2 P. Wms. 375: 1 Bla. Rep. 363: for this would be an infidelity contrary to good manners and the public interest. In cases of this nature it is not necessary that the fraud respect an article expressly contracted for; but any representation, misleading the parties contracting, on the subject of the contract, is within the principle which governs this class of cases. See 1 Bro. Rep. 543. and stated in Mr. Cox's note to *Roberts v. Roberts* 3 P. Wms. 74.

The principle of the rule there laid down, though it has been most frequently applied to agreements in fraud of marriage, extends to every other species of agreements; therefore, where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors, 2 Vern. 71, 602: 1 Atk. 105; and it seems that such fraud is now relievable at law, 2 Term Rep. 763: The case of *Lewis v. Chase*, 1 P. Wms. 620, is however irreconcilable with this principle; it may therefore be material to observe, that it is very much shaken, if not over-ruled, by several subsequent cases, particularly *Smith v. Bromley*, Doug. 670. But though private agreements in fraud of third persons, be void, yet if a bond or note be given by A. the more effectually to enable B. to bring about a

match, &c. such bond or note may be recovered upon at law, *Montefiori v. Montefiori*. 1 Bla. Rep. 303. And a conveyance of land for such purpose, notwithstanding a defeasance, will be sustained in equity, 13 Vin. Ab. 525: 2. Bro. P. C. 88.

AGRI, Arable lands in the common fields. *Fortescue*.

AID, See tit. Taxes; *Teuurey* I. 8. II. 6.

AID-PRAYER, *auxilium petere*.] A word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested; this gives strength to the party praying in aid, and to the other likewise, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the curtesy, for term of years, &c. being impleaded, may pray in aid of him in reversion; that is, desire the court that he may be called by writ to alledge what he thinks proper for the maintenance of the right of the person calling him, and of his own. F. N. B. 50.

Aid shall be granted to the defendant in *ejectione firmæ*, when the title of the land is in question: lessee for years shall have aid in trespass; and tenants at will: but tenant in tail shall not have aid of him in remainder in fee; for he himself hath the inheritance. *Danv. Abr.* 292. In a writ of replevin, the avowry being for a real service, aid is granted before issue; and in action of trespass after issue joined, if there be cause, it shall be had for the defendant, tho' never for the plaintiff. *Jenk. Cent.* 64: *Fitz. Abr.* 7. There ought to be privity between a person that joins in aid and the other to whom he is joined; otherwise joinder in aid shall not be suffered. *Danv.* 318. There is a prayer in aid of patrons, by parsons, vicars, &c. And between coparceners, where one coparcener shall have aid of the other to recover *pro rata*. *Co. Lit.* 341. b. And also servants, having done any thing lawfully in right of their masters shall have aid of them. *Terms de Ley* 34.

AID OF THE KING, *auxilium regis*.] Is where the king's tenant prays aid of the king, on account of rent demanded of him by others. A city or borough, that hold a fee-farm of the king, if any thing be demanded against them which belongs thereto, may pray in aid of the king: and the king's bailiffs, collectors, or accountants shall have aid of the king. In these cases the proceedings are stopp'd till the king's counsel are heard to say what they think fit, for avoiding the king's prejudice: and this aid shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another, *Jenk. Cent.* 64: *Terms de Ley* 35. See *stats.* 4 Ed. 1. c. c. 1, 2: 14 Ed. III. st. 1. c. 14: & 1 H. 4. c. 8: See also *Com. Dig.* tit. *Aide*.

AILE, or aid of the French *aieul*, *avus*.] A writ which lies where a man's grandfather being seised of lands and tenements in fee simple the day that he died, and a stranger abateth or entreth the same day, and dispossesses the heir of his inheritance. F. N. B. 222. See tit. *Affise of Mort d'ancestor*.

AL or ALD; from Saxon, *ald*, age.] This syllable in the beginning of the names of places denotes antiquity; as *Aldborough*, *Aldworth*, &c.—*Blount*.

ALANERARIUS, A manager and keeper of dogs, for the sport of hawking, from *alanus*, a dog, known to the ancients. *Du Fresnoy*. But Mr. *Blount* renders it a fault-coner.

ALBA, the alb.] A surplice or white sacerdotal vest anciently used by officiating priests.

ALBA FIRMA. When quit-rents, payable to the Crown by freeholders of manors, were reserved in silver, or white money, they were anciently called *albin rents*, or *blanch farms*; *reditus albi*; in contradistinction to rents reserved in work, grain, &c. which were called *reditus nigri*, or *black male*. 2 *Inst.* 19: & *vide* 2 *Inst.* 10, where it seems used for a species of tenure. See tit. *Black firmes*.

In Scotland this kind of small payment is called *blench-bolding*, or *reditus albi firmæ*. 2 *Crown* 47.

ALBERGELUM, [alberga] An habergeon; a defence for the neck. *Hoveden* 611.

ALBINATUS IUS. Is the *droit d'arbanne* in France, whereby the king at the death of an alien, is entitled to all he is worth, unless he has peculiar exemption. *Com. m.* 372. *Albinatus* is derived from *alibi natus*, *Spelm. Gloss.* 24. This was repealed by the laws of France in June 1791.

ALBUM, see *Albi Firma*.

ALDER, the first; as *alder best*, is the best of all; *alder liefest*, the most dear.

ALDERMAN, Sax. *calderman*, Lat. *aldermannus*.] Hath the same signification in general as senator, or senior but at this day, and long since, they are called *aldermen* who are associates to the civil magistrates of a city or town corporate. See *Spelm. Gloss.* 25. An *alderman* ought to be an inhabitant of the place, and resident where he is chosen; and if he removes he is incapable of doing his duty in the government of the city or place, for which he may be disfranchised. *Mod. Rep.* 36. *Alderman Langham* was a freeman of the city of London, and chosen *alderman* of a ward, and being summoned to the court of *aldermen* he appeared, and the oath to serve the office was tendered to him, but he refused to take it, in contempt of the court, &c. whereupon he was committed to Newgate; and it was held good. *March. Rep.* 179.

The *aldermen* of London, &c. are exempted from serving inferior offices; nor shall they be put upon assizes, or serve on juries, so long as they continue to be *aldermen*. 2 *Crown* 585. See tit. *London*.

In *Spelman's Glossary* we find that we had anciently a title of *aldermannus totius Angliæ*; mentioned in an inscription on a tomb in *Ramsay abbey*. And this officer was in nature of Lord Chief Justice of England. *Spelm.* *Alderman* was one of the degrees of nobility among the Saxons, and signified an earl; sometimes applied to a place, it was taken for a general, with a civil jurisdiction as well as military power; which title afterwards was used for a judge, but it literally imports no more than elder.

There was likewise *aldermannus hundredi*, (the alderman of the hundred,) which dignity was first introduced in the reign of Hen. 1. *De Fresne*. Cowel.

ALÆ ECCLESIAE, The wings or side-issles of the church; from the French, *Les ailes de l'Eglise*.

ALECENARIUM, A sort of hawk called a *lanner*. See *Putura*.

AL EHOUSES, Are to be licensed by justices of peace, who take recognizances of alehouse keepers not to suffer disorders in their houses, and they have power to put down *alehouses*, &c. But the act is not to restrain selling of ale in fairs. Stat. 5 & 6 Ed. 6. c. 25. *Alehouse* keepers are liable to a penalty of 20s. for keeping *alehouses* without license; not exceeding 40s. nor under 10s. for selling ale in short measure; and 10s. for permitting

tippling, &c. and persons retailing ale or beer, *alehouse* keepers, &c. shall sell their ale by a full ale quart or pint, according to the standard in the *Exchequer*, marked from the said standard; and sub commissioners, or collectors of excise, are to provide substantial ale quarts and pints in every town in their divisions; and mayors and chief officers to mark measures, or forfeit 5*l.* by statute 1 Jac. 1. c. 9: and see Stat. 4 Jac. 1. c. 5: 21 Jac. 1. c. 7: 1 Car. 1. c. 4: 3 Car. 1. c. 4: 11 & 12 W. 3. c. 15. See tit. *Inns*; *Brewers*.

By the stat. 26 Geo. 2. c. 41, Justices on granting licences are to take recognizances in 10*l.* with sureties in the like sum for the maintaining good order. Licences to be granted to none, not licenced the preceding year, unless they produce certificates of their good character. Licence only to extend to that place for which it was granted. Licences to be granted on the first of September, or within twenty days after, yearly, and to be for one yearly only; penalty for selling ale, &c. without a licence, by this and subsequent acts, first offence 40s. second offence 4*l.* third offence 6*l.*

As to licences see the above statutes and Stat. 29 Geo. 2. c. 12: 5 Geo. 3. c. 4: 30 Geo. 3. c. 38: and lastly 32 Geo. 3. c. 59; by which last act no person can sell wine by retail to be drunk in his own house, who has not also an ale licence. See tit. *Drunkennes*.

ALIER SANS JOUR, [Fr.] To go without day; viz. to be finally dismissed the court, because there is no further day assigned for appearance. *Kitch.* 146.

ALE-SILVER, A rent of tribute annually paid to the lord mayor of London, by those that sell ale within the liberty of the city. *Antiq. Purvey.* 183.

ALESTAKE, A may-pole called *alestake*, because the country people drew much ale there; but it is not the common may-pole, but rather a long stake drove into the ground, with a sign on it, that ale was to be sold.

ALE-TASTER, Is an officer appointed in every court leet, sworn to look to the assize and goodness of ale and beer, &c. within the precincts of the lordship. *Kitch.* 46. In London there are *ale comers*, who are officers appointed to taste ale and beer, &c. in the limits of the city.

ALFEI, [Sax. Alfeib.] A cauldron or furnace, wherein boiling water was put for a criminal to dip his arms in up to his elbow, and there hold it for some time. *Du Cange*. See tit. *Ordeal*.

ALIAS, A second or further writ, issued from the courts at Westminster, after a *capias*, &c. sued out without effect.

ALIAS DICTUS, Is the manner of description of a defendant, when sued on any specialty; as a bond, &c. where after his name, and common addition, then comes the *alias dict.* and describes him again by the very name and addition, whereby he is bound in the writing. *Dyer* 50: *Jenk. Cent.* 119. See *Misnomer*.

ALIEN, [Alienus, Alienigena.] Generally speaking, one born in a foreign country, out of the allegiance of the king. Under this head shall be briefly introduced the present state of the law, in particular, as to I. *Aliens*, II. *Denizens*, III. *Naturalized Subjects*, IV. *Of the general effect of the Laws on Aliens*.

I. An *ALIEN* born may purchase lands or other estates, but not for his own use, for the king is thereupon entitled

ALIEN II—III.

pled to them. 1 *Inst.* 2. and the notes there. But under the stat. 13 *Geo.* 3. c. 14, aliens are enabled to lend money on the security of mortgages of estates in the *West India Colonies*, and may have every remedy to recover the money lent, except foreclosing the mortgage and obtaining possession of the land; which is positively prohibited by the statute. Nor shall a woman alien, wife of a natural born subject, be endowed. 7 *Rep.* 25. a: 1 *Inst.* 31. b. but see the note there *contra*. Nor a Jewess wife of a husband converted to the Christian religion. *Id.* *ib.* See this Dict. tit. *Dower*. An alien may however acquire a property in goods, money, and other *personal* estate, or may hire a house for his habitation. 7 *Rep.* 17. For personal estate is of a transitory or moveable nature, and this indulgence is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the *Custom House*; and there also some obsolete statutes, (1 *Ric.* 3. c. 9: 14 *H.* 8. c. 2: 21 *H.* 8. c. 16: 22 *H.* 8. c. 13: 32 *H.* 8. c. 10:) prohibiting alien artificers to work for themselves in this kingdom, and making void all leases of houses or shops to aliens, [see tit. *Artificers*]; but it is generally held that these were virtually repealed by stat. 5 *Eliz.* c. 7, prohibiting the importation of some foreign manufactures; see however 1 *Inst.* 2. in note. Also an alien may bring an action concerning personal property; and may make a will and dispose of his personal estate. *Lutro.* 34. These rights of aliens must be understood of alien friends only; for alien enemies have no rights, no privileges, unless by the king's special favour during the time of war. 1 *Comm.* 372. and see *Cro. Eliz.* 683: *Stin.* 370.

Where it is said that an alien is one born out of the king's dominions or allegiance, this must be understood with some restrictions. The common law was absolutely so, with only a very few exceptions; so that a particular act of parliament, (stat. 29 *Car.* 11. c. 6,) was necessary after the restoration to naturalize children of *English* subjects born in foreign parts during the troubles. This maxim of law proceeded on a general principle that every man owes *natural allegiance* where he is born, and cannot owe two such allegiances at once. Yet the children of the king's ambassadors born abroad were always held to be natural born subjects. 7 *Rep.* 11. § 18. the father owing no *feudal* allegiance to the foreign prince; and representing the king of *England*; and by the stat. 25 *E.* 3. st. 2, it is declared to be the law of the crown of *England*, that the king's children *wherever born* are of ability to inherit the crown; and to encourage foreign commerce it is enacted by the same statute, that all children born abroad, provided *both* their parents were at the time of the child's birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in *England*. See *Cro. Car.* 601: *Mar.* 91: *Jenk. Cent.* 3.

By several more modern statutes (7 *Ann.* c. 5: 10 *Ann.* c. 5: 4 *Geo.* 2. c. 21: and 13 *Geo.* 3. c. 21,) these restrictions are still further taken off; so that all children born out of the king's allegiance, whose *fathers* (or *grandfathers* by the father's side) were natural born subjects, though their mothers were aliens, are now deemed to be natural born subjects themselves to all intents and purposes, unless their said ancestor were attainted, or banished beyond sea for high treason; or were at the birth of such children in the service of a prince at enmity with *Great*

Britain. See stat. 4 *Geo.* 2. c. 21. [The issue of an *English* woman by an alien, born abroad is an alien. 1 *Vent.* 421: 4 *Term Rep.* 400, solemnly decided.] But *grand-children* of such ancestors shall not be privileged in respect of the aliens duty, except they be protestants and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens born here in *England*, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. 1 *Comm.* 373.

II. A *DENIZEN* is an alien born, but who has obtained, *ex donatione regis*, letters patent to make him an *English* subject; a high and incommunicable branch of the royal prerogative. 7 *Rep.* 25. A denizen is in a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance. 11 *Rep.* 67; for his parent through whom he must claim, being an alien had no inheritable blood; and therefore could convey none to the son. And upon a like defect of hereditary blood the issue of a denizen born *before* denization cannot inherit to him; but his issue born *after* may, to the exclusion of that born before. 1 *Inst.* 8: *Paugh.* 285. But by stat. 11 & 12 *Wil.* 3. c. 6, all persons being *natural-born* subjects may inherit as heirs to their ancestors, though those ancestors were aliens. See also stat. 25 *Geo.* 2. c. 39, by which this statute of *Wil.* 3. is restrained to persons in being at the death of the ancestor; and divests the estate from daughters in favour of after-born sons. Both these acts are extended by stat. 16 *Geo.* 3. c. 52, to *Scotland*.

A Denizen is not excused from paying the alien's duty and some other mercantile burthens. See stat. 22 *H.* 8. c. 8. And no denizen can be of the privy council, or either house of parliament, or have any office of trust civil or military, or be capable of any grant of lands, &c. from the crown. Stat. 12 *W.* 3. c. 2.

III. *NATURALIZATION* cannot be performed but by act of parliament; for by this an alien is put in the same state as if he had been born in the king's allegiance; except only that he is (by the stat. 12 *Wil.* 3.) incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c. No bill for naturalization can be received without such disabling clause in it; (stat. 1 *Geo.* 1. c. 4.) nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he shall have resided in *Great Britain* for seven years next after the commencement of the session in which he is naturalized; (stat. 14 *Geo.* 3. c. 84;) neither can any person be naturalized or restored in blood unless he hath received the Sacrament of the Lord's Supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. (stat. 7 *Jac.* 1. c. 2.) But these provisions have been usually dispensed with by special acts of parliament previous to bills of naturalization of any foreign princes or princesses. See statutes 4 *Ann.* c. 1: 7 *Geo.* 2. c. 3: 9 *Geo.* 2. c. 24: 4 *Geo.* 3. c. 4. &c.

These are the principal distinctions between *Aliens*, *Denizens*, and *Natives*; distinctions which it hath been frequently endeavoured within the present century to lay almost

almost totally aside by one general naturalization-act for all foreign protestants. An attempt which was once carried into execution by stat. 7 *Ann.* c. 5; but this after three years' experience was repealed by stat. 10 *Ann.* c. 5; except the clause for naturalizing the children of *English* parents born abroad. However, every foreign seaman who in time of war serves two years on board an *English* ship by virtue of the king's proclamation, is by stat. 13 *Geo.* 2. c. 3, *ipso facto* naturalized, under the like restrictions as in stat. 12 *H.* 3. c. 2. And all foreign Protestants and *Jews*, upon their residing seven years in any of the *American* colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of these falling within the incapacities declared by stat. 4 *Geo.* 2. c. 21. (*viz.* attain, &c.) shall, on taking the oath of allegiance and abjuration, or in some cases an affirmation to the same effect, be naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or the privy council, and holding offices or grants of land, from the crown, in *Great Britain* or *Ireland*. See statutes 13 *Geo.* 2. c. 7: 20 *Geo.* 2. c. 44: 22 *Geo.* 2. c. 45: 2 *Geo.* 3. c. 25: 13 *Geo.* 3. c. 25: 20 *Geo.* 3. c. 20. They therefore are admissible to all other privileges, which Protestants or *Jews* born in this kingdom are entitled to. What those privileges are with respect to *Jews* in particular was the subject of very high debate about the time of the famous *Jew bill*; stat. 26 *Geo.* 2. c. 26; which enabled all *Jews* to prefer bills of naturalization in parliament without receiving the sacrament as ordained by stat. 7 *Jac.* 1. c. 2: but this act continued only a few months, and was then repealed by stat. 27 *Geo.* 2. c. 1.

IV. An *alien* enemy coming into this kingdom, and taken in war, shall suffer death by the martial law; and not be indicted at the common law, for the indictment must conclude *contra ligeantiam suam*, &c. and such was never in the protection of the king. *Molloy de Jur. Marit.* 417. *Aliens* living under the protection of the king, may have the benefit of a general pardon. *Hob.* 271. No *alien* shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c. but where an *alien* is party in a cause depending, the inquest of jurors are to be half denizens, and half *aliens*: but in cases of high treason, this is not allowed. 2 *Inst.* 17. See stat. 27 *E.* 3. c. 8, that where both parties are *aliens* the inquest shall be all *aliens*. and stat. 28 *E.* 3. c. 13. as to trials between denizens and *aliens*; see also 1 *Com. Dig.* tit. *Alien.* (C. 8.)

Tho' *aliens* are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them on a local statute.—Thus, a *French* prisoner indicted for privately stealing from a shop was acquitted of that by the direction of the judge, and found guilty of the larceny only. *Forst* 183.

A very great influx of *Frenchmen* into *England* having been caused in the years 1792 and 1793 by the troubles in *France*, and there being cause to suspect that some of them were sent here for dangerous and unjustifiable purposes, an act was passed, stat. 33 *Geo.* 3. c. 4, commonly

called the Alien-Bill, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the custom-house officers appointing justices and others to grant passports to such *aliens*; and giving the king power to restrain and to send them out of the kingdom on pain of transportation, and on their return, of death. The same act also directs an account to be delivered of the arms of *aliens*, which, if required, are to be delivered up, and *aliens* were not to go from one place to another in the kingdom without passports. This act was in the first instance temporary; and tho' opposed in both houses, was proved by circumstances of a very serious nature, to have been absolutely necessary.

By the various acts of parliament above mentioned, most, if not all of the niceties of the old law relative to *aliens* are obviated and reduced to plain and intelligible rules. See 1 *Comm.* 366—375: 1 *Inst.* 2 and 8, and the notes there; and 7 *Rep.* *Calvin's case*. As to descents between *aliens* collaterals, *Collingswood v. Paec*, 1 *Vent.* 413: 1 *Sid.* 193. As to pleading alienage, see tit. *Abatement*. And for further matter on the whole of the subject, *Com. Dig.* tit. *Alien*.

ALIENATION, from *alienare*, to alien.] A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to *alien* land in fee, is to sell the fee-simple thereof, &c. And to *alien* in mortmain, is to make over lands or tenements to a religious house or body politic. Fines for *alienations* are taken away by stat. 12 *Car.* 2. c. 24, except fines due by particular customs of manors. All persons who have a right to lands may generally *alien* them to others: but some *alienations* are forbidden: as an *alienation* by a particular tenant, such as tenant for life, &c. which incurs a forfeiture of the estate. *Co. Lit.* 118. For if lessee for life, by livery, *alien* in fee, or make a lease for the life of another, or gift in tail, it is a forfeiture of his estate: so if tenant in dower, tenant for another's life, tenant for years, &c. do *alien* for a greater estate than they lawfully may make. *Co. Lit.* 233, 251. Conditions in feoffments, &c. that the feoffee shall not *alien*, are void. *Co. Lit.* 206: *Hob.* 261. And it is the same where a man possessed of a lease for years, or other thing, gives and sells his whole property therein, upon such condition: but one may grant an estate in fee, on condition that the grantee shall not *alien* to a particular person, &c. And where a reversion is in the donor of an estate, he may restrain an *alienation* by condition. *Lit.* 361: *Wood's Inst.* 141. Estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to *alien* to others, for the preservation of the lands granted in the hands of the first grantee.

ALIMONY, *alimonia*, Nourishment or maintenance.] In a legal sense, it is taken for that allowance which a married woman sues for and is entitled to, upon separation from her husband. *Terms de Ley* 38. See tit. *Baron and Feme*.

ALLAUNDS, *ab alanis*, *Scythiæ gente*, Hare-hounds.

ALLAY. Lat. *allaya*.] The mixture of other metals with silver or gold. This *allay* is to augment the weight of the silver or gold, so as it may defray the charge of coinage, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-

twenty-two carats fine, and two carats *allay*: and a pound weight of right standard silver consists of eleven ounces two-penny weight of fine silver, and eighteen penny weight of *allay*. *Lorowies's Essay upon Coins*, pag. 19. & 9 H. 5. ft. 1. c. 11.

ALLEGIANCE, *allegiantia*, formerly called *ligeance*, from the Latin *alligare* & *ligare*; i. e. *ligamen fidei*.] The natural and lawful and faithful obedience which every subject owes to his prince. It is either perpetual, where one is a subject born; or where one hath the right of a subject by naturalization, &c. or it is temporary, by reason of residence in the king's dominions. To subjects born, it is an incident inseparable; and as soon as born, they owe by birth-right obedience to their sovereign; and it cannot be confined to any kingdom, but follows the subject wheresoever he goeth. The subjects are hence called *liege people*, and are bound by this *allegiance* to go with the king in his wars, as well within as without the kingdom. 1 *Infl.* 129 a: 2 *Infl.* 741. 7 Co. 4. *Calwin's Case*.

By the common law, all persons above the age of twelve years were required to take the oath of *allegiance* in courts-leet.

And there are several statutes requiring the oath of *allegiance* and supremacy, &c. to be taken under penalties: justices of peace may summon persons above the age of eighteen years to take these oaths. 1 *Eliz.* cap. 1: 1 *W. & M.* c. 1, 8. 1 *Ann.* stat. 1. c. 22. For the other statutes respecting *allegiance* see 5 *Eliz.* c. 1. sect. 5: 3 *Jac.* 1. c. 4: 7 *Jac.* 1. c. 6: 25 *Car.* 2. c. 2: 7 & 8 *W.* 3. c. 24 & 27: 13 & 14 *W.* 3. c. 6: 1 *Ann.* c. 22: 6 *Ann.* c. 14: 8 *Ann.* c. 15: 1 *Geo.* 1. c. 13: 2 *Geo.* 2. c. 31: 6 *Geo.* 3. c. 53. And see title OATHS, and *Kyd's Com. Dig.* tit. *Allegiance*. By the stat. 3 *Jac.* 1. c. 4. if any natural born subject be withdrawn from his *allegiance* and reconciled to the pope or see of Rome, or shall promise obedience to any other Prince or State, he, his procurers, counsellors, aiders and maintainers, shall incur the guilt of *High Treason*.

ALLEGIARE, to defend or justify by due course of law. *Leges Alured.* cap. 4. *Spelm.*

ALLER, This word is used to make what is added to signify superlatively; as *aller good* is the greatest good. See *Alder*. *Alder sans jour*, see *Aler*.

ALLEVIARE, to levy or pay an accustomed fine. *Convel.*

ALLOCATION, *allocatio*.] In a legal sense, an allowance made upon account in the *Exchequer*; or more properly a placing or adding to a thing.

ALLOCATIONE FACIENDA, A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer, and barons of the *Exchequer*, upon application made. *Reg. Orig.* 206.

ALLOCATO COMITATU, A new writ of *exigent* allowed, before any other county court holden, on the former not being fully served; or complied with, &c. *Fitz. Exig.* 14.

ALLODIAL. This is where an inheritance is held without any acknowledgement to any lord or superior; and therefore is of another nature from that which is feudal. *Allodial* lands are free lands, which a man enjoys without paying any fine, rent, or service to any other. *Allodium*. In *Domesday* book it signifies a free manour; and *alodarii* Lords Paramount. *Kent: Co. Litt.* 1, 5. & see 2 *Comm.* 45, &c. And this *Dist.* tit. *Tenure*.

VOL. I.

ALLUMINOR, from the Fr. *allumer*, to enlighten.] One who anciently illuminated, coloured or painted upon paper or parchment, particularly the initial letters of ancient charters and deeds. The word is used *stat.* 1 R. 3. c. 9.

ALMANACK, Is part of the law of England, of which the courts must take notice, in the returns of writs, &c. but the *almanack* to go by is that annex'd to the *Book of Common Prayer*. *Mod. Caf.* 41, 81. See tit. *Year*.

The diversity of fixed and moveable feasts was condemned *per tot. cur.* for we know neither the one nor the other but by the *almanacks*, and we are to take notice of the course of the moon. 6 *Mod.* 150, 160: *Pasch.* 3 *Ann.* B. R. in the case of *Harvey v. Broad*.—*ibid.* 196. S. C. and *Holt. Ch. J.* said, that at the council of *Nice* they made a calculation moveable for *Easter* for ever, and that is received here in England, and become part of the law; and so in the calendar established by act of parliament.—2 *Salk.* 626. pl. 8. S. C. accordingly; *per cur.*

Whether such a day of the month was on a Sunday or not, and so not a *dies juridicus*, is triable by the country or the *almanack*. *Dyer* 182. pl. 55. But,

It was said that the court might judicially take notice of *almanacks*, and be informed by them; and cited *Robert's* case in the time of Lord *Catline*; and *Coke* said, that so was the case of *Galley v. Bunbury*, and judgment accordingly. 1 *Leo.* 242. pl. 328: *Pasch.* 29 *Eliz.* B. R. *Page v. Rawcest.*—*Cio. Eliz.* 227. p. 12. S. C. and held that examination by *almanacks* was sufficient, and a trial *per juri* not necessary, tho' the error assigned, viz. that the 16 Feb. on which day judgment was said to be given, was on a Sunday, was an error in fact; and the judgment was reversed.

ALMARIA, for *armaria*: The archives or as they are sometimes stiled *muniments* of a church or library.—*Gerrard.* *Dorch.* in R. 2.

ALMNER, or **ALMONER**, *elemosynarius*.] An officer of the king's house, whose business it is to distribute the king's *alms* every day. He ought to admonish the king to bestow his *alms*, especially upon saints' days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners and other necessitous people, and to relieve them under their wants; for which purpose he hath the forfeitures of deadlands, and the goods of *felos de se*, allowed him by the king. *Fluta, lib.* 2. cap. 22. The lord *almoner* has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four-pence in money, a two-penny loaf of bread, and a gallon of beer; or instead thereof three-pence daily at the court gate to twenty four poor persons of the king's parish, to each of them that allowance. This officer is usually some bishop.

ALMSFEORH, or *almesfeob*, Saxon for *alms money*: It has been taken for what we call *Peter-Pence*, first given by *Ina* king of the *West Saxons*, and anciently paid in England on the first of August. It was likewise called *rome-feob*, *rome-feot*, and *beorhtþening*. *Selden's Hist. Tithes* 217.

ALMUTIUM. A cap made with goats or lambs' skins, the part covering the head being square, and the other part hanging behind to cover the neck and shoulders. *Monasticon* tom. 3. p. 36: *W. Thorn.* 1330.

ALNAGE Fr. *aulnage*.] A measure, particularly the measuring with an ell.

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ALNAGER,

ALNAGER, or *aulnager*, Fr. *alner*, Lat. *ulniger*.] Is properly a measure by the ell; and the word *aulne* in French, signifieth an ell. An *aulnager* was heretofore a public sworn officer of the king's, whose place it was to examine into the assise of cloths made throughout the land, and to fix seals upon them; and another branch of his office was to collect a subsidy or *aulnage* duty granted to the king. He had his power by stat. 25 Ed. 3. stat. 4. c. 1. and several other ancient statutes; which appointed his fees, and inflicted a punishment for putting his seal to deceitful cloth, &c. viz. a forfeiture of his office, and the value. 27 Ed. 3. stat. 1. c. 4: 3 R. 2. c. 2. There were afterwards three officers belonging to the regulation of cloathing, who bear the distinct names of *searber*, *measurer*, and *aulnager*; all which were formerly comprised in one person. 4 Inst. 31: Cowel.

By 11 & 12 W. 3. c. 20. Alnage duties are taken away.

ALNETUM, A place where *alders* grow; or a grove of *alder* trees. Domesday-Book.

ALODIUM, see *Allodium*.

ALOVERIUM, *A purse*. *Fleta*, lib. 2. c. 82. par. 2.

ALTARAGE, *altaragium*.] The offerings made upon the altar, and also the profit that arises to the priest by reason of the altar, *obventio altaris*. Mich. 21 Eliz. It was declared that by *altarage* is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes with the offerings due: the case of the vicar of *West-Haddon* in *Northamptonshire*. But the word *altarage* at first is thought to signify no more than the casual profits arising to the priest, from the people's voluntary oblations at the altar; out of which a portion was assigned by the parson to the vicar: since that, our parsons have generally contented themselves with the greater profits of glebe, and tenths of corn and hay; and have left the small tithes to the officiating priests: and hence it is that vicarages are endowed with them. *Terms de Ley* 39. 2 Cro. 516.

It seems to be certain, that the religious, when they allotted the altarage in part, or in whole to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixt. *Kenn. Paroch. Antiq. Gloss.*

In the case of *Franklyn* and the master and brethren of *St. Cross*, T. 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bomb. 79.*

ALTERATION, *alteratio*, Is the changing of a thing: and when witnesses are examined upon exhibits, &c. they ought to remain in the office, and not to be taken back into private hands, by whom they may be altered. *Hob. 254.*

ALTO & BASSO, *Ponere se in arbitrio in alto & basso*, means the absolute submission of all differences.

AMABYR, vel **AMVALBYR**, A custom in the honour of *Clun*, belonging to the earls of *Arundell*: *Pretium virginis domino solvendum* LL eccl. Gul. Howeli Dñi, regis Walliæ. This custom *Henry* earl of *Arundel* released to his tenants, Anno 3 & 4 P. & M.

AMBACTUS, A servant or client. *Cowel.*

AMBASSADOR, *legatus*.] A person sent by one Sovereign [Power] to another with authority by letters of

credence to treat on affairs of state. 4 Inst. 153. And *ambassadors* are either ordinary, or extraordinary; the ordinary *ambassadors* are those who reside in the place whither sent; and the time of their return being indefinite, so is their business uncertain, arising from emergent occasions; and commonly the protection and affairs of the merchants is their greatest care: the extraordinary *ambassadors* are made *pro tempore*, and employed upon some particular great affairs, as condolences, congratulations, or for overtures of marriage, &c. Their equipage is generally very magnificent; and they may return without requesting of leave, unless there be a restraining clause in their commission. *Molloy* 144.

An agent represents the affairs only of his master; but an *ambassador* ought to represent the greatness of his master, and his affairs. *Ibid.* By the laws of nations, none under the quality of a sovereign prince can send any *ambassador*; a king that is deprived of his kingdom and royalty, hath lost his right of legation. No subject, though ever so great, can send or receive an *ambassador*; and if a viceroy does it, he will be guilty of high treason: the electors and princes of *Germany* have the privilege of sending and reception of *ambassadors*; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no *ambassador* without letters of credence from his sovereign, to another that hath sovereign authority: and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an *ambassador*, he being for the Public. 4 Inst. 153.

Ambassadors may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken for enemies; but being once admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preserved as princes. *Moll.* 146. If a banished man be sent as an *ambassador* to the place from whence he is banished, he may not be detained or molested there. 4 Inst. 153. But if he be not received or admitted as *ambassador*, he has no privilege as such; and an *ambassador* may be refused in respect of him by whom sent; or in respect of the person sent; as if he is notoriously flagitious; or if he be disagreeable to the state to which he is sent. An *ambassador* ought not however to be refused without cause.—See *Grotius* and *Molloy*, cited *Com. Dig.* tit. *Ambassador*. The killing of an *ambassador* has been adjudged high treason. 3 Inst. 8. Some *ambassadors* are allowed, by concession, to have jurisdiction over their own families; and their houses permitted to be sanctuaries; but where persons who have greatly offended fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. *Ambassadors* cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. 4 Inst. 152. An *ambassador*, guilty of treason against the king's life, may be condemned and executed; but for other treasons, he shall be sent home, with demand to punish him, or to send him back to be punished. 4 Inst. 152. 1 Roll. Rep. 185.

If a foreign *ambassador* commits any crime here, which is *contra jus gentium*, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an *ambassador*, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but

— of courtesy. *Danv. Abr.* 327. But if a thing be only *malum prohibitum* by an act of parliament, private law, or custom of the realm, and it is not *contra jus gentium*, an ambassador shall not be bound by them. 4. 153. And it is said ambassadors may be excused of against the state where they reside, (except it be in point of conspiracy, which is against the law of nations) because it doth not appear whether they have it in *mandatis*; and then they are excused by necessity of obedience. *Bar. Max.* 26.

By the civil law, the person of an ambassador may not be arrested; and the moveable goods of ambassadors, which are accounted an accession to their persons, cannot be seised on, as a pledge, nor for payment of debts, though by leave of the king or state where they are resident; but on refusal of payment, letters of request are to go to his master, *Sc. Molloy* 157. *Danv.* 328. The law of nations touching ambassadors in its full extent, is part of the law of England; and the act 7 *An. c.* 12, is only declaratory. *Barbui's Case*, *Rep. temp. Ld. Talb.* 281; and see 3 *Burr.* 1748.

By our statute law, (*stat. 7 An. c.* 12.) An ambassador, or public minister, or his domestic servants, registered in the secretary's office, and thence transmitted to the sheriff's office of London and Middlesex, are not to be arrested; if they are, the process shall be void, and the persons suing out and executing it shall suffer such penalties and corporal punishments as the lord chancellor or either of the chief justices shall think fit. Also the goods of an ambassador, shall not be distrained. *Stat. ibid.* See 1 *Comm.* 254. The persons claiming privilege as servants of an ambassador, must be such as are really and *bona fide* retained and registered in that capacity; and the act itself expressly prohibits its extension to merchants and traders liable to the statutes of bankruptcy. See *Fitzgib.* 200: *Str.* 797: 1 *Will.* 20, 78, 9: 3 *Will.* 33: 2 *Str.* 797: 2 *Ld. Raym.* 1524: 3 *Burr.* 1676: 4 *Burr.* 2016, 7: and *Com. Dig.* tit. Ambassador.

AMBIDEXTER, *Lat.* One that plays on both sides. In a legal sense, it is taken for a juror or embracer, who takes money of the parties for giving his verdict; see tit. Juries. *Stat.* 5 *Ed.* III.

AMBRA, *Sax. amber*, *Lat. ambrona*.] A vessel among the Saxons; it contained a measure of salt, butter, meal, beer, &c. *Leg. Inq. West. Sax.*

AMBRY, The place where the arms, plate, vessels, and every thing which belonged to housekeeping were kept; and probably the ambry at Westminster is so called, because formerly set apart for that use: or rather the *aumroy*, from the Latin *elemosynaria*, an house adjoining to an abbey, in which the charities were laid up for the poor.

AMENABLE, *Fr. amener*. To bring or lead unto: or amenable, from the *Fr. Main*, a hand. Signifies tractable, that may be led or governed: and in our books it is commonly applied to a woman, that is governable by her husband. *Cowel Interp.* It also, in the modern sense, signifies to be responsible, or subject to answer, &c. in a court of justice.

AMENDMENT, *emendatio*.] The correction of an error committed in any process, which may be amended after judgment; and if there be any error in giving the judgment, the party is driven to his writ of error; though where the fault appears to be in the clerk who writ the record, it may be amended. *Terms de Ley* 39.

At common law there was little room for amendments, which appears by the several statutes of amendments and *jo-fails*, and likewise by the constitution of the courts; for, says *Britten*, the judges are to record the parols [or pleas] deduced before them in judgment; also, says he, *Ed. 1.* granted to the justices to record the pleas pleaded before them, but they are not to erase their records, nor amend them, nor record against their inrollment, nor any way suffer their records to be in warrant to justify their own misdoings, nor erase their words, nor amend them, nor record against their inrollment. This ordinance of *Ed. 1.* was so rigidly observed, that when justice Hengham, in his reign, moved with compassion for the circumstances of a poor man who was fined 13 s. 4 d. erased the record, and made it 6 s. 8 d. he was fined 800 marks, with which, it is said, a clock-house at Westminster was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit, clocks not being in use till a century afterwards. Notwithstanding what is mentioned above, there were some cases that were amendable at common law.

Original writs are not amendable at common law, for if the writ be not good, the party may have another; judicial writs may and have been often amended. 8 *Rep.* 157.

Whatever at common law might be amended in civil cases, was at common law amendable in criminal cases, and so it is at this day: resolved by *Helt Ch. J. Powell* and *Powis J.* 1 *Salk.* 51. pl. 14.

Though awarding of process on the roll might be amended at Common law the same term, because it was the act of the court; yet if any clerk at common law issued out an erroneous process on a right award of the court, that was never amended in any case at the common law. 1 *Salk.* 51. pl. 14.

Anciently all pleas were *ore tenus* at the bar; and then if any error was spied in them, it was presently amended. Since that custom is changed, the motion, to amend, because all in paper, succeeded in the room of it; and it is a motion that the court cannot refuse: but they may refuse it if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea. 10 *Mod.* 88.

Mistakes are now effectually helped by the statutes of amendment and *jo-fails*; the latter so called, because when a pleader perceived any slip in the form of his proceeding, and acknowledges such error, (*jeo faile* or *j'a faillé*); he is at liberty by those statutes to amend it, which amendment is seldom actually made, but the benefit of the act is attained by the courts overlooking the exception, 2 *Str.* 1011. These statutes are in the whole 12 in number, and are here recapitulated chronologically, by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot since be maintained, but for some material mistake assigned. 3 *Comm.* 407; which see, and *Buller's Ni. Pri.* (*Ed.* 1793) 320. and for a more extended view of the cases, in which amendments may or may not be made, See *Cris. Dig.* tit. Amendment.

By *stat. 14 Ed. 3. c.* 6. no process shall be annulled or discontinued, by the misprision of the clerk in mistaking in writing one syllable or one letter too much or too little; but it shall be amended.

The judges afterwards construed this statute so favourably, that they extended it to a word; but they were not

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so well agreed, whether they could make these amendments, as well *after* as *before* judgment; for they thought their authority was determined by the judgment; therefore by stat. 9 *H. 5. c. 4.* it is declared that the judges shall have the same power, as well *after* as *before* judgment, as long as the record in process is before them. *Gibb. H. C. B. 110.*

This statute is confirmed by statute 4 *Hen. 6. c. 3.* with an exception, that it shall not extend to process on out-lawry, or to records or processes in *Wales*. But according to 2 *Sund. 40.* this last exception, and the like exception in 8 *Hen. 6. c. 15.* seem to be annulled by the statute 27 *Hen. 8. c. 20.* by which it is enacted, that the laws of *England* shall be used, practised and executed in *Wales*.

Though the foregoing statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but *process*, which they did not contrive in a large signification, so as to comprehend the whole proceedings in real and personal actions, and criminal and common pleas, but confined it to the *mejne process and jury process*; 8 *Co. 157 a.* And therefore, to enlarge the authority of the courts, the statute 8 *Hen. 6. c. 12.* gives power to amend what they shall think in their discretion to be the misprision of their clerks in any record, process, and plea, warrant of attorney, writ, pannel, or return. *Gibb. H. C. P. 110.*

There are only two statutes of amendments, *viz.* the 14 *Ed. 3. stat. 1. c. 6.* and 8 *H. 6. c. 12 & 15.* the rest are reckoned to be statutes of *jeofails*, and not of amendments; *per Powell J. 1 Salk. 51. pl. 14 Mich. 3 Ann. B. R.* in the case of *The Queen v. Tatham*.—And *ibid.* he held that the 8 *H. 6.* was only to enlarge the subject-matter of 14 *Ed. 3.* and that 14 *E. 3.* extends only to process out of the roll, *viz.* writs that issue out of the record, and not to proceedings in the roll itself: but that the 14 *Ed. 3.* extends not to the king, because of these words, (*challenge of the party*) and that the statute 8 *H. 6.* has always been construed in limitation of the act of *Ed. 3.* and the exception in the statute of *H. 6.* was only *ex abundanti cautela*; and all judges and sages of the law in all ages have taken it not to extend to the crown; and the cases on the other side are not to be relied upon.

Farther by stat. 8 *Hen. 6. c. 15.* "The king's justices, before whom any misprision shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the sheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend the same."

As these statutes only extended to what the justices should interpret the misprision of their clerks, and other officers, it was found by experience, that many just causes were overthrown *for want of form*, and other failings, not aided by this statute, though they were good in substance; and therefore the statutes of *jeofail* were made. *Gibb. H. C. B. 111.*

By stat. 32 *H. 8. c. 30.* it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a *jeofail* in the proceedings, yet judgment shall be given according to the verdict." The stat. 18 *Eliz.*

c. 14. ordains, "That after verdict given in any court of record, there shall be no stay of judgment, or reversal, for want of form in a writ, count, plaint, &c. or for want of any writ original or judicial; or by reason of insufficient returns of sheriffs, &c." By stat. 21 *Jac. 1. c. 13.* "If a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c. or for want of averment of the party's being living, so as the person is proved to be in life; or for that the *venue facias* is in part mis-awarded; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a pannel of jurors be returned and annexed to the writs; or for that the return-officer's name is not set to the return, if proof can be made that the writ was returned by such officer, &c."

The stat. 16 and 17 *Car. 2. c. 8.* (called by *Twissden*), an omnipotent act, 1 *Vent. 100*; and made perpetual by stat. 22 and 23 *Car. 2. c. 4.* enacts, "That judgment shall not be stayed or reversed after verdict in the courts of record at *Westminster*, &c. for *default in form*; or for that there are not pledges to prosecute upon the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alledging and bringing into court of any bond, bill or deed, or of alledging or bringing in letters testamentary, or of administration; or for the omission of *et & armis*, or *contra pacem*, mistaking the Christian name or surname of either party, or the sum of money, day, month or year, &c. in any declaration or pleading, being rightly named in any record, &c. proceeding; nor for want of the averment of *hinc paratus est verificari*, or for not alledging *pro ut patet per recordum*, for that there is no right *venue*, if the cause was tried by a jury of the proper county or place; nor shall any judgment after verdict, by confession, *cognovit actionem*, &c. be reversed for want of *misericordia et clemencia*, or by reason that either of them are entered, the one for the other, &c. but all such defects, *not being against the right of the matter of the suit, or whereby the issue or trial is altered*, shall be amended by the judges; though not in suits of *assault*, of *felony*, *indictment*, and *infractions*, on *penal statutes*, which are excepted out of the act.

By stat. 4 and 5 *Ann. c. 16.* all the statutes of *jeofails* shall extend to judgments entered by confession, *nil dicir*, or *non sum informatus* in any court of record, and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there be an original writ filed, &c.—By stat. 9 *Ann. c. 20. § 7.* this act and all other statutes of *jeofails* are extended to writs of *mandamus* and *informations* in the nature of a *quo warranto*. The statutes of amendment and *jeofails* not being construed to extend to criminal proceedings, or on penal statutes in general. *Pall. N. P. 325: 2 Mod. 144.* But a *mandamus* may not be amended after return. 4 *Term Rep. 587.* The stat. 5 *Geo. 1. c. 13.* ordains, "That, after verdict given, judgment shall not be stayed or reversed for defect in form or substance in any bill or writ, or for variance therein from the declaration, or any other proceedings."

An action for a false return of a member of parliament on the stat. 7 and 8 *H. 3.* for double damages, is remedial, tho' founded on a law that is penal so within the statutes of *jeofails*. 1 *Wils. 125.*

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By the foregoing statutes (from 14 E. 3. c. 6; to 8 H. 6. c. 15,) the faults and mistakes of clerks are in many cases *amendable*: the misprision of a clerk in matter of fact is *amendable*; though not in matter of law. *Palm. 258*. If there be a mistake in the legal form of the writ, it is not *amendable*: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence (as if he have the copy of a bond, and do not pursue it), this shall be *amended*; but his ignorance in the legal course of original writs is not *amendable*. 8 Rep. 159. A party's name was mistaken in an original writ; and it appearing to the court that the surfitor's instructions were right, the writ was *amended* in court; and they *amended* all the proceedings after. 2 Vent. 152: Cro. Car. 74. If a thing which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be *amended*; but otherwise it is, if omitted only in part and misentered. *Danv. Abr. 346*. By the common law a writ of error, returned and filed, could not be *amended*; because it would alter the record: but now by stat. 5 Geo. 1. the writs of error, wherein there shall be any variance from the original record, or other defect, may be *amended* by the court where returnable.

In an *assumpsit*, the defendant pleads *Not Guilty*, thereupon issue is joined, and found for the plaintiff, he shall have judgment, tho' it is an improper issue in this action; for as there is a deceit alledged, *Not Guilty* is an answer thereto, and it is but an issue *misjoined*, which is aided by statute 4 Geo. Eliz. 407. If in debt upon a *single bill*, the defendant pleads *payment, without an acquittance*, and issue is joined and found for the plaintiff, tho' the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative, and a verdict for the plaintiff. *Mich. 37* and *38 Eliz. 5 Rep. 43*. An ill plea and issue may be aided by the Statute of *jeofails*, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. *Cro. Car. 316: Hob. 113*. The statutes likewise help when there is no original, and where there is no bill upon the file, it is aided after verdict by statute, but when there is an original, which is ill, that is not aided. *Cro. Jac. 185, 480: Cro. Car. 282*. The statute of *jeofails* 15 and 17 Car. 2, helps a mis-trial in a proper county, but not where the county is mistaken. 1 Mod. 24.

When the award of a writ of enquiry on the roll is good, the writ shall be *amended* by the roll. *Carth. 70*. The court cannot *amend* to make a new writ; or to alter a good writ, and adapt it to another purpose, &c. only when the writ is bad and vicious on the face of it. *Mod. Caf. 263, 316. Annals 367*.

With respect to *declarations*, a declaration grounded on an original writ may not be *amended*, if the writ be erroneous: though if it be on a bill of *Middlesex* or a *lettrat*, it is *amendable*. 1 Lill. Abr. 67.

A plaintiff may *amend* his declaration in matter of form after a general issue pleaded, before entry thereof, without payment of costs: if he *amend* in substance, he is to pay costs, or give imparlance; and if he *amend* after a special plea, though he would give imparlance, he must pay costs. 1 Lill. 58. A declaration in ejectment, laid the demise before the time; this was not *amendable*,

for it would alter the issue, and make a new title in the plaintiff. 1 Salk. 48. The plaintiff declared on the statute of *Winton* for a robbery done to himself, when it should have been of his servants; he had leave to *amend*. 3 Lev. 347. If a defendant pleads a plea to the right, or in abatement, the plaintiff may *amend* his declaration; but not where he demurs, for this fault may be the cause of the demurrer. 1 Salk. 50. A demurrer may be *amended* after the parties have joined in demurrer, if it be only in paper. *Style 48*. Where a plea shall be *amended*, when in paper, or on record, &c. see the statute 4 Geo. II. c. 26.

As to the amendments of *records*, &c. an issue entered upon record, with leave of the court may be *amended*; but not in a material thing, or in that which will deface the record. 1 Lill. Abr. 61. A record may be *amended* by the court in a small matter, after issue joined, so as the plea be not altered. *Danv. Abr. 338*. If on a writ of error a record is *amended* in another court in affirmance of the judgment, it must be *amended* in the court where judgment was given. *Hardr. 505*. Where the record of *nisi prius* does not agree with the original record, it may be *amended* after verdict, provided it do not change the issue: but a record shall not be *amended* to attain the jury, or prejudice the authority of the judge. A general or special verdict may be *amended* by the notes of the clerk of assize in civil causes; but not in criminal actions. 1 Salk. 47. The issue roll shall be *amended* by the imparlance roll, which is precedent; but a roll may not be *amended* after verdict, when there is nothing to *amend* it by; tho' surplusage may be rejected, and so make it good. *Cro. Car. 92: 1 Sid. 135*.

In an action on the statute of *usury*, a verdict was given for the plaintiff, and taken on one of the counts, in the declaration.—The other counts being found for defendant.—Motion in *arrest of judgment*.—The principal cause was, the *christian* name of one of the persons mentioned in that count (rightly named, in that count, before) was mistaken in the *issue roll*, which had been carried in, whereby the count was rendered absurd, and bad. The court gave leave to file a *right bill*, (the proceedings being by *bill*), and afterwards *amended* the *issue roll*, by the bill.—The *nisi prius* roll was right.—*Gardner qui tam v. Brown B. R. Trin. T. 15 Geo. 3*. This was done, as an *amendment* at common law.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c. was ordered to be *amended*. *Cro. Jac. 631: Hutt. 41*. A judgment may be *amended* by the paper book signed by the master. 1 Salk. 40. At common law, the judges may *amend* their judgments of the same term; and by statute of another term. 8 Rep. 156: 14 E. 3. If judgments are not well entered, on payment of costs they will be ordered to be so: when judgments are entered, 'tis said the defects therein being the act of the court, and not the misprision of the clerk, are not *amendable*. *Glib. 104*. Mistakes in returns of writs, fines and recoveries, made by mutual assent of parties may be *amended*. 5 Rep. 45. Judgment shall not be void after verdict, for that an original waste form, or varies from the record in point of form, which are *amendable*. 5 Rep. 45. After verdict given in any court of record, there shall be no stay of judgment for want of form in any writ, or insufficient returns of theriffs, variance in form between

between the original writ and declaration, &c. stat. 32 H. 8. 18 Eliz. Vide 5 Geo. 1. c. 13. The *postea* may be amended by the judge's notes. 1 Will. 33: 2 Stra. 1197. S. C. As to amendments in informations by the attorney general, see 4 Term Rep. 457, 8.

Amendments are usually made in affirmance of judgments; and seldom or never to destroy them: and where amendments were at common law, the party was to pay a fine for leave to amend. 3 Salk. 29.

AMERCIAMENT, *amerciamentum*, (from the Fr. *merci*) signifies the pecuniary punishment of an offender against the king or other lord in his court, that is found to be in *miseriordia*, i. e. to have offended, and to stand at the mercy of the king or lord. The author of *Terms de Ley* saith, that *amerciament* is properly a penalty assessed by the peers or equals of the party *amerced*, for the offence done; for which he putteth himself at the mercy of the lord. *Terms de Ley* 40. And by the statute of *Magna Charta*, c. 14. a freeman is not to be *amerced* for a small fault, but proportionable to the offence, and that by his peers. 9 H. 3. c. 4. *Amerciements* are a more merciful penalty than a fine; for which if they are too grievous, a release may be sued by an ancient writ founded on *Magna Charta*, called *moderata misericordia*. See *New Nat. Brev.* 167: *F. N. B.* 76. The difference between *amerciements* and fines, is this; fines are said to be punishments certain, and grow expressly from some statute; but *amerciements* are such as are arbitrarily imposed. *Kitch.* 78. Also fines are imposed and assessed by the court: *amerciements* by the country; and no court can impose a fine, but a court of record: other courts can only *amerce*. 8 Rep. 39, 41.

A court-leet can *amerce* for public nuisances only. 1 Sams. 135. For a fine and all *amerciements* in a court-leet, a distress is incident of common right; but for *amerciament* in a court baron, distress may not be taken but by prescription. 11 Rep. 45. When an *amerciament* is agreed on, the lord may have an action of debt, or distress for it, and impound the distress, or sell it at his pleasure; but he cannot imprison for it. 8 Rep. 41, 45. Vide the case of the *Duke of Bedford v. Allcock*, B. R. 1 Will. 248. See tit. *Lect.*

There is also *amercement* in pleas in the courts of record, when a defendant delays to tender the thing demanded by the king's writs, on the first day. *Co. Lit.* 116. And in all personal actions without force, as in debt, detinue, &c. if the plaintiff be nonsuited, barred, or his writ abate for matter of form, he shall be *amerced*: but if on judicial process, founded on a judgment and record, the plaintiff be nonsuited, barred, &c. he shall not be *amerced*. 1 Nelf. Abr. 206. And an infant, if nonsuited, is not to be *amerced*: *Jenk. Cent.* 258. The *capias pro fine* is taken away by 5 W. & M. c. 12.

The *amercement* of the sheriff, or other officer of the king, for misconduct, is called *amerciament royal*. *Terms de Ley*. *Amerciements* are likewise in several other cases. See tit. *Fines for Offences*.

AMESSE, see *Amictus*.

AMI, vide *Amicus*.

AMICIA, see *amictum*.

AMICIUS. The uppermost of the six garments worn by priests, tied round the neck, and covering the breast and heart—*Amictus*, *alba*, *cingulum*, *stola*, *manipulus* et *planctus*.—These were the six garments of priests.

AMICUS CURIÆ. If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court, as *amicus curiæ*. 2 Co. Inst. 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading, and sometimes as *amicus curiæ*. 2 Keb. 548. Any one as *amicus curiæ* may move to quash a vicious indictment; for if there were a trial and verdict, judgment must be arrested. *Comberb.* 13. A counsel urged, that he might, as *amicus curiæ*, inform the court of an error in proceedings, to prevent giving false judgment; but it was denied, unless the party was present. 2 Show. Rep. 297.

AMITTERE LEGEM TERRÆ, or LIBERAM LEGEM. To lose and be deprived of the liberty of swearing in any court: as to become infamous, renders a person incapable of being an evidence. Vide *Glanvill*, lib. 2. And see the statute 5 Eliz. cap. 9. against perjury. So a man that is outlawed, &c. is said to *lose his law*, i. e. is put out of the protection of the law, as least so far as relates to the suing in any of his majesty's courts of justice, though he may be sued.

AMMOBRAGIUM. A service, suggested by *Spelman* to be the same as *Chevaage*; which see.

AMNESTY, *amnestia*, *oblivio*.] An act of pardon or oblivion, such as was granted at the restoration by king Charles II.

AMNITUM INSULÆ. Isles upon the West coast of Britain. *Blount*.

AMORTIZATION, *amortizatio*, Fr. *amortissement*.] An alienation of lands or tenements in mortmain, viz. to any corporation or fraternity, and their successors, &c. And the right of *amortization* is a privilege or licence of taking in mortmain. In the statute *de libertatibus perquirendis*; an. 27 Ed. 1. st. 2, the word *amortissement* is used.

AMORTISE, Fr. *amortir*.] To alien lands in mortmain.

AMPLIATION, *amplatio*.] An enlargement; in law a referring of judgment, till the cause is further examined.

AMY, *amicus*.] In law *prochein amy* is the next friend to be trusted for an infant. And infants are to sue by *prochein amy* (i. e. next friend) or guardian, and defend by guardian. *Alien amy* is a foreigner here subject to some prince in friendship with us.

AN, JOUR & WASTE. See Year, Day and Waste.

ANCESTOR, *anteceſſor*, or *predeceſſor*.] One that has gone before in a family: but the law makes a difference between what we commonly call an ancestor and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politic and their predecessors. *Co. Lit.* 78. b.

ANCESTREL. What relates to or hath been done by one's ancestors; as *homage ancestrel*, &c.

ANCHOR. Is a measure of brandy, &c. containing ten gallons. *Lex Mercat.*

ANCHORAGE, *ancoragium*.] A duty taken of ships for the use of the haven where they cast anchor. *Mss. A. 15. Trevor, Arm.* The ground in ports and havens belonging to the king, no person can let any anchor fall thereon, without paying therefore to the king's officers.

ANCIENTS. Gentlemen of the *inns of court*. In *Gray's inn* the society consists of *benchers*, *ancients*, *barristers*, and *students* under the bar; and here the *ancients* are of the oldest barristers. In the *Middle Temple*, such

as have gone through, or are past their readings, are termed *ancients*: the inns of *Chancery* consist of *ancients* and students or clerks; and from the *ancients* one is yearly chosen the principal or treasurer.

ANCIENT DEMESNE, or *domain*; *vetus patrimonium domini*.] Is a tenure whereby all the manors belonging to the crown in the days of St. Edward and William, called the *Conqueror*, were held. The number and names of all manors, after a survey made of them, were written in the book of *Domesday*; and those which by that book appear to have at that time belonged to the crown, and are contained under the title *terra regis*, are called *ancient demesne*. *Kitch.* 98. The lands which were in the possession of *Edward the Confessor*, and were given away by him, are not at this day *ancient demesne*, nor any others, except those writ down in the book of *Domesday*; and therefore, whether such lands are *ancient demesne* or not, is to be tried only by that book. *1 Salk.* 57: *4 Inst.* 269: *Hob.* 188: *1 Brownl.* 43. *F. N. B.* 16. D.

But if the question is, whether lands be parcel of a manor which is *ancient demesne*, this shall be tried by a jury. For 'parcel or not parcel' is matter of fact, *9 Rep.* case of the abbot of *Strata Marcella*, *Salk.* 56. 774. and see *2 Burr.* 1046.

Fitzherbert tells us, that tenants in *ancient demesne* had their tenures from ploughing the king's lands, and other works towards the maintenance of the king's freehold, on which account they had liberties granted them. *F. N. B.* 14, 228. And there were two sorts of these tenures and tenants; one that held their lands freely by charter; the other by copy of court-roll, according to the custom of the manor. *Brit. c.* 66. The tenants holding by charter cannot be impleaded out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold concerning their substance and husbandry. And they may not be impanelled upon any inquest. *F. N. B.* 14.

If tenants in *ancient demesne* are returned on juries, they may have a writ *de non posendis in assis*, &c. and attachment against the sheriff. *1 Rep.* 105. And if they are disturbed by taking duties of toll, or by being distrained to do unaccustomed services, &c. they may have writs of *Monstraverunt*, to be discharged. See *F. N. B.* 14: *New Nat. Br.* 32, 35: *4 Inst.* 269. These tenants are free as to their persons; and their privileges are supposed to commence by act of parliament; for they cannot be created by grant at this day. *1 Salk.* 57.

Lands in *ancient demesne* are extendible upon a statute merchant, *l. ap. l.* or *elegit*. *4 Inst.* 270. No lands ought to be accounted *ancient demesne* but such as are held in socage; and whether it be *ancient demesne* or not, shall be tried by the book of *Domesday*. A lessee for years cannot plead in *ancient demesne*: nor can a lord in action against him plead *ancient demesne*, for the land is frank-fee in his hands. *Danv.* Abr. 660.

In real actions, *ejectment*, *replevin*, &c. *ancient demesne* is a good plea; but not in actions merely personal. *Danv.* 658. If in *ancient demesne* a writ of right close be brought, and prosecuted in nature of a *formedon*; a fine levied there by the custom, is a bar: and if this judgment be reversed in C. B. that court shall only adjudge, that the plaintiff be restored to his action in the court of *ancient demesne*; unless there is some other cause, which takes away its jurisdiction. *Jenk. Cent.* 87. *Dyer* 373.

See the statutes *9 H. 4. c. 5.* & *8 H. 6. c. 26.* to prevent depriving lords in *ancient demesne* of their jurisdiction by collusion.

A fine in the king's courts will change *ancient demesne* to frank-fee at common law; so if the lord enfeoffs another of the tenancy; or if the land comes to the king, &c. *4 Inst.* 270. See *Fine*. But if the lord be not a party, he may have a writ of *disseisin*, and avoid the fine or recovery; for lands in *ancient demesne* were not originally within the jurisdiction of the courts of *Westminster*; but the tenants thereof enjoy this amongst other privileges, not to be called from the business of the plough by any foreign litigation. *1 Rol. Abr.* 327. If the lord be party, then the lands become frank-fee, and are within the jurisdiction of the courts of *Westminster*, for the privilege of *ancient demesne* being established for the benefit of lord and tenant, they may destroy it at pleasure. *2 Rol. Abr.* 324: *1 Salk.* 57.

With respect to *pleading*, it is to be observed, that in all actions wherein, if the demandant recover, the lands would be frank-fee, *ancient demesne* is a good plea. *1 Rol. Abr.* 322.

Therefore in all actions real, or where the realty may come in question, *ancient demesne* is a good plea; as *assise*, writ of *ward of land*, writ of *account* against a bailiff of a manor, writ of *account* against a guardian, &c. See *4 Inst.* 270: *1 Rol. Abr.* 322, 323.

In *replevin* *ancient demesne* is a good plea, because by intentment the freehold will come in question. *Godb.* 64. *1 Bulst.* 108.

In an *ejectione firmæ* *ancient demesne* is a good plea; for by common intentment the right and title of the land will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by *ejectment*. *Hob.* 47: *1 Bulst.* 108: *Hetl.* 177: *Cro. Eliz.* 826.

But in all actions merely personal, as *debt* upon a lease, *trespass*, *quare clauum fregit*, &c. *ancient demesne* is no plea. *Hob.* 47: *5 Co.* 105. For further matter see *Kyd's Com. Dig.* tit. *Ancient Demesne*.

ANCIENTY, *Fr.* *Ancienté*, *Lat.* *Antiquitas*.] Eldership or seniority. This word is used in the stat. of *Ireland*, 14 Hen. 3.

ANDENA, A swath in mowing: it likewise signifies as much ground as a man can stride over at once.

ANELACIUS, A short knife or dagger. *Mat. Paris* 277.

ANFELDTYHDE, or according to *Sommer*, *Anfealtible*, A simple accusation; for the Saxons had two sorts of accusations, *viz.* *simplex* and *triplex*: that was called *single*, when the oath of the criminal and two more was sufficient to discharge him; but his own oath, and the oaths of five more were required to free him à *triplici accusatione*. *Blount*. See *Leg. Adelsani*, cap. 19. *apud Brompton*.

ANGARIA, *Fr.* *Angaire*; interpreted *Personal Service*.] A troublesome vexatious duty or service which tenants were obliged to pay their lords; and they performed it in their own persons. *Impressing of ships*. *Blount*. See also *Spelman & Cowel*; the former of whom gives some fanciful derivations under this word, and *v. Penangaria*. It seems that it may be easily and rationally derived from *Angor*. *Lat.*

ANGELICA VESTIS, A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called *angelicus*, because they were called *angeli*, who by their prayers *cum te saluti succurrant*. And the word *succurrendum*, in our old books, is understood of one who had put on the habit, and was near death. *Monasticon*, 1 tom. p. 632.

ANGEL, An ancient English coin value 10s.

ANGILD, *Angeltun*] The bare single valuation or compensation of a criminal; from the Saxon. *Ang* one, and *gild* payment, mulct, or fine. *Tessild* was the double mulct or fine; and *trigild* the triple, according to the rated ability of the person. *Laws of I. a. c. 20: S. d. m.*

ANALOPPE, A single tribute or tax. The words *anblote* and *anset* are mentioned in the laws of *William the Conqueror*; and their sense is, that every one should pay according to the custom of the country, his part and share, as foot and let, &c. *Leg. H. 1. c. 64.*

ANIENS, *Fr.*] Void, being of no force. *F. N. B. 214.*

ANNALES, Yearlings, or young cattle from one to two years old.

ANNATIS, *Annates*.] This word has the same meaning with first tithes, stat. 25 H. 8. c. 20. The reason of the name is, because the rate of the first-fruits paid for spiritual livings, is after the value of one year's profit.

ANNEALING OF TILE, stat. 17 Ed. 4. c. 4. From the Saxon, *Annelan*, *Accendere*, signifies the burning or hardening of tile.

ANNIENTED, from the *Fr. Annéti*.] Abrogated, frustrated, or brought to nothing. *Lit. f. 741.*

ANNIVERSARY DAYS, *Dies Anniversarii*.] Solemn days appointed to be celebrated yearly in commemoration of the death or martyrdom of saints; or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the *Roman Catholics*, mentioned in the statute of 1 Ed. 6. c. 14. This was in use among our ancient Saxons, as may be seen in *Lib. Ramef. f. 134.* The anniversary, or yearly return of the day of the death of any person, which the religious registered in their *etiquet* or *martyrology*, and annually observed in gratitude to their founders and benefactors, was by our forefathers called a *year day* and a *mind-day*, i. e. a memorial day.

ANNI NUBILES, see tit. *Age*.

ANNO DOMINI, The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The Romans began their *era* of time from the building of *Rome*; the *Græcians* computed by *Olympiads*, and the *Christians* reckon from the birth of *Jesus Christ*.

ANNOISANCE, **ANNOYANCE**, or *Noissance*, *Nuisance*, thus termed in stat. 22 H. 8. c. 5. Vide titles *Nuisance* and *Highways*.

ANNUA PENSIONE, An ancient writ for providing the king's chaplain unprovided with a pension. It was brought where the king had due to him an *annual pension* from an *abbot* or *prior*, for any of his chaplains whom he should nominate, (being unprovided of livings) to demand the same of such abbot or prior. *Terms de la Ley* 43: *Reg. Orig.* 165, 307.

ANNUALE, **ANNUALIA**. A yearly stipend annually assigned to a priest for celebrating an anniversary,

or for saying continued masses one year, for the soul of a deceased person.

ANNUITY, *Annuitus relictus*; A yearly payment of a certain sum of money, granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charged therewith; whereof a man shall never have assise or other action, but a writ of *annuity*. *Terms de Ley* 44: *Reg. Orig.* 158: *Co. Lit.* 144. b.

To make a good grant of an *annuity*, no particular technical mode of expression is necessary. For if a man grants an *annuity* to another, to be received out of his assise, or to be received out of a bag of money, or to be received of a stranger, yet this is sufficient to charge his person, and the subsequent words shall be rejected. 1 *Roll. Abr.* 227.

If a man grant a rent out of land, in which he has nothing, *provisô* that he be not charged for this in a writ of *annuity*, it shall be a good annuity; for the proviso, being repugnant, is void. *Co. Lit.* 145 a: 2 *Bull.* 149. See 6 *Co.* 58 b.

If a man grant a rent charge out of his land, the grantee has an election to take it as a rent; or as an annuity. *Lit. f. 219: 2 Bull.* 148.

The treatise called *Dorior and Stadout*, dial. 1. cap. 3, shews several differences between a rent and an *annuity*, viz. that every rent is issuing out of land; but an *annuity* chargeth the person only, as the grantor and his heirs, who have assise by descent.

If no lands are bound for the payment of an *annuity*, a distress may not be taken for it. *Dor.* 65.

But if an *annuity* issue out of land, (which of late it often doth) the grantee may bring a writ of *annuity*, and make it personal, or an assise, or distrain, &c. so as to make it real. *Co. Lit.* 144. And if the grantee take a distress, yet he may afterwards have a writ of *annuity*, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 *Inst.* 145. But if the grantee of a rent bring an assise for it, he shall never after have writ of *annuity*; he having elected this to be a rent; so if the grantee of an *annuity* avow the taking of a distress in a court of record. *Danco. Abr.* 486. And if the grantee purchase part of the land out of which an *annuity* is issuing, he shall never after have a writ of *annuity*. *Co. Lit.* 148.

Where a rent-charge, issuing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and so charge the lands therewith, or a personal thing to charge the person of the grantor in *annuity*. 2 *Rep.* 36. A. seised of lands in fee, he and B. grant an *annuity* or rent-charge to another; this *prima facie* is the grant of A. and confirmation of B. But the grantee may have a writ of *annuity* against both. If two men grant an *annuity* of 20 l. per ann. although the persons be several, if the deed of grant be not for them severally, yet the grantee shall have but one *annuity* against them. *Co. Lit.* 144.

When a man recovers in a writ of *annuity* he shall not have a new writ of *annuity* for the arrears due after the recovery, but a *scire facias* upon the judgment, the judgment being always executory. 2 *Rep.* 37. No writ of *annuity* lieth for arrears only when an *annuity* is determined, but for the *annuity* and arrears, *Co. Lit.* 285. Though, if a rent-charge be granted out of a lease for years, it hath been adjudged that the grantee may bring *annuity* when the lease is ended. *Moor, cap.* 450. Where

an annuity is granted to one for life, during the term he shall have writ of annuity; and when that is determined, then his executors may have action of debt: for the realty is resolved into the personality. 4 Rep. 49. New Nat. Br. 287.

If the annuitant of an annuity payable half yearly, since the last term of payment, die before the half year is completed, nothing is due for the time he lives. 3 Atk. 260. So if a grant be made to A. for life to be paid at the feast of Easter or within 20 days after, and he die after Easter within 20 days, it has been said his executor shall not have it, for the last day was the time of payment. Dal. 1.

Upon a rent created by way of reservation, no writ of annuity lies. Darv. 483. Writ of annuity may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be assets to bind the heir, by grant of annuity by his ancestor, when he is named. Co. Lit. 144: 1 Roll. Abr. 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seised, for this charges the land, but an annuity charges the person only. Br. Charge, pl. 54.

An annuity granted by a bishop, with confirmation of dean and chapter, shall bind the successor of the bishop. New Nat. Br. 340. If the king grant an annuity, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c. or the grant will be void; for the king may not be sued, and no person is bound to pay it, if not expressed in the patent. New Nat. Br. 341. If, where an annuity is granted *pro decimis*, the grantor is disturbed of his tithes, the annuity ceaseth; and so it is where any annuity is granted to a person *pro consilio*, and the grantee refuseth to give counsel; for where the cause and consideration of the grant amounts to a condition, and the one ceases, the other shall determine. Co. Lit. 204.

There are now very few, if any, grants of annuities, without a covenant for payment, expressed or implied; and therefore, where a distress can't be made, or is not approved of, the grantee may bring an action of covenant, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of annuity being much out of use.

ANNUITIES FOR LIFE. To guard against the fraudulent and oppressive practices of usurious money-lenders, exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the following act.

By stat. 17 Geo. 3. c. 26, a memorial of every deed, bond, or other assurance, whereby any annuity or rent-charge shall be granted for life, or for term of years, or greater estate determinable on lives, shall within 20 days of the execution (exclusive of the day of execution: 5 Term Rep. 283), be enrolled in Chancery; such memorial to contain the date of the deed, the name of all the parties, and for whom any of them are trustees, and of all the witnesses; and to set forth the annual sum to be paid, and the name of the person for whose life the annuity is granted, and the consideration; otherwise every such deed and assurance shall be void. § 1, 2.

In every deed, &c. whereby any annuity shall be granted, the consideration really (which shall be in money only) and also the name of the person by whom, and on whose behalf the consideration shall be advanced shall be

set forth in words at length, otherwise such deed shall be void. § 3.

If any part of the consideration shall be (directly or indirectly) returned to, or retained by the party advancing the same, or if the consideration or any part shall be in goods, the annuitant may apply to the court in which any action is brought, to stay proceedings, and the court may order the assurance to be cancelled, and any judgment to be vacated. § 4.

All contracts for the purchase of any annuity with any infant under 21 years of age shall be utterly void; notwithstanding any attempt to confirm the same on the infant's coming of age. And all persons soliciting infants to grant annuities, or advancing money to them on condition of their granting annuities when of age, or engaging them by oath or promise not to plead infancy. And solicitors or brokers demanding gratuities for procuring money (beyond 10s. per cent.) shall all be judged guilty of misdemeanors, and liable to fine, imprisonment, and corporal punishment. § 6, 7.

This act does not extend to any annuity given by will or marriage settlement, or for the advancement of a child; nor to any secured on lands of equal annual value whereof the grantor is seised in fee simple or fee tail in possession, or secured by actual transfer in the funds, the dividends being of equal value with the annuity; nor to any voluntary annuity without pecuniary consideration; nor to annuities granted by corporations, or under act of parliament; nor where the annuity does not exceed 10l. unless there be more than one to the same grantor, nor in trust for the same person. § 8.

A deed not registered according to the directions of the above act, is absolutely void and not merely voidable. 2 Term Rep. 603. See also 4 Term Rep. 463, 494, 500, 694, 790, 814.

Notes given as part of the consideration (which if actually given *bonâ fide* are to be understood as money) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 Term Rep. 288.—The redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 Term Rep. 283.

If the security be set aside for want of complying with the formalities of the act, the consideration, if fair and legal, may be recovered back by the grantee in action of *assumpsit*, against the person actually receiving such consideration money, but not against a surety. 1 Term Rep. 732: 2 Term Rep. 366.

How far the act extends to annuities granted previous to its passing, see 1 Term Rep. 267, 8.

For further matter relative to Annuities in general, as well as those for life, see Com. Dig. tit. Annuity.

ANNUITIES PUBLIC, see tit. National Debt.

ANSEL, or Ansil. See Ansil weight.

ANTEJURAMENTUM, and *Præjuramentum*. By our ancestors called *juramentum calumniæ*; in which both the accuser and the accused were to make this oath before any trial or purgation, viz. the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. Leg. Athelstan, apud Lambard 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended

tended to be guilty, and not admitted to purge himself. *Leg. Hen. 1. c. 66.*

ANTISTITUTUM, A word used for 'monastery in our old histories. *Blount.*

ANTITHETARIUS, Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of *Cnutus*, *cap. 47.*

APATISATIO, An agreement or compact made with another. *Upton. lib. 2. c. 12.*

APORIARE, To bring to poverty. *Walsingham in R. 2.* In another sense, to shun or avoid.

APOSTARE, To violate: *apostare leges*, and *apostatare leges*, wilfully to break or transgress, to apostatise from the laws. See *Leg. Edw. Confessoris*, c. 35.

APOSTATA CAPIENDO, A writ that formerly lay against one who, having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order; it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. *Reg. Orig. 71, 267.*

APOTHECARIES, are exempted from serving offices. See tit. *Constable, Churchwarden.* Their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty shall be burnt, &c. *32 Hen. 8. c. 40: 1 M. Stat. 2. c. 9.* And *apothecaries* to the army are to make up their chests of medicines at *Apothecaries' Hall*, there to be openly viewed, &c. under the penalty of 40*l.* See *Physicians.*

APPARATOR, or **APPARITOR**, A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. See *Stat. 21 Hen. 8. c. 5.*

If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Hy. Paring. 70: 2 Bulst. 264.*

APPARATOR COMITATUS, An officer formerly called by this name; for which the sheriffs of *Buckinghamshire* had a considerable yearly allowance; and in the reign of queen *Elizabeth*, there was an order of court for making that allowance; but the custom and reason of it are now altered. *Hale's Sher. Acco. 104.*

APPARLEMENT, from the *Fr. Parcillement*, i. e. in like manner.] A resemblance or likelihood; as *apparlement* of war. *Stat. 2 R. 2. ft. 1. c. 6.*

APPARURA, Furniture and implements. *Carrucarum apparura* is plough tackle, or all the implements belonging to a plough. *Blount.*

APPEAL, Is used in two senses.

1. It signifies the removal of a cause from an inferior court or judge to a superior. From the *French* verb *neutral*, **APPELLER**, of the same signification. As relative to this sense see the proper titles in this Dictionary. It may be well also in this place to observe the difference between an appeal from a court of equity, and a writ of error from a court of law. First, the former may be brought upon any interlocutory matter; the latter upon

nothing but only a definitive judgment. Secondly, that on writs of error the House of Lords pronounces the judgment; on appeals it gives direction to the court below to rectify its own decree. *3 Comm. 55.*

2. When spoken of as a criminal prosecution, it denotes an accusation by a private subject against another for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the publick. And in this sense it is derived from the *French* verb *actives*, **APPELLER**, to call upon, summon or challenge one. *4 Comm. 312.* Or the accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver. (See tit. *Accessory*) *Co. Lit. 287.* See also *Briat. lib. 3: Brit. c. 22, 25: Staundf. lib. 2. c. 6.*

CRIMINAL APPEALS are either *capital* or *not capital*—But of the latter sort appeals *de pace, de plagis, de imprisonment*, and of *mayhem*, are now become *obsolete* being turned into actions of trespass long since. *Leach's Hawk. P. C. ii. 235.* of the last however a few words shall be said hereafter. Capital appeals are either of *Treason* or *Felony*. The latter may be subdivided into 1. *Appeals of Death*, or as they are otherwise called *Appeals of Murder*. 2. *Appeals of Larceny or Robbery*. 3. *Appeals of Rape*. 4. *Appeals of Assault*, which last are now entirely obsolete. *1 Inst. 288 a.* and see *2 Hawk. P. C. c. 23.*

This private process for the punishment of publick crimes, probably had its original in those times, when a private pecuniary satisfaction, or *weregild* was constantly paid to the party injured, or his relations to expiate enormous offences. As therefore during the continuance of this custom, a process was certainly given, for recovering the *weregild* by the party to whom it was due; it seems that when these offences by degrees grew no longer redeemable, the private process was still continued in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation. *4 Comm. 313, 4.*

It was also anciently permitted (as above hinted) for one subject to appeal another of *high Treason*, either in the courts of common law (*Britt. c. 22.*) or in parliament; or, for treasons committed beyond the seas, in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631, there was a trial by battle awarded in the court of chivalry on such appeal of treason; [By *Donald Lord Rae* against *David Ramsay*. *Rushw. vol. 2. part 2. p. 112.*] But the cognizance of appeals for treason in the common law courts was virtually abolished by *stat. 5 E. 3. c. 9: & 25 E. 3. [stat. 5. c. 4.]* (*1 Hale P. C. 349, 359:*) and in Parliament expressly by *stat. 1 H. 4. c. 14.* See *4 Comm. 314.*

On this subject *Mr. Kyd* the ingenious editor of *Comyns's Digest* makes the following useful remark.—It does not appear that the appeal of treason is taken away by this statute (*1 H. 4. c. 14.*) or any other. The *stat. 5 E. 3. c. 9.* only says, that none shall be attached, &c. against the form of the great charter and the laws of the land. The *stat. 25 E. 3. [stat. 5.] c. 4.* goes a little farther and says "that none shall be taken by petition or suggestion to the king or to his council, but by indictment or presentment, or by process made by writ original at the common law." It is conceived that a writ of appeal is a writ original; (*2 Hawk. 232: 5 Burr. 2643:*) therefore if an appeal of treason was part of the common law, these

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these statutes do manifestly not take it away. The stat. 1 H. 4. c. 14. applying only to appeals in parliament. See *Com. Dig.* tit. *Appeal* (A. 1.)

However, as there has been no instance of any such appeal, before any court of common law, either since the making the stat. 1 H. 4. c. 14, nor for many years before, the law relating to such appeals seems wholly obsolete at this day. *Leach Hawk. P. C.* ii. c. 23. § 29.

An *Appeal of Felony* may be brought for crimes committed either against the parties themselves or their relations. The crimes against the parties themselves are *Larceny*, *Rape*, *Maim*, and *Assault*. The only crime against one's relation, for which an appeal can be brought is that of killing him; either by murder or manslaughter. 4 *Comm.* 314. (But this seems an unguarded assertion in the learned commentator, as an appeal is given to the husband, next of kin, &c. by stat. in case of Rape. See post. III. *Appeal of Rape*.)

Appeal of Death cannot be brought by every relation, but only by the wife for the death of her husband, *Magna Charta* c. 34. or by the heir male for the death of his ancestor; which heirship was also confined by an ordinance of king Henry the First to the four nearest degrees of blood. *M. r.* c. 2. § 7. It is given to the wife on account of the loss of her husband; therefore if she marries again before or pending her appeal, it is lost and gone; (2 *Inst.* 68, 317). or if she marries after judgment, she shall not demand execution. (2 *Hawk. P. C.* 213. by which it seems that the Court may award execution *ex officio*—*sed dubitatur*). The heir must also be heir male, and such a one as was the next heir by the course of the common law at the time of the killing of the ancestor (*H. P. C.* 182.) But this rule has three exceptions. 1st. If the person killed leaves an innocent wife, she only and not the heir shall have the appeal. 2d. If there be no wife, and the heir be accused of the murder, the person who next to him would have been heir male, shall bring the appeal. 3d. If the wife kill her husband the heir may appeal her of the death (1 *Lev.* 325: 1 *Inst.* 33.) And by the stat. of *Glocester* 6 E. 1. c. 9. all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party; which seems to be only declaratory of the old common law. 4 *Comm.* 314, 5.

These several appeals may be brought previous to any indictment; and if the appellee be acquitted thereon he cannot be afterwards indicted of the same offence. 2 *Hawk. P. C.* c. 35. § 15. [But if the appellant does not prosecute his appeal, or if he release to the appellant, the appellee may be indicted. 3 *Inst.* 131: *Staudf.* 147. 8.] But if a man be acquitted on an indictment for murder, or found guilty and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of stat. 3 H. 7. c. 1. in order to be furthering to answer an appeal for the same felony, though if he has been found guilty of manslaughter, or on indictment, and has had the benefit of clergy and suffered the judgment of the law, he cannot afterwards be appealed. 4 *Comm.* 315.

If the defendant on an indictment is convicted of manslaughter, and allowed his clergy, some of the books say the heir may lodge an appeal immediately before clergy had: and others say clergy ought to be granted, and that it is unreasonable an appeal should interpose presently to prevent judgment. 3 *Inst.* 131. If a person, immedi-

ately after the verdict of manslaughter, put in an appeal of murder, and before the appeal is arraigned, the defendant demands his benefit of clergy; this is a good bar to appeal; and praying of clergy, is having of clergy, though the court delay calling the party to judgment, &c. 1 *Salk.* 60, 62: *Kel.* 93. But formerly it was held, that the court might delay the calling a convict to judgment, and thereby hinder him from his clergy, and make him liable to an appeal, especially if the appeal were depending: and where the record of a conviction of manslaughter is erroneous, or insufficient, &c. the offender cannot plead the conviction and clergy had therein, in bar of an appeal or second indictment, &c. 2 *Hawk. P. C.* c. 36. § 12, 14.

If the appellee be acquitted, the appellor (by stat. *Westm.* 2: 13 E. 1. c. 12,) shall suffer one year's imprisonment and pay a fine to the king, besides damages to the party; and if the appellor be incapable to make restitution in damages, his abettors shall do it for him, and also be liable to imprisonment. This provision as was foreseen by the author of *Fleta* (*lib.* 1. c. 34. § 48.) proved a great discouragement to appeals; so that thenceforward they ceased to be in common use. 4 *Comm.* 316.

If the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment; but with this remarkable difference; that on an indictment the king may pardon and remit the execution; but on an appeal, being the suit of a private subject, to make atonement for the private wrong, the king can no more pardon it than he can remit the damages recovered in an action of battery. 4 *Comm.* 316. See 2 *Hawk. P. C.* c. 37. § 35: *Jenk.* 160. pl. 4. [But by the express provision of stat. 4 & 5 W. & M. c. 8. an accomplice convicting two others guilty of robbery shall have the king's pardon, which shall be a good bar to an Appeal of Robbery.]

The punishment of the offender may however be remitted and discharged by the concurrence of all parties interested in the appeal. 1 *Hale P. C.*

Having said thus much on the subject of appeals in general, the following miscellaneous matter may serve for further elucidation. I. Appeals of Death; II. Appeals of Maim; III. Appeals of Rape; IV. Appeals of Robbery.—The student who wishes for the most ample information on this subject must apply to *Hawkins P. C.* vol. ii. and *Com. Dig.* tit. *Appeal*.

I. For the proceedings on an appeal of Death, see the case of *Bigby widow v. Kennedy*, 5 *Burr.* 2643; where they are detailed much at length and with great exactness.

At the common law, a woman as well as a man might have an appeal of death of any of her ancestors, and therefore the son of a woman shall at this day have an appeal, if he be heir at the death of the ancestor, for the son is not disabled, but the mother only; for the statute of *Mag. Ch.* c. 34. says *propter appellum feminæ*. 2 *Inst.* 68. the husband shall not have appeal for the death of his wife, but the heir only. *Darro. Ab.* 1. 488.

The judges are so far bound to take notice of this statute, that if a woman brings an appeal of death of her father, or of any other besides her husband, they ought *ex officio* to abate it, tho' the defendant takes no exception to it. 2 *Hawk. P. C.* cap. 23. f. 42.

A feme shall have appeal where she shall have no dowry, as where she elopes from her baron. *Br. Appeal.* pl. 17. cites 50 E. 3. 15. per *Ingleby*.

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The wife is to be a wife *de facto* to be intitled to *appeal*; 2 *Inst.* 68, 317. Where a woman has judgment in *appeal*, of the death of her husband, she cannot have execution if she do not personally pray it: a judge went to a woman great with child, to know if she would have execution? She said, Yes, and the *appellee* was hanged. *Jenk. Cent.* 137.

An idiot, or a person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any *appeal* whatsoever. *H. P. C.* 183: 2 *Hawkt. P. C. c.* 23. § 30.

The *appellant* is to commence his *appeal* in person; but he may proceed by attorney, having a special warrant of attorney filed. 1 *Salk.* 60. The *appeal* must be brought in a year and a day after the death of the person murdered: and the count must set forth the fact, and the length and depth of the wound, the year, day, hour, place where done, and with what weapon, &c. And that the party died in a year and a day. 2 *Inst.* 665; 3 *Inst.* 6 *Ed.* 1. c. 9. principal and accessaries before and after are to be joined in *appeal*. *Danv. Abr.* 493. And this is to be observed, though the accessory is guilty in another county. *Stat.* 3 *H. 7. c.* 1.

An *appeal* is prosecuted two ways; either by writ, or bill: *appeal* by writ is when a writ is purchased out of *chancery* by one for another, to the intent he may *appeal* a third person of some felony committed by him, finding pledges that he shall do it: *appeal* by bill is where a man of himself gives up his accusation in writing, offering to undergo the burden of *appealing* the person therein named. *Bracton*.

This *appeal* may be brought by bill before the justices in the *King's Bench*; before justices of goal delivery, and commissioners of *oyer and terminer*, &c. or before the sheriff and coroner, in the county court: but the sheriff and coroner have only power to take and enter the *appeal* and count, for it must be removed by *certiorari* into *B. R.*

In *appeal* by original, principals and accessaries are generally charged alike without distinction, till the plaintiff counts: but 'tis otherwise in *appeals* by bill. *Danv.* 494.

There is but one *appeal* against the principal and accessory: if the principal is acquitted, it shall acquit the accessory; and both shall have damages against the appellant on a false *appeal*, or the accessory may bring a writ of conspiracy. 2 *Inst.* 383.

If the defendant in *appeal* is attaint, or acquit: or the plaintiff nonsuit after appearance, which is peremptory, no other *appeal* lies. *H. P. C.* 188. If there be an indictment and *appeal* depending at the same time against the same person, the *appeal* shall be tried first, if the appellant be ready. *Kel.* 107. Otherwise the king would destroy the suit of the party. *Jenk.* 160. pl. 4.

The case of other appeals than of murder, as of robbery, rape, &c. are not within *stat.* 3 *H. 7. c.* 1; and therefore *auterfois acquit*, upon an indictment within the year, stands at common law a good bar to an *appeal* of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape, or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 *H. 8. cap.* 12,

gives restitution to the prosecutor as effectually as upon an *appeal*. 2 *Hale's Hist. P. C.* 250.

A charter of pardon is no bar of an *appeal*; and if the party be outlawed, &c. in *appeal*, and the king pardon him, a *scire facias* shall issue against the appellant, who may pray execution, notwithstanding such pardon; but if returned *sci. fac.* and he appears not, then the *appellee* shall upon the pardon be discharged. *H. P. C.* 251. A peer in *appeal* of murder shall not be tried by his peers, but by a common jury; though he shall upon an indictment for murder. *Vide stat.* 3 *H. 7. c.* 1. directing appeals before the sheriff and coroners, or at king's bench, or gaol delivery; and *stat.* 1 *H. 4. c.* 14. (mentioned before) that no appeals are to be pursued in parliament.

And where *appeal* of death is brought, the defendant cannot justify *se defendendo*; but must plead not guilty, and the jury are to find the special matter. *Bro. App.* 122. 3 *Salk.* 37.

The court *ex officio* will quash the writ for apparent faults appearing on the face of the writ; as where the sense is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 *Hawkt. P. C. c.* 23. § 57.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the fact is laid, &c. 2 *Hawkt. P. C. c.* 23. § 98.

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any *appeal*; but a release of all personal actions does not bar an *appeal* of felony, being an action of an higher nature. *Cro. Jac.* 283; *Yelv.* 204; 2 *Hawkt. P. C. c.* 23. § 155.

If the *appellee* pleads a special plea, which does not amount to a confession of the fact, he must at the same time plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where his plea declines the jurisdiction of the court. 2 *Hawkt. P. C. c.* 23. § 137; *Carth.* 56.

In *appeal of murder* brought by the wife for the death of her husband; the *appellee* pleaded, that she was never lawfully married to her husband, but did not plead over to the felony; adjudged, that this plea being to be tried by the ordinary upon his certificate, whether the marriage was lawful or not, in such case the defendant need not plead over to the felony; but where the plea is triable by the common law, he must plead over to the felony. *Cro. Eliz.* 224.

II. *Appeal of Maibem*, Is the accusing one that hath married another: but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages. In an action of assault and battery, the court may increase damages, on view of the *maibem*, &c. And though *maibem* is not felony, in *appeals* and indictments of *maibem*, the words *felonice maibemavit* are necessary. 3 *Inst.* 63. *Bracton* calls *appeal of maibem appellum de plagis & maibemio*, and writes a whole chapter upon it. *lib.* 3. *tract.* 2. *cap.* 24. In an *appeal of maibem*, the defendant pleads that the plaintiff had brought an action of trespass against him, for the same wounding, and had recovered, and damages given, &c. and this was a good plea in bar of the *appeal*; because in both actions damages only are to be recovered. 4 *Rep.* 43. And where there is a recovery in assault and battery,

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battery, &c. the jury give damages according to the hurt, which was done, and it shall be intended a *maibem* at that time; and therefore *appeal of maibem*, doth not lie. *Hob. 94: 1 Leon. 318.* In *appeal of maibem*, the appellant ought not to plead in abatement of the writ, and likewise over to the *maibem*; if he doth, he will lose the benefit of his plea to the writ. *Moor 457: See 2 Hawk. P. C. c. 23. § 16—28.*

III. *Appeal of Rape*, Lies where a *rape* is committed on the body of a woman. *3 Inst. 30.* A feme covert, without her husband, may bring *appeal of rape*: and stat. 6. R. 2. c. 6. gives power where a woman is ravished, and afterwards consents to it, for a husband, or a father, or next of kin, there being no husband, to bring *appeal of rape*: also the criminal, in such case, may be attainted at the suit of the king. *3 Inst. 131: 6 R. 2. cap. 6.*

If a woman be ravished by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the appeal; for he has disabled himself by the rape, whereby he becomes a felon. *2 Inst. 434—Hale's Hist. P. C. 632. S. P. cites 28 H. 6. Corone 459—2 Hawk. P. C. c. 23. § 64. S. P.*

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. *Hale's P. C. 180.*

This statute, as to the husband, shall be construed strictly, and be intended of a husband in possession, tho' there be good cause of divorce; for he is her husband till a divorce be had. See *Br. Parliament, pl. 89.* cites *11 H. 4. 13, 14: 2 Hawk. P. C. c. 23. § 62.* says, that *ne unques accouple*, &c. is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a *pre-contract*, ought to certify against the appellant.

The statute of *Westm. 1. c. 13.* which reduced the crime of *rape* to a trespass, enacts that *appeal of rape* shall be brought within forty days, but by stat. *Westm. 2. c. 34.* which makes this offence felony, no time is limited for the prosecution; so that it may be brought in any reasonable time. *H. P. C. 186.* *Appeal of rape* is to be commenced in the county where committed; and if a woman be assaulted in one county, and ravished in another, the *appeal of rape* lies in that county where she was ravished. *H. P. C. 186.* It is held, that though formerly the defendant might have his clergy, 'tis taken away by the stat. *18 Eliz. c. 17: Dyer 201.* See further on this subject, *2 Hawk. P. C. c. 23. § 58—73.*

IV. *Appeal of Robbery, or Larceny.* A remedy given by the common law, where a person is *robbed* of his goods, &c. to have restitution of the goods stolen: as they could not be restored on indictment at the king's suit, this *appeal* was judged necessary. *3 Inst. 242.* If a man *robbed* make *fresh pursuit* after, and apprehend and prosecute the felon, he may bring *appeal of robbery* at any time afterwards. *Staudf. 62.*

An *infant* shall have an *appeal of robbery.* *St. P. C. 60. b. cap. 9.*

Appeal of felony lies against a feme covert without her baron. *St. P. C. 62. cap. 11.*

So it lies against an *infant*; and so of all others who may commit felony. *St. Pl. C. 62. cap. 11.*

A woman at this day may have an *appeal of robbery, &c.* for she is not restrained thereof. *2 Inst. 68.*

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Adjudged, that an *appeal of robbery* may be brought by the party *robbed* twenty years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in *appeal of murder*: *4 Leon. 16.*

But the courts of law would now scarce permit a prosecution after such a length of time, unless good cause could be shewn why it had not been sooner commenced, as that the offender had fled the kingdom, and was but just returned, &c.

If one man *robs* several persons, every one of them may have *appeal*: likewise if the *robber* be attainted at the suit of one, he shall be tried at the suit of the rest, so as their *appeals* were commenced before the attainer. *Danv. Abr. 494.* In *appeal of robbery*, the plaintiff must declare of all the things whereof he is *robbed*, or they shall be forfeited to the king; for the appellant can have restitution for no more than is mentioned in his *appeal*. *3 Inst. 227.* By the Year-book 21 Ed. 1. 16, restitution of goods was granted upon an outlawry, in *appeal of robbery*; but a person having preferred an indictment against a *robber*, and afterwards an *appeal*, on which he was outlawed, the plaintiff moved to have restitution of his goods, and it was denied. *2 Leon. 108.*

If the count or declaration in *appeal of burglary* be sufficient, and the defendant is convicted at the suit of the party upon the *appeal*; he shall not be again impeached for the same offence at the king's suit. *4 Rep. 39.* By stat. 21 H. 8. c. 11, the like restitution of stolen goods may be had on *indictments* after attainer, as on *appeals*: and *appeals of robbery* are now much out of use. See further *2 Hawk. P. C. c. 23. § 44—57*; and this Dict. tit. *Robbery.*

APPEAL TO ROME. At the reformation in the reign of H. 8. the kingdom entirely renounced the authority of the see of Rome; and therefore by the several statutes 24 H. 8. c. 12. and 25 H. 8. c. 19 and 21, to appeal to Rome from any of the king's courts, (which tho' illegal before, had at times been connived at); to sue to Rome for any licence or dispensation; or to obey any process from thence are made liable to the pains of *præmunire*; and by stat. 5 Eliz. c. 1, to defend the pope's jurisdiction in this realm is a *præmunire* for the first offence, and high treason for the second. See tit. *Papists.*

Where an *appeal* in an *ecclesiastical cause* is made before the bishop, or his commissary, it may be removed to the archbishop; and if before an archdeacon, to the court of arches, and from the arches to the archbishop; and when the cause concerns the king, *appeal* may be brought in fifteen days from any of the said courts to the prelates in convocation. St. 24 H. 8. c. 12 — and the stat. 25 H. 8. c. 19, gives *appeals* from the archbishop's courts to the king in *chancery*, who thereupon appoints commissioners finally to determine the cause; and this is called the court of delegates: there is also a court of commissioners of review; which commission the king may grant as supreme head, to review the definitive sentence given on *appeal* in the court of delegates.

APPEARANCE, In the law signifieth the defendant's filing common or special bail, when he is served with copy of, or arrested on any process out of the courts at Westminster: and there can be no *appearance* in the court of B. R. but by special or common bail. There are four ways for defendants to *appear* to actions; in person,

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son, or by attorney; by persons of full age: and by guardians, or next friend, by infants. *Show.* 165.

By the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's special warrant by writ or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits. *Co. Lit.* 128: 2 *Inst.* 249. But it is now the common course for the plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ from the king for that purpose. And therefore, generally, in all actions real, personal, and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. *F. N. B.* 26.

But in every case, where the party stands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in person. As if he comes in by a *cepi corpus* upon an *exigent*. *F. N. B.* Or, if he be outlawed. 2 *Co.* 462, 616.

But by stat. 4 & 5 *W. & M. c.* 18. Persons outlawed in any case, except for treason or felony, may appear by attorney to reverse the same without bail; except where special bail shall be ordered by the court.

In all cases where process issues forth to take the party's body, if a common appearance only, and not special bail is required, there every such party may appear in court in his proper person, and file common bail. 1 *Lill. Abn.* 85: *Hil.* 22 *Car. B. R.*

In a capital criminal case the party must always appear in person, and cannot plead by attorney: also in criminal offences, where an act of parliament requires that the party should appear in person; and likewise in appeal, or on attachment. 2 *Hawk. P. C. c.* 22. § 1.

On an indictment, information or action, for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. 1 *Lev.* 146: *Kirkw.* 165: *Dyer* 346: *Co. Jac.* 462.

If husband and wife are sued, the husband is to make attorney for her. 2 *Saund.* 213, and see *Barnes* 412.

If an indent doth sue or defend, he cannot appear by guardian, *prochein amie*, or attorney, but must appear in proper person; but otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney, if of full age. *Co. Lit.* 135 b: 2 *Inst.* 390: 4 *Co.* 124.

A corporation aggregate of many persons cannot appear in person, but by attorney, and such appearance is good. 10 *Rep.* 32, in the case of *Sutton's Hospital*.

If a man is bound to appear in court on the first day of the term, it shall be intended the first day in common understanding, viz. the first day in full term. 1 *Lill.* 83: 2 *Leov.* 4.

If the plaintiff files common bail for defendant, he only can deliver a declaration by the bye. *R. M. T.* 10 *Geo.* 2.

But, when defendant has filed common or special bail for himself, any person may deliver or file a declaration against him by the bye, at any time during the term wherein the process against the defendant is *ret. sedente curia*; and the practice has been, that the plaintiff, at whose suit the process is, might declare against the defendant, in as many actions as he thinks fit, before the end of the next term, after the *ret.* of the process. *Impey's Pract. K. B.* 177: 4 *Burr.* 2180.

APPEN

Attornies subscribing warrants to appear, are liable to attachment, upon non-appearance. And where an attorney promises to appear for his client, the court will compel him to appear and put in common bail, in such time as is usual by the course of the court; and that although the attorney say he hath no warrant for appearance: nor shall repealing a warrant of attorney, to delay proceedings, excuse the attorney for his not appearing, who may be compelled by the court. See *Impey's Pract. K. B.* 189, cites *R. M.* 1654. The defendant's attorney is to file his warrant the same term he appears, and the plaintiff the term he declares, under penalties by stat. 4 and 5 *Ann. c.* 16.

An attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear. 1 *Salk.* 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, tho' the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney be not responsible or suspicious, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. 1 *Salk.* 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but said an action on the case lies. *Comb.* 2.

In actions by original, appearances must be entered with the filazer of the county; and if by bill, they shall be entered with the prothonotary: and by stat. 5 *Geo.* 2. c. 27, where defendant is served with a copy of the process appearances and common bail are to be entered and filed by him within eight days after the return of the process.—And if defendant does not appear, plaintiff may on affidavit of the service of process enter a common appearance for defendant and proceed thereon. stat. 12 *G.* 1. c. 29, and by stat. 25 *Geo.* 3. c. 80. f. 22, a common appearance may be filed by plaintiff without entering or filing of record, a memorandum or minute for defendant.

An appearance entered by plaintiff for defendant in a wrong name may be amended after declaration. 3 *Wilf.* 49.

An appearance by defendant cures all errors and defects in process. *Barnes* 163, 167: 3 *Wilf.* 141: *Lutro.* 954: *Jenk. Cent.* 57.

In what cases common appearance will be ordered, see *Impey's Pract. K. B.* 189, and this *Dict.* tit. *Bail, Arrest, &c.*

On two *writs* returned upon a *seire & alias seire facias*, they amount to a *seire feci*, and the plaintiff giving rule, the defendant is to appear, or judgment shall be had against him by default: and where a defendant doth not plead after appearance, judgment may be had against him. *Style* 208.

A wife may appear without her husband. 1 *Wilf.* 264. A man may appear before the return of a *capias ad respondendum*. *Id.* 39. For the appearance is to the suit.

Appearance in person and by attorney are very different. *Vide* 1 *Sid.* 93, 322, 392: 4 *Rep.* 71: 1 *Lev.* 80: *Ray.* 59.

As to Appearance by guardian and next friend, vide *Infants, &c.*

APPENDANT, *appendens*.] Is a thing of inheritance, belonging to another inheritance that is more worthy. As an advowson, common, court, &c. may be appendant to a manor,

a manor, common of fishing, *appendant* to a freehold: land *appendant* to an office: a seat in a church to a house, &c. But land is not *appendant* to land, both being corporeal, and one thing corporeal may not be *appendant* to another that is corporeal; but an incorporeal thing may be *appendant* to it. *Co. Lit.* 121: 4 *Rep.* 86: *Danv. Abr.* 500. A forest may be *appendant* to an honour; and waifs and estrays to a leet. *Co. Lit.* 367. And incorporeal things, advowsons, ways, courts, commons, and the like, are properly parcel of and *appendant* to corporeal things; as houses, lands, manors, &c. *Plowd.* 170: 4 *Rep.* 38.— If one disseise me of common *appendant* belonging to my manor, and during the disseisin I sell the manor; by this the common is extinct for ever. 4 *E. 3.* 21: 11 *Rep.* 47. Common of *estovers* cannot be *appendant* to land; but to a house to be spent there. *Co. Lit.* 120. By the grant of a messuage, the orchard and garden will pass as *appendant*.

Appendants are ever by prescription, and this makes a distinction between *appendants* and *appurtenances*, for *appurtenances* may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts, levant or couching upon his manor; or if he grant to another common of *estovers* or turbary in fee-simple, to be burnt or spent within his manor; by these grants, these commons are *appurtenant* to the manor, and shall pass by the grant thereof; in the civil law it is called *adjunctum*. *Co. Lit.* 121 *b.*

A way may be *quasi appendant* to a house, &c. and as such pass by grant thereof. *Cro. Jac.* 150.

What things may be *appendant*. *Vide Plow. Com.* 103. *b.* 104. *b.* 170. See also tit. *Appurtenances*.

APPENDITIA, The *appendages* or *pertinences* of an estate. Hence our *pentices* or *pent-houses*, are called *appenditia domus*, &c.

APPENNAGE, or *apennage*, *Fr.*] Is derived from *apennendo*; or the German word *apennage*, signifying a portion. It is used for a child's part or portion; and is properly the portion of the king's younger children in France. *Spelm. Gloss.*

APPENSURA. The payment of money at the scale or by weight. *Hist. Elton. edit. Gale.* l. 2. c. 19.

APPLES. A duty is granted on all apples imported into Great Britain. By what measure apples are to be sold, see 1 *Ann. Stat.* 1. c. 15.

APPODIARE. A word used in old historians, which signifies to lean on, or prop up any thing, &c. *Walsingham ann.* 1271. *Mat. Paris. Chron. Aulæ Regiæ ann.* 1321.

APPONERE. To pledge or pawn. *Neubrigensis lib.* 1. c. 2.

APPORTIONMENT, *apportionamentum*.] Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a stranger recovers part of the land, a lessee shall pay, having regard to that recovered, and what remains in his hands. Where the lessor recovers part of the land or enters for a forfeiture into part thereof, the rent shall be *apportioned*. *Co. Lit.* 148. If a man leases three acres, rendering rent, and afterwards grants away one acre, the rent shall be *apportioned*. *Co. Lit.* 144. Lessee for years leases for years, rendering rent, and after devises this rent to three persons, this rent may be *apportioned*. *Danv. Abr.* 505. If a lessee for life or years under rent, surrenders part of the land, the rent shall be *apportioned*:

but where the grantee of a rent-charge purchases part of the land, there all is extinct at law. *Moor* 231. But he shall have relief in equity. *Fonblanque's Treatise of Equity* i. 379. A rent-charge, issuing out of land, may not be *apportioned*: nor shall things *entire*, as if one holds lands by service to pay yearly to the lord, at such a feast, a horse, &c. *Co. Lit.* 149. But if part of the land, out of which a rent-charge issues, descends to the grantee of the rent, this shall be *apportioned*. *Danv.* 507.

A grantee of rent releases part of the rent to the grantor, this doth not extinguish the residue, but it shall be *apportioned*: for here the grantee dealeth not with the land, only the rent. *Co. Lit.* 148. On partition of lands out of which a rent is issuing, the rent shall be *apportioned*. *Danv. Abr.* 507. And where lands held by lease rendering rent are extended upon *elegit*, one moiety of the rent shall be *apportioned* to the lessor. *Ibid.* 509. If part of lands leased is surrounded by fresh water, there shall be no *apportionment* of rent; but if it be surrounded with the sea, there shall be an *apportionment* of the rent. *Dyer* 56.

The stat. 11 *Geo. 2. c.* 19. § 15, has in certain cases altered the law as to the apportioning of rents, in point of time; it being thereby enacted, "That if any tenant for life shall happen to die before, or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrators of such tenant for life, shall and may, in an action on the case, recover, of and from such under-tenant or under-tenants of such lands, tenements, and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively."

Before this statute, the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent. 1 *P. Wms.* 392. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants in tail. *Amb. Rep.* 198: 2 *Bro. C. Rep.* 659.

But though the executor of tenant for life is now intitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean-time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half year. 3 *Atk.* 502: *Amb. Rep.* 279: 2 *Faz.* 672: and the authority of the case on the will of Lord C. J. Holt, 3 *Vin. Abr.* 18. pl. 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable, 2 *P. Wms.* 176. This distinction, however, may be referred to interest on a mortgage being in fact due from day to day, and

APPORTIONMENT.

and so not properly an apportionment: whereas the dividends accruing from the publick funds are made payable on certain days, and therefore not apportionable; and upon the principle of this distinction the Master of the Rolls decreed an apportionment of maintenance-money, it being for the daily subsistence of the infant. 2 P. Wms. 501. See also Mr. Cox's note (1). And the principle extending to a separate maintenance for a feme covert, such apportionment has, in such case, been allowed at law. 2 Black. R. 1016. 2. Whether equity would not apportion dividends of money in the funds, directed to be applied for the maintenance of an infant, or secured by the husband as a separate provision for his wife, as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of a quarter? That equity will not in general apportion dividends, see 3 Bro. Ch. Rep. 99.

As to apportionment of fines paid on renewal of leases by tenant for life, see 1 Bro. Ch. Rep. 440: 2 Bro. Ch. Rep. 243. and the cases there referred to.

In what cases eviction of part of the land is a ground for apportionment, see Co. Litt. 148. See Foulknap's Treat. of Equity 376.

A man *tenches* part of the land where he hath common appendant, the common shall be apportioned: of common appurtenant it is otherwise, and if by the act of the party, the common is extinct. 8 Rep. 79. Common appendant and appurtenant may be apportioned on alienation of part of the land to which it is appendant or appurtenant. Wood's Inst. 197. If where a person has common of pasture *fans number*, part of the land descends to him, this being intire and uncertain cannot be apportioned: but if it had been common certain, it should have been apportioned. Co. Litt. 149.

APPORTUM, from the Fr. [*apport.*] Signifies properly the revenue or profit which a thing brings in to the owner: and it was commonly used for a corody or pension. It hath also been applied to an augmentation given to an abbot out of the profits of a manor for his better support.

APPOSAL OF SHERIFFS, The charging them with money received upon their accounts in the exchequer. Stat. 22 & 23 Car. 2. c. 22.

APPRAISERS of goods, are to be sworn to make true *appraisement*; and, valuing the goods too high, shall be obliged to take them at the price *appraised*. Statute 11 Ed. 1: Stat. Aston Burnel.—See Auctioneers.

APPRENDRE, [Fr.] A fee or profit *apprendre*, is fee or profit to be taken or received. Stat. 2 & 3 Ed. 6. cap. 8.

APPRENTICE, *apprenticius*, [Fr. *apprenti*, from *apprendre* to learn.] A young person bound by indentures to a tradesman or artificer, who upon certain covenants is to teach him his mystery or trade.

It will be proper under this head to consider.

I. Who may be bound apprentices, and in what manner; and who are compellable to receive them.

II. How they are to be provided for and governed during their apprenticeship, and in what manner they are to be assigned, &c.

III. What trades may not be exercised without having served an apprenticeship.

IV. For what offences they are punishable, and how.

APPRENTICE I.

Of apprentices acquiring settlement, see tit. Settlement. [For more full matter relative to apprentices, particularly parish apprentices, see Mr. Conft's edition of Bott's Poor Laws.]

I. It seems clearly agreed, that by the common law infants, or persons under the age of twenty-one years, cannot bind themselves apprentices, in such a manner as to intitle their masters to an action of covenant, or other action against them for departing from their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. 11 Co. 89 b. 2 Inst. 379, 580: 3 Leon. 63: 7 Mod. 15. And notwithstanding stat. 5 Eliz. c. 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indentures contained, as if they were at full age at the time of making of them; it hath been held, that although an infant may voluntarily bind himself an apprentice, and, if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above mentioned statute, can a covenant or obligation of an infant, for his apprenticeship, bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute: but no remedy lieth against an infant upon such covenant. Cro. Car. 179: Cro. Jac. 194. S. P.

But if any one entices an apprentice from his master's service, or harbours him after notice, the master may maintain a special action on the case, against the person so doing. Vide 1 Salk. 380.

By the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture with proper covenants; which covenants, by the custom of London, shall be as binding as if he were of full age. Moor 134: 2 Bulst. 192: 2 Rol. Rep. 305: Palm. 361: 1 Mod. 271: 2 Keb. 687. But a waterman's apprentice is not, within the custom of London, to bind himself being under twenty-one. 6 Mod. 69.

A freeman's widow may take a maid apprentice for seven years, and enrol her as a youth; if she be above fourteen years old: and if an exchange woman, that hath a husband free of London, take such apprentice, she shall be bound to the husband; and may be made free, at the end of the apprenticeship, if she be then unmarried. Lex Londonen. 48.

By Stat. 5 Eliz. c. 4. sect. 35. The justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by stat. 43 Eliz. c. 2, and 18 Geo. 3. c. 47. churchwardens and overseers of the poor may bind out the children of the poor to be apprentices, with the consent of two justices; if boys till 21, if girls till that age or marriage. And if any person refuse to accept a poor apprentice, he shall forfeit 10l. Stat. 8 & 9 W. 3. c. 30. § 5. Also justices of peace and churchwardens, &c. may put out poor boys apprentice to the sea-service. Stat. 2 & 3 Ann. c. 6. and 4 Ann. c. 19. And by stat. 7 Jac. 1. c. 3. apprentices bound out by publick charities are regulated. See title Chimney-Sweepers.

APPRENTICE II.

As to the manner of their being bound;

By the statute 5 *Eliz. c. 4. sect. 25*, an apprentice must be bound by deed indented; and this must be complied with for all purposes except for the obtaining a settlement.

Indentures must also be enrolled in all towns corporate under stat. 5 *Eliz. c. 5*, and 5 *Geo. 2. c. 46*; and in *London*, by the custom, in the chamberlain's office there.

In *London*, if the indentures be not enrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire fac* shall issue to the master, to shew cause why not enrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged: otherwise if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c. for it cannot be enrolled, unless the apprentice be in court and acknowledge it. 2 *Roll. Rep.* 305: *Palm.* 361: 1 *Mod.* 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

By stat. 8 *Ann. c. 9*, made perpetual by stat. 9 *Ann. c. 21*, a duty of 6*d.* in the pound under 50*l.* and 12*d.* in the pound for sums exceeding it, given with apprentices (except poor apprentices) is granted. And if the full sum agreed be not inserted, or the duty not paid, indentures shall be void, and apprentices not capable of following trades; and the masters are liable to 50*l.* penalty.

But there are several statutes allowing further time to pay the duties and stamp indentures, thro' neglect omitted, &c. And acts of indemnity of this nature are usually passed every two or three years.

The payment of the duties on apprentice-fees is enforced by several acts, 18 *Geo. 2. c. 22*; 20 *Geo. 2. c. 45*; the former of which provides, that if the apprentice shall pay the duties, on the neglect of the master, he may recover back the apprentice fee; and the latter, that if no suit is commenced, and the master shall pay double duties within two years after the end of the apprenticeship, the indentures shall be valid, or the apprentice may pay them, and in such case recover double the apprentice-fee, by action, from his master.

The stats. 5 *Eliz. c. 4* & 5 direct who shall take apprentices, and direct that every cloth worker, fuller, shoarman, weaver, taylor, or shoe-maker, taking three apprentices, shall have one journeyman, and for every other apprentice above three, also one journeyman. *f.* 33.—Stat. 1 *Jac. 1. c. 17*, allows only two apprentices at a time to butters and felt makers; (except a son apprentice?);—and stat. 13 & 14 *Car. 2. c. 5*, allows only two to *Notwich-weavers*, who must then have also two journeymen.

As by the stat. of 5 *Eliz. c. 4*, the justices of the peace, have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for tho' an act of parliament prescribe an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 *Mod.* 163: 1 *Salk.* 381.

The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. *Skin.* 108: 5 *Mod.* 139: 2 *Salk.* 471.

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And under the said stat. 5 *Eliz. c. 4*, justices, or the Sessions, may hear and determine disputes between masters and apprentices; and the Sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice.

An order of justices on the master to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money, is as necessary a proof of the receipt of it, as if it had been expressly alleged: and the court held, that the justices had jurisdiction to oblige the master to refund. *Trin. 7 Geo. 2.* in *B. R. The King v. Amies*; tho' an order of this nature has been quashed. *Batt.* (by *Const*) i. 513.

By the stat. 20 *Geo. 2. c. 19*, Any two justices, upon complaint of any apprentice put out by the parish, or with whom no more than 5*l.* was paid, of any mis-usage, refusal of necessary provisions, cruelty, or other ill treatment by his master, may summon the master to appear before them; and upon proof of the complaint on oath, to their satisfaction, (whether the master be present or not, if service of the summons be proved,) to discharge such apprentice by warrant or certificate, for which no fee shall be paid: and on complaint of the master against any such apprentice, touching any misdemeanor, miscarriage, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calendar month; or otherwise by discharging such offender. Either party may appeal to the Sessions, and the determination there is to be final. By 31 *G. 2. c. 11*, This act is extended to servants in husbandry, though hired for less than a year.

By stat. 6 *Geo. 3. c. 25*, Apprentices (with whom less than 10*l.* premium is paid) absented themselves during their apprenticeship, shall serve an equal time beyond their term.—In *London*, apprentices are all under the controul of the chamberlain, whose jurisdiction is saved in the several statutes.—The stat. 33 *Geo. 3. c. 57*, makes some additional regulations as to the punishing and relieving parish apprentices.

With regard to the assigning of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 *Salk.* 68. *pl. 7. Mich. 13 W. 3. B. R.*

But though an apprentice is not assignable, yet such assignment amounts to a contract between the two masters, that the child should serve the latter. 1 *Salk.* 68. *pl. 7: Mich. 13 W. 3. B. R. Caster v. Eccles Parish.*

By the custom of the city of *London*, also an apprentice may be turned over from one master to another; and if the master refuse to make the apprentice free at the end of the term, the chamberlain may make him free: in other corporations, there must be a *mandamus* to the mayor, &c. to make him free in such case. *Danc. Abr.* 421: *Wood's Inst.* 51.

But it hath been held, that tho' justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice: and tho' he applied to them, that could not give them a jurisdiction. *Comb.* 324.

APPRENTICE III.

It seems agreed, that, if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, and cloathing and other necessaries, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have assets. 1 *Sid.* 216: 1 *Krb.* 761, 820: 1 *Lev.* 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, (which he may do, in case covenant be brought against him,) and must maintain the apprentice, whether he hath assets or not. *Carth.* 231: 1 *Salk.* 66: 1 *Show.* 405. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time. *Burn.*

But it is said, that in this case of the master's dying, by the custom of *London* the executor must put the apprentice to another master of the same trade. 1 *Salk.* 66. *per Holt Ch. J.*

By stat. 32 *Geo. 3. c. 57*, in case of the death (§ 3) or insolvency (§ 8) of the master or mistress of a parish-apprentice (with a premium not exceeding 5*l.*) the justices, shall by indorsement on the indenture, direct the apprentice to serve another master, &c. and so toties quoties. And masters, &c. of apprentices under stat. 8 & 9 *W. 3. c. 30*, may with consent of two justices assign them.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice *de facto*. *Salk.* 68. For enticing an apprentice to embezzle goods, indictment will lie. 1 *Salk.* 380. A master may be indicted for not providing for, or for turning away, an apprentice. If a master gives an apprentice license to leave him it cannot afterwards be recalled. *Mod. Caf.* 70. If an apprentice marries, without the master's privity, that will not justify his turning him away, but he must sue his covenant. 2 *Vern.* 492. By the custom of the city of *London* a freeman may turn away his apprentice for gaming. *Ibid.* 241. Though if a master turns an apprentice away on account of negligence, &c. equity may decree him to refund part of the money given with him. 1 *Vern. Rep.* 450. As no apprentice can be made without writing; so none may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. *Dult.* 121.

III. As to the exercising of trades.

By the common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. 11 *Co.* 53.

So that without an act of parliament no man may be restrained, either from working in any lawful trade; or using divers mysteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmance of the common law. *Burn.*

It is enacted by the 5 *Eliz. cap. 4. sect. 31*, "That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery,

or manual occupation, to set up, occupy, use or exercise any craft, mystery or occupation, now used or occupied within the realm of *England* or *Wales*, except he shall have been brought up therein seven years, at the least, as an apprentice; nor to set any person on work in such mystery, art or occupation, being not a workman at this day, except he shall have been apprentice, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indictment, &c. it must be alleged, that it was a trade at the time of making the statute, for the words thereof are, any craft, mystery or occupation, now used, &c. from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. 2 *Salk.* 611: *Palm.* 528: 1 *Sid.* 175.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; that therefore merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held, that a *bemp-dresser* is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. 8 *Co.* 130: 2 *Bull.* 190: *Cro. Car.* 499.

It is clearly agreed, that the following the common trade of a brewer, baker or cook, is within the statute, as unskilfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute. 11 *Co.* 54 *a*: *Cro. Car.* 499: *Hob.* 183, 211: *Moor* 885: 8 *Co.* 129: *Palm.* 542: *Lit. Rep.* 251: *Bridg.* 141.

It hath been held, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages, because their masters kept the same mixed trades there before. *Carth.* 163.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. 2 *Wilf.* 168.

It hath been resolved, that there is no occasion for any actual binding, but that the following a trade for seven years, is a sufficient qualification within the statute. 1 *Salk.* 67: 2 *Salk.* 613.

By stats. 2 & 3 *P. & M. c. 11*, and 5 *Eliz. c. 4*, Aliens and denizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven years apprenticeship within the realm, under the penalty of 40*l.* per month. *Hutt.* 132. But it hath been adjudged, that if an apprentice serve seven years beyond sea, he shall be excused from the penalties of the statute. 5 *Eliz. c. 4*. And so if he serves seven years, tho' he was never bound. 1 *Salk.* 76.

So it hath been held, that serving five years to a trade out of *England* and two in *England*, is sufficient to satisfy the statute; but that there must be a service of a full time; and therefore serving five years in any country, where

where by the law of the country more is not required, will not qualify a man to use the trade in *England*. *Ca. in Law and Eq.* 70.

By the statute 31 *Eliz. cap. 5. sect. 7*, It is enacted, "That all suits for using a trade without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace, or assizes in the same county where the offence shall be committed; or otherwise inquired of, heard and determined in the assizes, or general quarter sessions of the peace in the same county where such offence shall be committed, or in the leet within which it shall happen."

In the construction of this statute it hath been held, that it restrains not a suit in the king's bench or exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in *any other court*, but that they shall not be brought in *any other county*; and the prerogative of these high courts shall not be restrained without express words. *Cro. Jac.* 178: *Hob.* 184: 1 *Salk.* 373.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county seem to be within the express words of the statute. *Hob.* 184, 327: *Cro. Jac.* 85.

Infants voluntarily binding themselves apprentice, and continuing seven years, shall have the benefit of their trades; but a bond for their service shall not bind them. *Cro. Car.* 179. See the several statutes enabling *soldiers* and *mariners* to exercise trades.

IV. *As to their punishment for particular offences, it is to be observed, That*

At common law, a servant or apprentice, without any regard to age, may be guilty of felony in feloniously taking away the goods of their master, tho' they were goods *under their charge*, as a shepherd, butler, &c. and may at this day for any such offence be indicted, as for felony at common law; but at common law, if a man had delivered goods to his servant to keep, or carry for him, and he carried them away *animo furandi*; this was considered only a breach of trust, but not felony. 1 *Hale's Hist. P. C.* 505, 666.

But now by the statute of 21 *H. 8. cap. 7*, It is enacted, that servants guilty of a breach of trust in embezzling money, goods, &c. delivered to them to the value of 40 s. or above, are guilty of felony; with a proviso nevertheless, that the act do not extend to apprentices, nor to persons under the age of eighteen years.

By stat. 12 *Ann. st. 1. cap. 7*, clergy is taken from persons stealing in any house or out-house, to the value of 40 s. except as to apprentices under the age of fifteen years robbing their masters. 1 *Hale's P. C.* 666, 667: See 1 *Hawth. P. C. c.* 33. § 11—16.—See tit. *Servants*.

APPROPRIATION, *appropriatio*, from the Fr. *appropriier*.] The annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishoprick, college, or spiritual person, to enjoy for ever; in the same way as *impropriation* is the annexing a benefice to the use of a lay person or corporation; that which is an appropriation in the hands of religious persons being usually called an *impropriation* in the hands of the laity. See *Com. Dig.* tit. *Advowson*. (D. E.) It is computed that there are in *England* 3845 impropriations.

This contrivance seems to have sprung from the policy of monastic orders. At the first establishment of parochial clergy, the tithes of the parish were distributed in four parts—one for the bishop; one to maintain the fabrick of the church; a third for the poor; and the 4th for the incumbent. The Sees of the bishops becoming amply endowed, their shares sunk into the others; and the monasteries inferring that a small part was enough for the officiating priests, *appropriated* as many benefices, as they could by any means obtain, to their own use; undertaking to keep the church in repair, and to have it constantly served. But in order to compleat such appropriation effectually, the king's licence and consent of the bishop must first be obtained; because they might both, some time or other have an interest by *lapse* in the benefice; if it were not in the hands of a corporation which never dies. The consent of the patron is also necessarily implied, because the appropriation could originally be made to none but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk. *Powd.* 496—500.

When the appropriation is thus made, the appropriators and their *successors* are perpetual parsons of the church; and must sue and be sued in all matters concerning the rights of the church by the name of parsons. *Hob.* 307.—An appropriation cannot be granted over. *Ibid.*

This appropriation may be severed and the church become disappropriate two ways. 1st. If the patron or appropriator present a clerk who is instituted and inducted to the parsonage; for such incumbent is to all intents and purposes complete parson; and the appropriation being once severed can never be reunited again, unless by a repetition of the same solemnities. *Co. Litt.* 46: 7 *Rep.* 13. And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sine-cure*; because he has no cure of souls, having a vicar under him to whom that cure is committed; though this is not the only mode of creating *sine-cures*. See 2 *Burn's Ecc. Law* 347. Also if the corporation to which the benefice is annexed is dissolved the parsonage becomes disappropriate at common law. 1 *Comm.* 386.

In this manner may appropriations be made at this day; and thus were most, if not all, now existing, originally made. At the dissolution of the monasteries by stat. 27 *H. 8. c.* 28, and 31 *H. 8. c.* 13, the appropriations belonging to those religious houses (being more than one third of all the parishes in *England*) would at common law have been disappropriated; had not a clause been inserted in those statutes to give them to the king, in the same manner as the alien priories had before been. 2 *Iust.* 584.—and from hence have sprung all the lay impropriations or secular parsonages in the kingdom; they having been afterwards granted out from time to time by the crown. See 1 *Comm.* 384, &c.: 11 *Rep.* 11: *Gilf.* 719.—See also tit. *Parson, Vicar*.

APPROPRIARE COMMUNIAM, to inclose or appropriate any parcel of land, that was before open common, and thus to discommon it.

APPROVE, *approbare*] To augment a thing to the utmost: to approve land is to make the best benefit of it, by increasing the rent, &c. 2 *Iust.* 474.

APPROVEMENT, Is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common with egress and regress for the commoners. *Reg. Jud.* 8, 9. See tit. *Common*.

The word *Approvement* is also used for the profits of the lands themselves. *Crompt. Just.* 152. And the statute of *Merton* 20 H. 3. c. 4. makes mention of land newly approved. *F. N. B.* 71. *Approvement* is also the same with *improvement*.

APPROVER, or **PROVER**, *approbator*.] One that confessing felony committed by himself, appealed or accused others to be guilty of the same crime. See tit. *Accessory*, II. 5. He is called *approver* because he must *prove* what he hath alleged; and that proof was anciently by battle, or the country, at the election of him appealed: and the form of this accusation you may find in *Crompt. Just.* 250: See also *Bracton*, lib. 3: *Staunf. Pl. Cor.* 52. If a person indicted of treason or felony, not disabled to accuse, upon his arraignment, before any plea pleaded, and before competent judges, confesseth the indictment, and takes an oath to reveal all treasons and felonies that he knoweth of; and therefore prays a coroner to enter his appeal, or accusation against those that are partners in the crime contained in the indictment; such a one is an *approver*. 3 *Inst.* 129: *H. P. C.* 192.

When a person hath once pleaded not guilty, he cannot be an approver. 3 *Inst.* 129. And persons attainted of treason or felony shall not be approvers; their accusation will not then be of such credit as to put a man upon his trial. 2 *Hawk.* 205. Vide 5 H. 4. cap. 2, as to characters of pardon.

Infants under age of discretion may not be approvers: and it being in the discretion of the court to suffer one to be an approver, this method of late hath seldom been practised. See tit. *Accessory* II. 5; tit. *Appeal*; and *Leach's Hawk.* P. C. ii. c. 24.

APPROVERS. In old statutes, bailiffs of lords in their franchises are called their *approvers*: and approvers in the marches of *Wales* were such as had licence *de vendere & abster* beasts, &c. But by the statute 2 Ed. 3. c. 12, approvers are such as are sent into counties to increase the farms of hundreds, &c. held by sheriffs. Such persons as have the letting of the king's demesnes, in small manors, are called approvers of the king (*approbatores regis*) stat. 51 H. 3. ft. 5. And in the stat. 1 Ed. 3. ft. 1. c. 8, sheriffs are called the king's approvers.

APPRUARE, To take to his own use or profit. stat. IV. 2. c. 20.

APPURTENANCES, *pertinentia* derived from the *French* *apartenir*, to belong to.] Signify things both corporeal and incorporeal appertaining to another thing as principal: as hamlets to a chief manor; and common of pasture, piscary, &c. Also liberties and services of tenants. *Erit. cap.* 39. If a man grant common of estovers to be burnt in his manor, these are appurtenant to the manor; for things appurtenant may be granted at this day. *Co. Lit.* 121. Common appurtenant may be to a house, pasture, &c. Out-houses, yards, orchards, and gardens are appurtenant to a messuage; but lands cannot properly be said to be appurtenant to a messuage. 1 *Lill. Ab.* 91. And one messuage cannot be appurtenant to another. *Ibid.* Lands cannot, in the true sense of the words *cum pertinentiis*, be appurtenant to the house; but the word

pertinent may be taken in the sense of usually letten or occupied with the house. *Plowd.* 170. See *Civ. El.* 704. *contra*; but it seems now settled that lands will not pass by the word *appurtenances*, but only such things which do properly belong to the house. *Palm.* 375: *Godb.* 352. *S. C.*: *Cro. Car.* 57: *Mutt.* 85. *S. C.*: *Litt. Rep.* 8. *S. C.*

Lands, a common, &c. may be appurtenant to a house; though not a way. 3 *Salk.* 40. Grant of a manor, without the words *cum pertinentiis*, 'tis said will pass all things belonging to the manor. *Owen's Rep.* 31. Where a person hath a messuage, &c. to which estovers are appurtenant, and it is blown down or burnt by the act of God; if the owner re-edify it, in the same place and manner as before, he shall have the ancient appurtenances. 4 *Rep.* 86. A turbary may be appurtenant to a house; so a seat in a church, &c. but not to land; for the things must agree in nature and quality. 3 *Salk.* 40: *Vide* tit. *Appendant*, and see *Pl. Com.* 103. b, 104. b, 170: *Allo vide Com. Dig.* (1 V.) tit. *Appendant* and *Appurtenant*.

AQUAGE, *aquagium*, *quasi aque agium*, i. e. *aqueductus & aquægangium*.] A water-courle.—In some instances used for toll paid for water carriage. See *Ewage*.

ARACE, *arabl.* To raise or erase from the French *arracher*, *evellere*, *Blount*.

ARATIA, Arable grounds, *Corwel*.

ARAO, *In arabo conjurare*, i. e. To make oath in the church, or some other holy place; for according to the *Riparian* laws, all oaths were made in the church upon the relics of saints. *Spelm.*

ARATRUM TERRÆ, As much land as can be tilled with one plough.—*Aratura terræ* is the service which the tenant is to do for his lord in ploughing his land. See *Arura*.

ARBITRATION, **ARBITRATOR**, and **ARBITRAMENT**. See tit. *Award*.

ARCA CYROGRAPHICA, *five cyrographorum Judeorum*. This was a common chest with three locks and keys, kept by certain Christians and Jews; wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud; and this by order of K. *Rich. I.* *Howden's Annals*, p. 745.

ARCHERY, A service of keeping a bow, for the use of the lord to defend his castle.—*Co. Litt. sect.* 157.

ARCHBISHOP, *archiepiscopus*.] The chief of the clergy in his province. See title *Bishops*.

ARCHDEACON, *archidiaconus*.] Is one that hath ecclesiastical dignity, and jurisdiction over the clergy and laity next after the bishop throughout the diocese, or in some part of it only. *Archdeacons* had anciently a superintendant power over all the parochial clergy in every deanery in their precincts; they being the chiefs of the deacons; though they have no original jurisdiction, but what they have got is from the bishop, either by prescription or compulsion; and Sir *Simon Degg* tells us, that it appears an *archdeacon* is a mere substitute to the bishop; and what authority he hath is derived from him, his chief office being to visit and inquire, and *episcopo nunciare*, &c. In ancient times *archdeacons* were employed in servile duties of collecting and distributing alms and offerings; but at length, by a personal attendance on the bishops, and a delegation to examine and report some causes, and commissions to visit the remoter parts of the dioceses, they became, as it were, overseers of the church; and by degrees advanced into considerable dignity and power.

Lanfranc,

Lanfranc, archbishop of *Canterbury*, was the first prolate in *England* who instituted an *archdeacon* in his diocese, which was about the year 1075. And an *archdeacon* is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year: and he hath a court, where he may inflict penance, suspend, or excommunicate persons, prove wills, grant administrations, and hear causes ecclesiastical, &c. subject to appeal to the bishop of the diocese under stat. 24 Hen. 8. c. 12. It is one part of the office of an *archdeacon* to examine candidates for holy orders, and to induct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 Cro. 556: 1 Lev. 193: *Wood's Inst.* 30.

Archdeacons are commonly given by bishops, who do therefore prefer to the same by collation: but if an archdeaconry be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after some ceremonies place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. *Walf. c. 15.*

Archdeacons, by stat. 13 & 14 Car. 2. c. 4. are to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary; but they are not obliged by stat. 13 Eliz. c. 12, to subscribe and read the thirty-nine articles; for altho' an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, which relates only to such benefices with cure as have particular churches belonging to them. *Walf. c. 15.* And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the archdeacon's court (where he doth preside himself) is called the official. *Wood's Inst.* 30.

Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted: for the statute intends that no suit shall be *per saltum*: but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123.

An archdeacon is a ministerial officer, and cannot refuse a churchwarden elected by the parish. *Rex v. Martin Rice*, *L. Raym.* 138.

ARCHES COURT, *curia de arcubus*.] The chief and most ancient consistory court belonging to the archbishop of *Canterbury* for the debating of spiritual causes. It is so called from the church in *London*, commonly called *St. Mary Le Bow*, (*de Arcubus*) where it was formerly held; which church is named *Bow Church* from the steeple which is raised by pillars, built *arcwise*, like so many bent bows. *Coxvel.*

The judge of this court is styled the Dean of the *Arches*, or Official of the *Arches* court: he hath extraordinary ju-

risdiction in all ecclesiastical causes, except what belong to the prerogative court; also all manner of appeals from bishops or their chancellors or commissaries, deans and chapters, archdeacons, &c. first or last are directed hither: he hath ordinary jurisdiction throughout the whole province of *Canterbury*, in case of appeals; so that upon any appeal made, he, without any farther examination of the cause, sends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made. Of this see more 4 *Inst.* 337. But he cannot cite any person out of the diocese of another, unless it be on appeal, &c. Stat. 23 H. 8. c. 9.

In another sense the dean of the *arches* has a peculiar jurisdiction of thirteen parishes in *London*, called a deanery, (being exempt from the authority of the bishop of *London*) of which the parish of *Bow* is the principal. The persons concerned in this court, are the judge, advocates, registers, proctors, &c. And the foundation of a suit in these courts, is a citation for the defendant to appear; then the libel is exhibited, which contains the action, to which the defendant must answer; whereupon the suit is contested, proofs are produced, and the cause determined by the judge, upon hearing the advocates on the law and fact; when follows the sentence or decree thereupon.

This court, as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates, (for the most part,) is now held in the hall belonging to the college of Civilians, commonly called Doctors Commons. *Floy.* 21.

From this court the appeal is to the king in chancery; by stat. 25 Hen. 8. c. 19.

ARCHIVES, *Archiva*, from *arca*, a chest.] The *Rolls*, or any place where ancient records, charters, and evidences, belonging to the crown and kingdom, are kept; also the *Chancery*, *Exchequer-office*, &c. And it hath been some-times used for repositories in libraries.—It is used in common speech for the records themselves.

ARERIESMENT, Surprise, affrontment.—To the great *areriesment* and *estonishment* of the Common law. *Rot. Parl.* 21 Ed. 3.

ARIERBAN, The edict of the ancient *French* and *German* kings, &c. commanding all their tenants to come into the army: if they refuse, then to be deprived of their estates.—See *Spelm.* in v. *Aribannum*, &c.

ARENTARE, To rent out, or let at a certain rent. *Consuetud. Domus de Farendon*, MS. fol. 53.

ARGENTUM ALBUM, Silver coin, or pieces of bullion that anciently passed for money. See *Alba Firma*.

ARGENTUM DEI, God's money; i. e. money given in earnest upon the making of any bargain; hence comes *arles*, *carnelt*.

ARGIL, or ARGOIL, Clay, lime, and sometimes gravel; also the lees of wine, gathered to a certain hardness. *Law Fr. Ditt.*

ARGUMENTOSUS, ingenious, mentioned by our historian *Neubrigenfis* Lib. 1. c. 14.

ARIEIUM LEVATIO, An old sportive exercise, supposed to be the same with running at the quintain. See *Stevens's Shakspeare*, Edit. 1793. vol. vi. p. 27, 175.

ARMA DARE, To dub or make a knight. *Arma capere*, or *suscipere* to be made a knight. *Kennet's Paroeb. Antiq.* p. 288. *Walsingham*, p. 507. The word *arma*, in these places, signifies only a sword; but sometimes a knight

knight was made by giving him the whole armour. *Ordericus Vitalis, lib. 8. de Henrico, &c.*

ARMA LIBERA, A sword and a lance which were usually given to a servant when he was made free. *Leg. Will. cap. 65.*

ARMA MOLUTA, Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. *Bract. lib. 3. They are called arma emolita by Pleta, lib. 1. c. 33. par. 6.*

ARMA REVERSATA, A punishment when a man was convicted of treason or felony: thus our historian Knighton, speaking of Hugh Spencer, tells us, *Primo vestierunt eum uno vestimento cum armis suis reversatis. Lib. 3. p. 2546.*

ARMARIA, Vide *Almaria*.

ARMIGER, *Esquire*. A title of dignity, belonging to such gentlemen as bear arms: and these are either by courtesy, as sons of noblemen, eldest sons of knights, &c. Or by creation, such as the king's servants, &c. The word *armiger* has been also applied to the higher servants in convents. *Paroch. Antiq. 576.* See title, *Esquire*, and *Spelman* in v.

ARMISCARA, Is a sort of punishment decreed or imposed on an offender by the judge. *Malmsh. lib. 3. p. 97: Walsingham, p. 430.* At first it was to carry a saddle at his back in token of subjection. *Brampton* says, that in the year 1176, the king of the Scots promised king Hen. 2. at York, *Lanceam & sellam suam super altare Sancti Petri ad perpetuam hujus subjectionis memoriam offerre.* See *Spelm.* in v.

ARMOUR and ARMS, In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger to strike or cast at another. *Crompt. Just. 65.* Arms are all what we call in Latin *insignia*, ensigns of honour; as to the original of which, it was to distinguish commanders in war; for the ancient defensive armour being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms*; but not made hereditary in families till the time of king Rich. 1. on his expedition to regain Jerusalem from the Turks: and besides shields with arms, they had a silk coat drawn over their armour, and afterwards a stiff coat, on which their arms were painted all over, now the herald's coat of arms. *Sid. 352.*

By stat. 13 R. 2. §. 1. c. 2, The constable (Lord High Constable) shall have cognizance of contracts touching deeds of arms done out of the realm; but it seems he cannot punish for painting coats of arms, &c. See 2 Hawk. P. C. c. 4. §. 5—8. and this Dict. tit. *Constable*.

By the common law it is an offence for persons to go or ride armed with dangerous and unusual weapons: but gentlemen may wear common armour according to their quality, &c. 3 Inst. 160.

By stat. 7 E. 1. §. 1, The king may prohibit force of arms, and punish offenders according to law; and herein every subject is bound to be aiding. And by stat. 2 E. 3. c. 3, enforced by stat. 7 R. 2. c. 13, and 20 R. 2. c. 1, None shall come with force and arms before the king's justices, nor ride nor go armed in affray of the peace, on pain to forfeit their armour, and suffer imprisonment, &c.

Under these statutes none may wear (unusual) armour publicly upon pretence of protecting his person; but a man may assemble his neighbours to protect his house

without transgressing the act. 1 Hawk. P. C. 267. But no wearing of arms is within the stat. unless they are such as terrify, therefore the weapons of fashion, as swords, &c. or privy coats of mail may be worn. *Id. ib.* And one may arm to suppress riots or dangerous insurrections. *Id. 268.*

By the Bill of Rights, 1 W. & M. §. 2. c. 2, It is declared that "the subjects which are Protestants may have arms for their defence suitable to their conditions as allowed by law." See stat. 33 H. 8. c. 6. and tit. *Game and Constable* III. 2.

Embezzling the king's armour felony; stat. 31 Eliz. c. 4. Armour may be exported, unless prohibited by proclamation; stat. 12 Car. 2. c. 4. Importing arms or ammunition prohibited; 1 Jac. 2. c. 8.

ARNALIA, *Arable grounds*. This word is mentioned in *Domesday*, tit. *Essex*.

ARNALDIA, *Arnoldia*; A disease that makes the hair fall off like the *alopecia*, or like a distemper in foxes. *Rog. Hoveden, p. 693.*

AROMATARIUS, *Latin*.] A word often used for a grocer, but held not good in law proceedings. 1 Vent. 142.

ARPEN, or *Arpent*. An acre or furlong of ground; and according to the old French account in Domesday-book, 100 perches make an *arpent*. The most ordinary acre, called *l'arpent de France*, is one hundred perches square: but some account it but half an acre.

ARPENTATOR, A measurer or surveyor of land.

ARQUEBUS, *Fr. Arquebuse*.] A short hand-gun, a caliver or pistol; mentioned in some of our ancient statutes. *Law Fr. Dict.*

ARRACK, A duty and excise is payable for arrack imported from the East Indies; See tit. *Navigation-Acts*.

ARRAIATIO PEDITUM, Is used in *Pat. 1. Ed. 2.* for the arraying of foot soldiers.

ARRAIER, *Arraiatores*.] Such officers as had the care of the soldiers' armour, and whose business it was to see them duly accounted. In several reigns commissioners have been appointed for this purpose.

ARRAIGN, from the *Fr. arranger*, To set a thing in order; hath the same signification in law; but the true derivation is from the French *arraisonner*, i. e. *ad rationem ponere*.] To call a man to answer in form of law. A prisoner is arraigned, when he is indicted and brought to trial: and to arraign a writ of assise, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. *Co. Lit. 262.* But no man is properly arraigned but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged: and this arraignment is to take care that the prisoner do appear to be tried, and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. *Co. Lit. 262, 263.*

The prisoner is to hold up his hand only in treason and felony; but this is merely a ceremony: if he owns that he is the person, it is sufficient without it; and then upon his arraignment his fetters are to be taken off; and he is to be treated with all the humanity imaginable. 2 Inst. 315: 3 Inst. 35.—A peer need not hold up his hand. 4 St. Trials 211, 508.

Prisoners are now generally tried in their irons, because taking them off is usually attended with great pain and trouble.

ARR

An attainder of high treason has been reversed for the omission of an arraignment. 2 *Hawk. P. C.* 438, which see for further matter as to *Arraignment*.

If in action of slander for calling one thief, the defendant justifies that the plaintiff stole goods, and issue is thereon taken; if it be found for the defendant in *B. R.* and for felony in the same county where the court sits, or before justices of assize, &c. he shall be forthwith arraigned upon this verdict of twelve men, as on an indictment. 2 *Hale's Hist. P. C.* 151.

The pleas upon arraignment are either the general issue, Not guilty; plea in abatement, or in bar; and the prisoner may demur to the indictment: he may also confess the fact, but then the court has nothing more to do than to proceed to judgment against him.

For the solemnity of the arraignment and trial of a prisoner. See *Dalt. chap.* 185. p. 515.

ARRAY, *arraya* five *arraimentum*.] An old French word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. And when we say to array a panel, that is, to set forth the men impanelled one by another. *F. N. B.* 157. To challenge the array of the panel, is at once to except against all the persons arrayed or impanelled, in respect of partiality, &c. *Co. Lit.* 156. If the sheriff be of affinity to either of the parties; or if any one or more of the jurors are returned at the nomination of either party; or for any other partiality; the array shall be *quashed*. The word array also relates, in a particular manner, to military order, as to conduct persons armed, &c. *Stat.* 13 & 14 *Car.* 2. *cap.* 3.

ARREARAGES, *arreragia*, from the French *arrière*, *reho*, behind.] Money unpaid at the due time, as rent behind; the remainder due on an account; or a sum of money remaining in the hands of an accountant.

ARRECATUS, One suspected of any crime. *Offic. Coronat. Spelm: Gloss.*

ARRÉNATUS, *arraigned*, accused. *Rot. Parl.* 21 *Ed.* 1.

ARRÉNTATION, from the Spanish *arrendar*, *ad certum redditum dimittere*.] The licensing the owner of lands in the forest, to inclose them with a low hedge and small ditch, according to the assize of the forest, under a yearly rent: *saving the arrentations* is saving a power to give such licences. *Ordin. Forestæ*, 34 *Ed.* 1. *§.* 5.

ARREST, *arrestum* from the *Fr. arrêter*, to stop, or stay.] A restraint of a man's person, obliging him to be obedient to the law: and it is defined to be the execution of the command of some court of record or officer of justice. An arrest is the beginning of imprisonment, where a man is first taken, and restrained of his liberty, by power or colour of a lawful warrant: also it signifies the decree of a court, by which a person is arrested. 2 *Shep. Abr.* 299.

ARRESTS are either in civil or criminal cases.

An arrest in a civil cause is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice. *Wood's Inst.* 575.

There are several statutes, securing the liberty of the subject, against unlawful arrests and suits. See *Magna Charta*, c. 29: 3 *Ed.* 1. c. 35: and See tit. *Barrator*.

Some persons are also privileged from arrests, viz. peers of the realm, members of parliament, peeresses by birth (1 *Inst.* 131: 2 *Inst.* 50: 4 *Bacon's Ab.* 228;) peers of Scotland, (2 *Str.* 990;) a peeress by marriage, (*Co.*

ARREST.

Lit. 16: 6 *Ca.* 53: *Dyer* 79;) members of convocation actually attending thereon, (*St.* 8 *H.* 6. c. 1:) bishops, ambassadors, or the domestic servant of an ambassador, *really & bona fide in that capacity*. (*St.* 7 *Ann.* c. 12: 3 *Wilf.* 33: 2 *Str.* 797: 2 *Ld. Raym.* 1524: 4 *Burr.* 2016, 17: 3 *Burr.* 1676:) the king's servants, (1 *Raym.* 152: 8 *Mod.* 12:) marshall, warden of the Fleet, (1 *Vent.* 65:) clerks, attornies, and all other persons attending the courts of justice, (4 *Inst.* 72: 2 *Inst.* 551: 12 *Mod.* 163:) clergymen performing divine service, and not merely staying in the church with a fraudulent design, (*Stats.* 50 *E.* 3. c. 5: 1 *R.* 2. c. 16:) suitors, (*Bro. Privil.* 57:) witnesses subpoena'd, and other persons necessarily attending any court of record upon business; (*Sir T. Raym.* 101: 1 *Vent.* 11: *Rules in Chan.* 217: 3 *Inst.* 141.) A bankrupt coming to surrender, or within forty-two days after his surrender (*St.* 5 *Geo.* 2. c. 30. § 5: and See *Cowp.* 156:) witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, (1 *Atk.* 54:) but not creditors coming to prove their debts (4 *Term Rep.* 377:) heirs, executors, or administrators. *R. M.* 1654: except on personal contracts by themselves (1 *T. Rep.* 716:) or in cases of *devastavit* (1 *Salk.* 98:) failor or voluntier soldier: (unless the debt is twenty pounds.) *Stat.* 1 *Geo.* 2. c. 14 § 15: 31 *Geo.* 3. c. 13. § 65. See *Barnes* 114: 1 *Str.* 2, 7: 1 *Black. Rep.* 29, 30:—Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. *Hob.* 177: *Dyer* 24. p. 150: 2 *Sid.* 157: *Latch.* 199: *Godb.* 10: 2 *Rot. Abr.* 274.

But this privilege does not extend to *Irish* or other foreign peers, (2 *Inst.* 48: 3 *Inst.* 70:) or to peeresses by marriage, if they afterwards intermarry with commoners. *Co. Lit.* 16: 2 *Inst.* 50: 7 *Co.* 15, 16.

And though the servants of peers necessarily employed about their persons and estates, could not formerly be arrested; (2 *Str.* 1065: 1 *Wilf.* 278:) yet this privilege seems to have been taken away by the st. 10 *Geo.* 3. c. 50. § 2.

Members of corporations aggregate, and hundredors, not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. *Bro. tit. Corp.* 43: 3 *Keb.* 126, 7. Corporations must be made to appear by *distringas*. *Finch.* 353: 3 *Salk.* 46.

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife; 1 *Vent.* 49: 1 *Mod.* 8; and if she is arrested, she shall be discharged on common bail. 1 *Term Rep.* 486: 1 *Salk.* 115. See tit. *Bail*.

A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 *Lill.* 94. Arrests are not to be made within the liberty of the king's palace: nor may the king's servants be arrested in any place, without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. Vide tit. *Ambassador*.

There is this difference between arrests in civil and criminal cases; that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony,

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or breach of the peace, any man may arrest without warrant or precept. *Term. de Ley* 54.

The abuses of gaolers and sheriff's officers towards their prisoners are well restrained and guarded against by *Stat. 32 Geo. 2. c. 28*; the chief provisions of which are, that an officer shall not carry his prisoner to any tavern, &c. without his consent, nor charge him for any liquor but such as he shall freely call for, nor demand for caption or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his prisoner to gaol within twenty-four hours after his arrest, unless the prisoner refuses to go to some safe house (except his own) of his own choosing. Nor shall any officer take for the diet, lodging or expences of his prisoner more than shall be allowed by an order of sessions. Bailiffs to shew a copy of the act to prisoners, and to permit perusal thereof; and the prisoner to send for his own victuals, bedding, &c.

Sheriffs and their officers to take no reward for doing their office but according to law. *Stat. 3 E. 1. c. 26*: *20 E. 3. c. 6*: *1 H. 4. c. 11*: *C. Lit. 368*: *23 H. 6. c. 9*. *Plowd.* 465.

The fees now allowed by the Master for arrests on mesne process in term are 10s. 6d. in the country 1l. 1s. and 1s. per mile. *Imprey's Sheriff* 122.

By *Stat. 29 Car. 2. c. 7*. No writ. process, warrant, &c. (except in cases of treason, felony, or for breach of the peace) shall be served on a Sunday: on pain that the person serving them shall be liable to the suit of the party grieved, and answer damages, as if the same had been done without writ: an action of false imprisonment lies for arrest on a Sunday, and the arrest is void. *1 Salk.* 78. A defendant was arrested on a Sunday by a writ out of the *Masbalsea*; and the court of *B. R.* being moved to discharge him, it was denied; and he was directed to bring action of false imprisonment. *5 Mod. Rep.* 95. The defendant being taken upon a Sunday, without any warrant, and locked up all that day; on Monday morning a writ was got against him, by which he was arrested; it was ruled, that he might have an action of false imprisonment, and that an attachment should go against those who took him on the Sunday. *Mod. Caf.* 96. Attachments have been often granted against bailiffs for making arrests on Sunday: but affidavit is usually made, that the party might be taken upon another day. *1 Mod.* 56. A person may be retaken on a Sunday, where arrested the day before, &c. *Mod. Caf.* 231. And a man may be taken on a Sunday on an escape-warrant: or on fresh pursuit when taken the day before. *2 Ld. Raym.* 1028: *2 Salk.* 625. when he goes at large out of the rules of the *King's Bench* or *Fleet* prison, &c. *Stat. 5 Ann. c. 9*. Allo Bail may take the principal on a Sunday, and confine him till Monday, and then render him. *1 Atk.* 239: *6 Mol.* 251. A party cannot be arrested on a Sunday on an attachment for non-performance of an award, it being only in the nature of a civil execution. *1 T. Rep.* 266, denies *1 Atk.* 581.

By *Stats. 12 Geo. 1. c. 29*: and *5 Geo. 2. c. 27*, both made perpetual by *Stat. 21 Geo. 2. c. 3*. No person can be arrested, or held to bail, on a writ sued out of the *superior* courts, unless the cause of action be 10l. or upwards.

And now by *Stat. 19 Geo. 3. c. 70*. No person can be arrested or held to bail upon process out of any inferior court for less than 10l. but proceedings are to be had in

inferior courts according to the directions of *12 Geo. 1. c. 29*, extended by *19 Geo. 3. c. 70* to debts under 10l.

By § 3. of *19 Geo. 3. c. 70*, so much of all acts of parliament for the recovery of debts within certain districts, as gives power to arrest debtors for less than 10l. is repealed. And by § 4, when final judgment is obtained in such suits, and defendant cannot be found within the jurisdiction, the superior courts may issue execution.

By *Stat. 11 & 12 W. 3. c. 9*, No person is to be held to bail in *Writs* on process out of the courts at *Wylminster* for less than 20l.

In trover the defendant may be held to bail of course. *2 Str.* 1122: *Corop.* 529. For this is more an action of property than a *tort*. *1 Wils.* 23.

In an action of debt on a judgment, whether after verdict or by default, defendant cannot be arrested if he was previously held to bail in the original action. *Say.* 160.

It is now settled both in *K. B.* and *C. P.* that a defendant may be arrested in an action on a judgment for 10l. for damages and costs though the original debt alone were under 10l. *4 Term Rep.* 570. on the authority of *2 Black. Rep.* 1274; (though it had been otherwise ruled in *K. B.* *2 Burr.* 1309: *4 Burr.* 2117: *5 Burr.* 2660: *Corop.* 128.)

Bail cannot be had in an action on the second judgment, where bail has been given on the first. *2 Str.* 782.

In what cases special bail shall be required, See tit. *Bail*.

Formerly one great obstruction to public justice, civil as well as criminal, was the number of privileged places, such as the *Mint*, *Savoy*, &c. under pretence of their being ancient palaces; but these sanctuaries for iniquity are now abolished, and the opposing any process therein is made highly penal by *Stat. 8 & 9 W. 3. c. 27. § 15*: *9 Geo. 1. c. 28. § 1*: and *11 Geo. 1. c. 22*; by which persons opposing the execution of process, or abusing the officer, if he receives any bodily hurt, are declared guilty of felony.

When a person is apprehended for debt, &c. he is said to be arrested: and writs express *arrest* by two several words *capias* and *attachias*, to take and catch hold of a man; for an officer must actually lay hold of a person, besides saying he arrests him, or it will be no lawful arrest. *1 Lil. Abr.* 96. If a bailiff be kept off from making an arrest, he shall have an action of assault: and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff touches a man, which is an *arrest*, and he makes his escape, it is a *rescous*, and attachment may be had against him. *1 Salk.* 79. If a bailiff lays hold of one by the hand, (whom he had a warrant to arrest) as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaking open of the house to carry him away. *1 Vent.* 306.

When a person has committed treason or felony, &c. doors may be broke open to arrest the offender; but not in civil cases, except it be in pursuit of one arrested; or where a house is recovered by real action, or in ejectment, to deliver possession to the person recovering. *Plowd.* *5 Rep.* 91. Action of trespass, &c. lies for breaking open a house to make arrest in a civil action. *Mod. Caf.* 105. But if it appears a bailiff found an outer door,

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door, &c. open, he may open the inner door to make an arrest. *Comb.* 327.

In the case of *Lee v. General Garsel*, the court of King's Bench determined, that the chamber door of a lodger, is not to be considered as his *outer* door; but that the street door being open, the officers had a right to force open the chamber door, the defendant being in the room, and refusing to open it. *Conn.* 1.

Also it is enacted by the 3 & 4 *Jac.* 1. *par.* 35, That upon any lawful writ, warrant or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 *Hawk. P. C. c.* 14. § 10.

But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 *Hawk. P. C. c.* 14. § 11.

An arrest in the night, as well as the day, is lawful. 9 *Rep.* 66. And every one is bound by the common law to assist not only the sheriff in the execution of writs, and making arrests, &c. but also his bailiff that hath his warrant to do it. 2 *Inst.* 193. A bailiff upon an arrest ought to shew at whose suit, out of what court the writ issues, and for what cause, &c. when the party arrested submits himself to the arrest: a bailiff, sworn and known, need not shew his warrant, though the party demands it; nor is any other special bailiff bound to shew his warrant, unless it be demanded. 9 *Rep.* 68, 69: *Cro. Jac.* 485. If an action is entered in one of the *compters* of London, a city serjeant may arrest the party without the sheriff's warrant. 1 *Lill. Abr.* 94. And by the custom of London, a debtor may be arrested before the money is due, to make him find sureties: but not by the common law. 1 *Nelf. Abr.* 258.

If a wrong person is arrested; or one for felony, where no felony is done, &c. it will be false imprisonment.

By *Glynn Ch. J. Mich.* 1658. If one be arrested by the sheriff of the county, within a liberty, without a *non omittas*, yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entering of his liberty. But upon a *quo minus*, a sheriff may enter any liberty, and execute it *impune*. *Pract. Reg.* 72.

With regard to arrests in *criminal cases*, it hath already been observed, that for *treason, felony, or breach of the peace*, any person may arrest without warrant or precept. But the king cannot command any one by word of mouth to be arrested; for he must do it by writ, or order of his courts, according to law: nor may the king arrest any man for suspicion of treason, or felony, as his subjects may; because, if he doth wrong, the party cannot have an action against him. 2 *Inst.* 186.

Arrests by *private persons* are in some cases commanded. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. 3 *Inst.* 117: 4 *Inst.* 177.

And for this cause, by the common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender escape, the town shall be

amerced, and if out of a town, the hundred shall be amerced. 3 *Inst.* 53.

And since the statute of *Winchester*, c. 5, which ordains that walled towns shall be kept shut from sun-setting to sun-rising; if the fact happen in any such town by night, or by day, and the offender escape, the town shall be amerced. 3 *Inst.* 53.

And, as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 *Inst.* 117.

Every private person is bound to assist an officer, requiring him to apprehend a felon.

As to the arresting of offenders by *private persons* of their own authority, permitted by law for the prevention of *treason* or *felony* only intended to be done; any one may lay hold of a person, whom he sees upon the point of committing treason, or felony, or doing an act which would manifestly endanger the life of another, and detain him, till it may be reasonably presumed he has changed his purpose. 2 *Hawk. P. C. c.* 12. § 19.

As to arrests for inferior offences, no private person can arrest another for a bare breach of the peace after it is over; but it is held, that a private man may arrest a night-walker, or a common cheat going about with false dice, and actually caught playing with them, in order to have him before a justice of peace; and the arrest of any other offenders, by private persons, for offences in like manner scandalous, and prejudicial to the public, seems justifiable. 2 *Hawk. P. C. c.* 12. § 20.

With regard to arrests by *public officers*, they may be made either with or without process.

Arrests without process may be made by *watchmen, constables, bailiffs of towns, or justices of peace*. For the power of *watchmen*, See *Stat. Winchester*, c. 4. It has been holden, that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any *suspicious night-walker*, and detain him till he give a good account of himself. 2 *Hawk. P. C. c.* 13. § 6.

As to arrests by *constables*, See tit. *Constable* III. 1, 2. 'Tis the better opinion at this day, that any constable, or even a private person, to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent; and whether he were before indicted of the same offence or not, and whether any felony were, in truth, committed or not: for, however the justice himself may be punishable for granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding. 2 *Hawk. P. C. c.* 13. § 11.

The doctrine of *general warrants* (i. e. to apprehend all the authors and publishers of libels, or generally all persons suspected of any particular crime, without mentioning the name of the person accused) seem exploded as illegal. See *Leach's Hawk. P. C.* ii. c. 13. § 10; and the note there as to *Wilkes's case*. But it is to be observed that the term *general warrant* used by *Hawkins* in that place, does not seem to mean a warrant, without the name of

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the party being specified, but one which does not contain the specific charge against the party. See the case of *Money v. Leach*, and also 4 *Comm.* 291.

The great point gained by these determinations, was the rescuing persons from the malice or ignorance of the inferior ministers of justice.

With regard to arrests by *baillifs* of towns, their power is founded on the above-mentioned statute of *H. 1. c. 4.* And as to arrests by *justices of peace*, arrests by their command are either by word of mouth or by warrant.

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 *Harw. P. C. c.* 13. § 14: *Dalt. c.* 117.

And a justice of peace may lawfully grant a warrant for apprehending, or arresting persons charged with treason, felony, premunire, or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 *Harw. P. C. c.* 13. § 15.

But it is said, that anciently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor; cognizable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. *Id.* § 16.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor, but he seems to be punishable, as well at the suit of the king, as of the party grieved, if he grant any such warrant groundlessly, or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. *Id.* § 18.

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the *special cause* upon which it is granted, but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set forth the special cause, and it seems to be rather discretionary than necessary to set it forth in any case. *Id.* § 21—25.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, though the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and *à fortiori* no private person, is compellable to serve it. *Id.* § 27.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrant; and

and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants, if demanded. *Id.* § 28.

And therefore *Stat. 27 Geo. 2. c.* 20, provides, that in all cases where a justice is empowered by statute to issue a warrant of distress for levying a penalty, the officer executing such warrant, if required shall shew the same to the defendant, and suffer a copy to be taken.

The sheriff, having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it; yet, it seems, that any one may lawfully *assist* him. *Id.* § 29.

After presentment or indictment found in felony, &c. the first process is a *capias*, to arrest and imprison the offender: and if the offender cannot be taken, an exigent is awarded in order to outlawry. *H. P. C.* 209. For further matter See tit. *Debtors*.

ARREST OF JUDGMENT. To move in *arrest of judgment*, is to shew cause why judgment should be stayed, notwithstanding verdict given. Judgment may be arrested for good cause in criminal cases, as well as civil; if the indictment be insufficient, &c. 3 *Inst.* 210.

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. *Ld. Raym.* 232. Motions in arrest of judgment may be made at any time before judgment signed. *Dougl.* 747: *Str.* 845. *Sunday* is no day, 4 *Burr.* 21, 30. nor a *dies non*. It is a rule to shew cause, therefore needs no notice to be given, nor yet an affidavit to ground it on, as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not alledge it before. *Str.* 425.

It may be made after motion for a new trial discharged, *Dougl.* 716: 1 *Burr.* 334. and if arrested, each party pays his own costs, *Coop.* 407.

After verdict a man may alledge any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 *Roll. Abr.* 716. And judgment after verdict, shall not be arrested for an objection that would have been good on demurrer. 3 *Burr.* 1725. For further matter See tit. *Amendment, Judgment*; and for causes of arrest of judgment, See 3 *Comm.* 393, 4.

ARREST OF ENQUEST is to plead in arrest of taking the enquest, upon the former issue, and to shew cause why an enquest should not be taken. *Bro. tit. Replead.*

ARRESTANDIS BONIS NE DISSIPENTUR, A writ which lay for a man whose cattle or goods are taken by another, who during the contest doth or is like to make them away, not being of ability to render satisfaction. *Reg. Orig.* 126.

ARRESTANDO IPSUM QUI PECUNIAM RECEPIT, &c. Is a writ that lay for apprehending a person who hath taken the king's prest-money to serve in wars, and hides himself when he should go. *Reg. Orig.*

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM, A writ that lay for a denizen against the goods of *aliens* found within this kingdom, in recompence of goods taken from him in a foreign country, after denial of restitution. *Reg. Orig.* 129. This the ancient civilians called *clarigatio*; but by the moderns it is termed *replevia*.

ARRETTE, *arrestatus, quasi, a. l. reatum vocatus.*] Is where a man is convened before a judge, and charged with a crime. *Staundf. Pl. Co.* 45. And it is sometimes used for imputed or laid unto; as no folly may be *arrested* to one under age. *Littleton*, cap. *Remitter*. Chaucer useth the verb *arresteth*, that is, lays blame, as it is interpreted. *Bracton* says, *ad reatum habere malefactorum*, i. e. to have the malefactor forth-coming, so as he may be charged, and put to his trial. *Bract. lib. 3. tract. 2. cap. 10.* And in another place, *reatus de morte hominis*, charged with the death of a man.

ARROWS. By an ancient statute, all heads for arrows shall be well brazed, and hardened at the point with steel, on pain of forfeiture and imprisonment: and to be marked with the mark of the maker. *Stat. 7 H. 4. c. 7.*

ARRURA,—In the black book of *Hereford*, *De Operationibus Arruræ*, signifies days' work of ploughing; for antiently customary tenants were bound to plough certain days for their lord. *Una arrura*, one day's work at the plough: and in *Wiltshire*, earing is a day's ploughing. *Paroch. Antiq. p. 41.* See *Atarrum terræ*.

ARSON, from *ardeo*, to burn.] House-burning, which is felony at common law. 3 *Inst.* 66. It must be maliciously, voluntarily, and an actual burning: not putting fire only into a house, or any part of it, without burning; but if part of the house is burnt, or if the fire doth burn, and then goeth out of itself, it is felony. 2 *Inst.* 188: *H. P. C.* 85. and it must be the house of another, for if a man burns his own house only, though with intention to burn others, it was not at common law felony, but a great misdemeanor, punishable with fine, pillory, &c. But a pauper may be guilty of this offence by burning the public workhouse. *Leach's Hawk. P. C. i. c. 39. § 3.* and in note.

If a house is fired by negligence or mischance, it cannot amount to *arson*. 3 *Inst.* 67: *H. P. C.* 85. Where one burns the house of another, if it be not wilful and malicious, it is not felony, but only trespass: therefore if *A.* shoot unlawfully in a gun at the cattle or poultry of *B.* and by means thereof sets another's house on fire, this is not *arson*; for though the act he was doing was unlawful, yet he had no intent to burn the house. 1 *Hale's Hist. P. C.* 569. By *Stat. 5 Eliz. c. 13*, to burn corn in the four Northern counties, is felony without clergy. And the *Stat. 22 & 23 Car. 2. c. 7*, makes it felony to set barns, stables, stacks of corn, hay, &c. on fire in the night-time, or any out-houses, or buildings: but the offender may be transported for seven years.

By 9 *Geo. 1. c. 22*, (made perpetual by 31 *Geo. 2. c. 42*.) Setting fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, or wood, or to rescue any offender is made felony without benefit of clergy.—*Leach's Hawk. P. C. i. c. 58. App. 4. § 3.*

As to other malicious burnings; by *Stat. 37 H. 8. c. 6. § 4*, to burn any cart loaded with fuel, incurs 10*l.* penalty and treble damages. By *Stat. 4 & 5 W. & M. c. 23*, to burn the covert for red or black game, one

month's imprisonment; and by *Stat. 28 Geo. 2. c. 19*, to burn the covert for deer or game, a penalty between 40*l.* and 5*l.* By *Stat. 1 Geo. 1. c. 48*, to burn any wood or coppice is felony. By *Stat. 10 Geo. 2. c. 32*, to set fire to a coal mine, felony without clergy. By *Stat. 9 Geo. 3. c. 29*, to burn any mill, felony without clergy, if prosecuted within eighteen months.

The offence of *Arson* was denied the benefit of clergy, by *Stat. 21 H. 8. c. 1*; but that *Stat.* was repealed by *Stat. 1 E. 6. c. 12*; and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference from the *Stat. 4 & 5 P. & M. c. 4*; which expressly denied it to the accessory before the fact: though now it is expressly denied to the principal in all cases within the *Stat. 9 Geo. 1. c. 22. 4 Comm. 223*, which see and *Leach's Hawk. P. C. vol. i. and ii.*

ARSER IN LE MAIN, burning in the hand, is the punishment of criminals that have the benefit of clergy. *Terms de Ley.*

ARSURA, The trial of money by fire, after it was coined. In *Domesday* we read, *reddidit 50*l.* ad arsuram*, which is meant of lawful and approved money, whose alloy was tried by fire.

ART AND PART, Is a term used in *Scotland* and the North of *England*; when one charged with a crime, in committing the same, was both a contriver of, and acted his part in it.

ARTHEL, A *British* word, and more truly written *arddelaw*, or according to the South Welsh *ardhel*, signifying to avouch; as if a man were taken with stolen goods in his hand, he was to be allowed a lawful *arthel* (or vouchee) to clear him of the felony: it was part of the law of *Hovel Dha*; according to whose laws every tenant holding of any other than of the prince or the lord of the fee, paid a fine *pro defensione regis*, which was called *arian arabel*. The privilege of *arthel* occasioning a delay and exemption of criminals from justice, provision was made against it by *Stat. 28 H. 8. c. 6.*—*Blount.*

ARTICULI CLERI, (*articles of the clergy.*) Are statutes containing certain *articles* relating to the church and clergy, and causes ecclesiastical. 9 *E. 2. Stat. 1.*

ARTICULUS, An *article*, or complaint, exhibited by way of libel, in a court Christian. Sometimes the religious bound themselves to obey the ordinary, without such formal process. *Paroch. Antiq. p. 344.*

ARTIFICERS, See tit. *Manufactures* and *Manufacturers*.

A stranger, *artificer* in *London*, &c. shall not keep above two strangers servants; but he may have as many *English* servants and apprentices as he can get, *Stat. 21 H. 8. c. 16.* *Artificers* in wool, iron, steel, brass, or other metal, &c. persons contracting with them to go out of this kingdom into a foreign country, shall be fined not exceeding 100*l.* and be imprisoned three months: and *English artificers* going abroad, not returning in six months after warning given by our ambassadors, &c. shall be disabled to hold lands by descent or devise, be incapable to take any legacy, &c. and deemed aliens. *Stat. 5 Geo. 1. c. 27.*

By the *Stat. 23 Geo. 2. c. 13*, Persons convicted of seducing artificers in the manufactures of *Great Britain* or *Ireland*, out of the dominions of the crown of *Great Britain*, to forfeit 500*l.* and to be imprisoned for twelve months; for the second offence to forfeit 1000*l.* and be

imprisoned two years. See also *Stat. 14 Geo. 3. c. 71*; *15 Geo. 3. c. 5*; and *21 Geo. 3. c. 37*; by which heavy penalties are inflicted on masters of ships assisting in such seduction.

ARUNDEL. See *Honour*.

ARUNDINETUM, A ground or place where reeds grow. *1 Inst. 4*. And it is mentioned in the book of *Domesday*.

ARVIL-SUPPER, A feast or entertainment made at funerals, in the North part of *England*: *arvil bread* is the bread delivered to the poor at funeral solemnities. *Covel*. And *arvil*, *arval*, *arsal*, are used for the burial or funeral rights.

ASCESTERIUM, *Archisterium*, *arcisterium*, *acisterium*, *alcysterium*, *architrium*, from the Greek.] A monastery. It often occurs in old histories. *Du Cange*.

ASSACH, or *Affash*, Was a custom of purgation used of old in *Wales*, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient MSS. and prevailed till the time of *Hen. 5*, when it was abrogated. *1 H. 5. c. 6*: *Spelman*. and See *Stat. 27 H. 8. c. 7*.

ASSART, *Affartum* from the Fr. *Affartir*, To make plain.] *Affartum est quod redactum est ad culturam*. *Fleta*, lib. 4. c. 21. And the word *affartum* is by *Spelman* derived from *exertum*, to pull up by the roots: for sometimes it is wrote *effart*. Others derive it from *exaratum* or *exartum*, which signifies to plow or cut up. *Manwood*, in his *Forest Laws*, says it is an offence committed in the forest, by pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land; this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the felling down the coverts which may grow up again, *assart* is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. See the Red book in the Exchequer. But this is no offence if done with licence; and a man may, by writ of *ad quod damnum*, sue out a licence to *assart* ground in the forest, and make it several for tillage. *Reg. Orig. 257*. Hence are lands called *assarted*: and formerly *assart rents* were paid to the crown for forest lands *assarted*. See *Stat. 22 Car. 2. c. 6*. *Affartments* seem to be used in the same sense in *Rot. Parl.* Of *assarts* you may read more in *Crompt. Juris. p. 203*. And *Charta de Foresta*, anno 9 H. 3. c. 4; *Manwood*, part 1. p. 171.

ASSAULT, *Affultus*, from the Fr. *Affayler*.] An attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him, with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. *1 Hawk. P. C. c. 62. § 1*: See also *Lamb. Eiren. lib. 1. c. 3*: *22 Lib. Aff. pl. 60*.

Assault does not always necessarily imply a hitting, or blow; because, in trespasss for assault and battery, a man may be found guilty of the assault, and excused of the battery. *1 Hawk. P. C. 263*. But every battery includes an assault; therefore if the assault be ill laid, and the battery good, it is sufficient. *Id. ib.*

If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any staff or weapon, it is trespass and assault in law: and if a man threaten to beat another person, or lie in wait to

do it, if the other is hindered in his business, and receives loss thereby, action lies for the injury. *Lamb. lib. 1: 22 Aff. pl. 60*.

Any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are batteries in the eye of the law. *1 Hawk. P. C. 263, 4*.—from the Fr. *Battre* to beat or strike.

In many cases a man may justify an assault; thus, to lay hands gently upon another, not in anger, is no foundation of an action of trespass and assault: the defendant may justify *molliter manus imposuit* in defence of his person, or goods; or of his wife, father, mother, or master; or for the maintenance of justice. *Braft. 9 B. 4: 35 H. 6. c. 51*.

A servant, &c. may justify an assault in defence of a master, &c. but not *à contra*. *Ld. Raym.*

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him, he may justify it; so if a parent in a reasonable manner chastise his child, or master his servant, being actually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife (for reasonable and proper cause,) or if one confine a friend who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lays his hand on another and thereby stay him from inciting a dog against a third person; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of another delivered to me to be kept for him, and who will not desist upon my laying my hand gently on him and disturbing him; or if a man beat, wound or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; if the beating was actually necessary, to obtain the good end proposed, or rendered necessary in self-defence; in all these cases it seems the party may justify the assault and battery. See *1 Hawk. P. C. 259*. and the several authorities there cited.

And on an indictment the party may plead Not guilty, and give the special matter in evidence; but in an action he must plead it specially. *6 Mod. 172*. Supposing it matter of justification.—If of excuse, it is said it may be given in evidence, on the general issue. *Bull. N.P. 17*.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master, may have action of trespass, *per quod servitium amittit*. In case of a wife, husband and wife should join in the action for the personal abuse of the wife, (the husband not having sustained any damage). If the husband has been damaged, as by tearing her cloaths, &c. or loss of her assistance, &c. in his domestic concerns, for that peculiar injury to himself he alone must sue.

As to parent and child, master and servant, unless injury accrues to the parent or master, the child or servant may sue.

For an assault, the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king.

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king, wherein he shall be fined according to the heinousness of the offence. 1 *Hawk.* 263.

But if both are depending at one time, unless in very particular cases, the attorney general, will, on application, grant a *nolle prosequi*, if the party will not discontinue his action.

Stat. 8 & 9 *W.* 3. c. 11, enacts, That where there are several defendants to any action of assault, &c. and one or more acquitted, the person so acquitted shall recover costs of suit; unless the judge certify that there was a reasonable cause for making such person a defendant or defendants to such action.

If any person assault a privy councillor, in the execution of his office, it is felony. Stat. 9 *Ann.* c. 16.

Stat. 6 *Geo.* 1. c. 23. *sect.* 11. If any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn or deface, and shall tear, spoil, cut, burn, or deface the garments, &c. of such person, it is felony; and the offender may be transported for seven years.

Assaulting persons in a forcible manner, with intent to commit robbery, is made felony and transportation, by Stat. 7 *Geo.* 2. c. 21. And assaulting or threatening a counsellor at law, or attorney employed in a cause against a man; or a juror giving verdict against him; his adversary for suing him, &c. is punishable on an indictment, by fine and imprisonment, for the contempt. 1 *Hawk.* 58. There are other assaults punishable in a precise peculiar manner *viz.*—Stat. 5 *Hen.* 4. c. 6, & 11 *Hen.* 6. c. 11, render assaults on members of parliament more than usually penal, upon non-surrender on proclamation. Stat. 9 *E.* 2. Stat. 1. c. 3, gives a double criminal process against those who assault clergymen, indictment for the temporal offence, and process in the ecclesiastical court, for the spiritual one. By Stat. 5 *Edw.* c. 4, servants assaulting their master, mistress, or overseer may be imprisoned twelve months on conviction before two justices: By Stat. 9 *Ann.* c. 14. § 8, to assault, beat or challenge another on account of money won by gaming incurs forfeiture of goods and two years' imprisonment. By Stat. 9 *Geo.* 1. c. 22, to assault another by wilfully shooting at him is felony without clergy. By Stat. 12 *Geo.* 1. c. 34, assaulting a master woolcomber or weaver, &c. for not complying with the demands of workmen, is felony and transportation for seven years.

ASSAY of weights and measures, (from the Fr. *essay*, i. e. a proof or trial). Is the examination of weights and measures, by clerks of markets, &c. *Reg. Orig.* 279.

ASSAYER OF THE KING, *Assayator regis.*] An officer of the king's mint, for the trial of silver; he is indifferently appointed between the master of the mint and the merchants that bring silver thither for exchange. See tit. *Gold and Silver*; and *Money*.

ASSAYERS, Of plate made by goldsmiths, &c. See tit. *Goldsmiths*.

ASSAYSIARE, To associate, to take as fellow judges; a word used in old charters. *Cart. Abbat. Glaf.* MS. § 57.

ASSECURARE, *Adsecurare.*] To make secure by pledges, or any solemn interposition of faith. In the charter of peace between *Hen.* 2. and his sons, this word is mentioned. *Hoveden*, anno 1174.

ASSEMBLY UNLAWFUL, See tit. *Riot*.

ASSENT, or CONSENT. To a legacy of goods, the assent of the executor is necessary. See tits. *Executor* and *Legacy*.

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Assent of Dean and Chapter in making leases of church lands; *vide* Leases. Of the major part of corporations, in making by-laws, *Vide Bye Laws*. Of assents to agreements. See tit. *Agreement*.—See also other proper titles.

ASSESSORS, Those that assess public taxes. There are assessments of parish duties, for raising money for the poor, repairing of highways, &c. made and levied by rate on the inhabitants; as well as assessments of public taxes, &c. See *Assessors*.

ASSETS, Fr. *Assets*, i. e. *Satis*.] Goods enough to discharge that burden which is cast upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor. *Bro. tit. Assets*.

Assets are *real*, or *personal*; where a man hath lands in fee-simple, and dies seised thereof, the lands which come to his heir are *assets real*; and where he dies possessed of any *personal* estate, the goods which come to the executors are *assets personal*.

Assets are also divided into *assets per descent*, and *assets inter mains*. Assets by *descent*, is where a person is bound in an obligation, and dies seised of lands which descend to the heir, the land shall be *assets*, and the heir shall be charged as far as the land to him descended will extend.

Assets inter mains, is when a man indebted makes executors, and leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to them in right of the testator, which are called *assets in their hands*. *Terms de Ley* 56, 77.

As to assets by *descent* it is to be observed, that by the common law, if an heir had sold or aliened the lands which were assets, before the obligation of his ancestor was put in suit, he was to be discharged, and the debt was lost: but by Statute, 3 *W. & M.* c. 14, made perpetual by 6 *Will.* 3. c. 14, the heir is made liable to the value of the land by him sold, in action of debt brought against him by the obligee, who shall recover to the value of the said land, as if the debt was the proper debt of the heir; but the land which is sold or aliened *bona fide* before the action brought, shall not be liable to execution upon a judgment recovered against the heir in any such action.

And by Stat. 29 *Car.* 2. c. 3. § 10, Lands of *cessuy que trust* shall be assets by descent; and by the same Stat. § 12, Estates *pur autre vie* shall be assets in the hands of the heir, if it come to him by reason of a special occupancy; and where there is no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

Where a man binds himself and his heirs in a bond; and dies leaving issue two sons, if the eldest son enters on the lands by descent as heir to the father, and die without issue; and then the youngest son enters, he shall be charged with assets as heir to the father. *Dyer* 368. Lands which come to the heir by *purchase* shall not be assets; for it is only lands by *descent* that are assets. 1 *Danv.* Abr 577.

A reversion in fee, depending upon an estate tail, is not assets; because it lies in the will of the tenant in tail to dock and bar it by fine, &c. 6 *Rep.* 56. But after the tail is spent, it is assets. 3 *Mol.* 257. And a reversion on an estate for life or years shall be assets. A reversion expectant upon the determination of an estate for life

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is assets, and ought to be pleaded specially by the heir and the plaintiff in such case may take judgment of it *et cum acciderit*. *Dyer* 371: *Carth.* 129. An advowson is assets; but not a presentation to a church actually void, which may not be sold. *Co. Lit.* 374.

And lands by descent in ancient demesne will be assets in debt. But a copyhold estate descending to an heir is not assets; nor is any right to an estate assets, without possession, &c. till recovered and reduced into possession. *Dan.* 577.

An annuity is no assets, for it is only a *chose en action*. *Br. Assets per Descent*, pl. 26.

Equity of redemption of an estate mortgaged, and a term for years to attend the inheritance are assets. 3 *Leon.* 32. An heir may plead *riens per descent*, but the plaintiff may reply that he had lands from his ancestor; and special matter may be given in evidence, &c. 5 *Rep.* 60. A special judgment against assets shall only have relation to, and bind the land from the time of filing the original writ or bill. *Carth.* 245: See tit. *Heir.*—and *Com. Dig.* tit. *Assets*.

Assets also are either legal or equitable; of the former some have been specified above; for the latter see *Com. Dig.* tit. *Chancery*, (2 G. 1.) &c.

As to assets *inter maines*. See tit. *Executor*, V. 5.

ASSEWIARE, To draw or drain water from marsh grounds. *Mon. Ang.* 2 vol. f. 334.

ASSIDERE, or *Affelare*, To tax equally; to *assess*. *Mat. Paris.* anno 1232. Sometimes it hath been used to assign an annual rent, to be paid out of a particular farm, &c.

To **ASSIGN**, *assignare*.] Hath various significations; one general, as to set over a right to another, or appoint a deputy, &c. another special, to set forth or point at; as to assign error, assign false judgment, waste, &c. And in assigning of error, it must be shewn where the error is committed; in false judgment, wherein the judgment is unjust; in waste, wherein especially the waste is done. *F. N. B.* 19, 112: *Reg. Orig.* 72. Also justices are said to be assigned to take assizes. Stat. 11 H. 6. c. 2.

ASSIGNS or **ASSIGNEES**, *assignatus*. Lat.] Those who are assigned, deputed or appointed by the act of the party, or the operation of law, to do any act, or enjoy any benefit on their own accounts and risks—an assignee being one that possesses a thing in his own right; but a deputy, he that acts in right of another. *Perkins*. Assignee by deed is when a lessee of a term, &c. sells and assigns the time to another, that other is his assignee by deed: assignee in law is he whom the law makes, without any appointment of the person; as an executor is assignee in law to the testator. *Dyer* 6. But if there be assignee in deed, assignee in law is not allowed: if one covenant to do a thing to J. S. or his assigns by a day, and before that day he dies; if before the day he name any assignee, the thing must be done to his assignee named; otherwise to his executor or administrator, who is assignee in law. 27 H. 8. 2.

He is called assignee, who hath the whole estate of the assignor: and an assignee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named, *Co. Lit.* 215. Assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 *And* 82. What covenants affect or benefit assignees see tit. *Covenant*, *Condition*.

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Under the word *assigna*, shall be included the assignee of an assignee *in perpetuum*, the heir of an assignee, or the assignee of an heir. *Co. Lit.* 384 b: *Plowd.* 173: 5 *Co.* 16, 17 b. So the assignee of an assignee's executor, a *Show.* 57. And a devisee. 2 *Show.* 39: *Godb.* 161. But if an obligation be, to pay such persons as he shall name by his will, or writing; there must be an express nomination, and his executor shall not take as assignee. *Mo.* 855.—An administrator is an assignee. *Moor* 44.

ASSIGNMENT, *Assignatio*.] The setting over or transferring the interest a man hath in any thing to another.

Herein shall be considered principally what things are assignable.—As to what covenants, &c. affect or benefit assignees, See tit. *Condition*, *Covenant*.

Assignments may be made of lands in fee, for life, or years; of an annuity, rent-charge, judgment, statute, &c. but as to lands they are usually of leases and estates for years, &c. And by the statute of frauds, Stat. 29 *Car.* 2. c. 3, no estate of freehold, or term for years, shall be assigned but by deed in writing signed by the parties; except by operation of law. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over. *Co. Litt.* 214.

But though a bond, being a *chose in action*, cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. *Co. Lit.* 232. And in the assignment of bonds, &c. is always contained a power of attorney to receive and sue in the assignor's name.

Also in equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes intitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 *Vern.* 595: In the case of a policy of insurance the court of K. B. will so far take notice of an assignment, as to permit an action to be brought in the name of the assignor. 1 *Term Rep.* 26. And the assignor who has become a bankrupt may sue the debtor for the benefit of the assignee. *Id.* 619.

As to bare rights and possibilities see *Com. Dig.* tit. *Assignment* (C).

Tho' a possibility or contingent interest, be not grantable at law, yet (whether in real or personal estate) it is transmissible and devisable; *Cro. Jac.* 509: 1 *P. Wms.* 566: *Porter* 117: 8 *Vin. Abr.* 112. pl. 38: 2 *Atk.* 616: 1 *Vez.* 236: *Pollexfen* 44: 3 *Term Rep.* 88: 2 *Burr.* 1131: 1 *Bro. Rep.* 181: *Fearne's Con. Rem.* 444.—The cases in the books, (1 *C. R.* 18: 1 *Ch. Caf.* 8: *Pollex.* 31, 44: 1 *P. Wms.* 572: 3 *P. Wms.* 132: 2 *Freem.* 250: 9 *Mod.* 101: 2 *P. Wms.* 608,) abundantly prove, that interests in contingency, respecting personal estates are assignable in equity; but it may be material to observe, that in the case of assignments of such interests, Equity requires the assignee to shew that he gave a valuable consideration for the interest assigned; and therefore will not interpose to assist volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. 1 *Vez.* 409. See *Fonblanque's Treatise of Equity* i. 203.

An assignee must take the security assigned, subject to the same equity that it was in the hands of the obligee;

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as if on a marriage treaty the intended husband enters into a marriage-brotherage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor 2 Vern. 428.

Where there is a bond for the performance of the covenants in a lease, if the lessee assigns the lease, he may likewise assign the bond; but this must be before any of the covenants are broken; but if any of the covenants are broken, and the lessee afterwards assigns the lease and bond, and the assignee puts the bond in suit, for those breaches, it is maintenance. Godb. 81.

'Tis enacted by the statute 7 Jac. 1. c. 15, *That a debtor to the king shall not assign any debts to him, but such as did originally grow due to the debtor*; afterwards there was a debtor to the husband in 2000l. by a statute; the husband made his wife executrix, and died; she married again one G. D. who was indebted to the king, and then the husband and wife assigned this statute to the king in satisfaction of the debt due to him; adjudged, that the assignment was good, for tho' the second husband had the statute in right of his wife, and by consequence the debt was not originally due to him; yet because he might release the statute, it is the same thing as if it had been originally taken in his name 2 Cro. 324.

An office of trust is not grantable or assignable to another; and therefore it was adjudged, that the office of a filazer, which was an office of trust could not be assigned; nor could it be extended upon a statute Dyer 7.

A bare power is not assignable, but where it is coupled with an interest it may be assigned: 2 Jon. 206: 2 Mod 317.

Arrars of rent, &c. is a chose in action, and not assignable. See Skin. 6.

It hath been doubted if a lease for years, before entry and possession, be assignable. See Show 291.

A lessee out of possession cannot make any assignment of his term off the land; but must first enter, and recontinue his possession; or seal and deliver the deed upon the land, which puts the assignee into actual possession. Dalif. 81. But it has been adjudged that where lessee for years of the crown is put out of his estate by a stranger, yet he may assign the term, though he is not in possession; because the reversion being in the crown, he cannot lawfully be put out of possession, but at his own will. Cro. Eliz. 275.

If lessee for years assign all his term in his lease to another, he cannot reserve a right in the assignment; for he hath no interest in the thing by reason of which the rent reserved should be paid; and where there is no reversion there can be no distress: but debt may lie upon it, as on a contract. 1 Lill. Abr. 99. Where the executor of a lessee assigns the term, debt will not lie against him for rent incurred after the assignment; because there is neither privity of contract, nor estate between the lessor and executor: but if the lessee himself assigns his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the assignment, and he shall be chargeable during his life; but after his death, the privity of contract is likewise determined. 3 Rep. 14, 24. Although a lessee make an assignment over of his term, yet debt lies against him by the lessor or his heir; (not having accepted rent from the assignee;) but where a lessee assigns his term, and the lessor his reversion, the privity is determined, and debt doth not lie for the re-

versioner against the first lessee. Moor 472. Vide Barker v. Dormer. 1 Sbo. 191.

A man made a lease, provided that the lessee or his assigns should not alien the premises without licence of the lessor, &c. who after gave licence to the lessee to alien; by this the lessee or his assigns may alien in infinitum. 4 Rep. 119.

Adjudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the donee in tail holdeth of the donor by fealty, he cannot assign it over to another, because fealty is incident to, and inseparable from, the reversion; so if the founder of a college grant his foundation, though it be to the king, the grant is void, because it is inseparable from his blood. 11 Rep. 66. b, in Magdalen College's case.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes and bills of exchange by Stat. 3 & 4 Ann. c. 9; bail-bonds by the sheriff, by 4 & 5 Ann. c. 16; a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 W. 3. c. 23; a bankrupt's effects by the several statutes of bankruptcy.

A lease was made for years of lands, excepting the woods; the lessor grants the trees to the lessee, and he assigns the land over to another; the trees do not pass by this assignment to the assignee. Goldsb. 188.

Where tenant for years assigns his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignees: in other cases some consideration must be paid. 1 Mod. 263. The words required in assignments are, *grant, assign and set over*; which may amount to a grant, feoffment, lease, release, confirmation, &c. 1 Inst. 301. In these deeds the assignor is to covenant to save harmless from former grants, &c. That he is owner of the land, and hath power to assign; that the assignee shall quietly enjoy, and to make further assurance; and the assignee covenants to pay the rent, and perform the covenants, &c.

FORM of an ASSIGNMENT of a BOND.

TO all to whom these presents shall come, greeting;
Whereas A. B. of, &c. in and by one bond or obligation, bearing date, &c. became bound to C. D. of, &c. in the penal sum of, &c. conditioned for the payment of, &c. and interest at a day long since passed, as by the said bond and condition thereof may appear: And whereas there now remains due to the said C. D. for principal and interest on the said bond, the sum of, &c. Now know ye, That the said C. D. for and in consideration of the said sum of, &c. of lawful British money to him in hand paid by E. F. of, &c. the receipt whereof the said C. D. doth hereby acknowledge; he the said C. D. Hath assigned and set over, and by these presents doth assign and set over, unto the said E. F. the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in, and to the same. And the said C. D. for the consideration aforesaid, hath made, constituted and appointed, and by these presents doth make, constitute and appoint, the said E. F. his executors and administrators, his true and lawful attorney and attorneys irrevocable, for him and in his name, and in the name and names of his executors and administrators, but for the sole and proper use

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use and benefit of the said E. F. his executors, administrators and assigns, to ask, require, demand, and receive of the said A. B. his heirs, executors and administrators, the money due on the said bond; and on non-payment thereof, he the said A. B. his heirs executors and administrators, to sue for and recover the same; and on payment thereof to deliver up and cancel the said bond, and give sufficient releases and discharges therefore, and one or more attorney or attorneys under him to constitute; and whatsoever the said E. F. or his attorney or attorneys, shall lawfully do in the premises, the said C. D. doth hereby allow and assent. And the said C. D. doth covenant with the said E. F. that he the said C. D. hath not received, nor will receive the said money due on the said bond, any part thereof; neither shall or will release or discharge the same, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the said E. F. saving the said C. D. harmless, of and from any costs that may happen to him thereby. In witness, &c.

ASSIMULARE, To put highways together: it is mentioned in *Leg. Hen. 1. c. 8.*

ASSISA CADERE, This word signifies to be nonsuited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no further on it. *Fleta, lib. 4. c. 15: Bracton, lib. 2. c. 7.*

ASSISA CADIT IN JURATAM, Is where a thing in controversy is so doubtful, that it must necessarily be tried by a jury. *Fleta, lib. 4. c. 15: See post Attaint.*

ASSISA CONTINUANDA, A writ directed to the justices of assize for the continuation of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. *Reg. Orig. 217.*

ASSISA PROROGANDA, Is a writ directed to the justices assigned to take assizes, for the stay of proceedings, by reason of the party's being employed in the king's business. *Reg. Orig. 208.*

ASSISE, *Fr. Affir.*] According to our ancient books is defined to be an assembly of knights, and other substantial men, with the Justice, in a certain place, and at a certain time appointed. *Custum. Normand. cap. 24.* This word is properly derived from the Latin verb *affideo*, to sit together; and is also taken for the court, place or time, when and where the writs and processes of assize are handled or taken. And in this signification assize is general; as when the justices go their several circuits with commission to take all assizes; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assize upon one or two disseisins only. *Bract. lib. 3.*

Concerning the general assize, all the counties of England are divided into six circuits; and two judges are assigned by the king's commission to every circuit, who hold their assizes twice a year in every county; (except, *Middlesex*, where the king's courts of record do sit, and where his courts for his counties palatine are held;) and these judges have five several commissions.

1. Of *oyer and terminer*, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c. and this is the largest commission they have.

2. Of *gaol delivery*, directed to the judges and the clerk of assize associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever,

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but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it.

3. Of *assise*, directed to themselves only, and the clerk of assize, to take assises, and do right upon writs of assize brought before them by such as are wrongfully thrust out of their lands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. Of *nisi prius*, directed to the judges and clerk of assize, by which civil causes grown to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

These causes by the course of the courts are usually appointed to be tried at *Westminster* in some *Easter* or *Michaelmas* Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius*, unless before the day prefixed, the judges of assize come into the county in question.—This they are sure to do in the preceding vacation.

5. A commission of the peace, in every county of the circuits; and all justices of the peace of the county are bound to be present at the assizes; and sheriffs are also to give their attendance on the judges, or they shall be fined. *Bacon's Elem. 15, 16, &c. 3 Comm. 60, 269.*

There is a commission of the peace, *oyer and terminer* and *gaol delivery* of *Newgate*, held eight times in a year, for the city of London and county of *Middlesex*, at *Justice Hall* in the *Old Bailey*, where the lord mayor is the chief judge.

In *Wales* there are but two circuits, *North* and *South Wales*; for each of which the king appoints two persons learned in the laws to be judges; stat. 18 *Eliz. c. 8.* If justices sit by force of a commission, and do not adjourn the commission, it is determined. 4 *Inft. 265.*

The constitution of the justices of assize was begun by *Hen. 2*; though somewhat different from what they now are: and by *Magna Charta* justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel disseisin, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 *Hen. 3. c. 12.*

There are several statutes as to holding the assises at particular places in certain counties.

ASSISE is likewise used for a jury, where assises of novel disseisin are tried: the panels of assises shall be arrayed, and a copy indented delivered by the sheriff, &c. to the plaintiffs and defendants six days before the sessions, &c. if demanded, on pain of 40*l.* by stat. 6 *Hen. 6. cap. 2.* And assize, is taken for a writ for recovery of possession of things immoveable, whereof any one and his ancestors have been disseised. Likewise, in another sense, it signifies an ordinance or statute as *Affisa Panis et Cervisie*. *Reg. Orig. 279.*

ASSISE OF NOVEL DISSEISIN, *Affisa nova disseisinæ.*] See *Disseisin*.

An assize of novel disseisin is a remedy *maximè festinum*, for the recovery of lands or tenements, of which the party was disseised. 2 *Inft. 410.* And it is called novel disseisin, because the justices in *eyre* went their circuits from seven years to seven years; and no assize was allowed before them

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them, which commenced before the last circuit, which was called an *ancient assise*; and that which was upon a *disseisin* since the last circuit, an *assise of novel disseisin*. *Co. Lit.* 153 b.

An assise is called *sextimum remedium*. 1. Because the tenant shall not be effoined. 2. Shall not call a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger, except he be present, and will enter presently into warranty; so of receipt. 5. The parol shall not demur for the nonage of the plaintiff or defendant. 8 *Co.* 50: *Booth* 262.

It lies where tenant in fee-simple, fee-tail, or for term of life, is put out and disseised of his lands, or tenements, rents, common of pasture, common way, or of an office, toll, &c. *Glouc. lib.* 10: *Reg. Orig.* 197: Assise must be of an actual freehold in lands, &c. and not a freehold in law: it lieth of common of pasture, where the commoner hath a freehold in it, and the lord or other persons feed it so hard, that all the grass is eat up; but then the plaintiff must count and set forth how long the land was fed, and alledge *per quod profectum suum ibidem amisit*, &c. 9 *Rep.* 113. One may have an assise of land and rent, or of several rents, and offices and profits in his soil, all in one writ; and if it be of a rent-charge, or rent-seck, it shall be general *de libero tenemento* in such a place, and all the lands and tenements of the tenants charged ought to be named in the writ; but in assise for rent service it is otherwise. *Dyer* 31. An assise may be brought for an office held for life; but then it must be an office of profit, not of charge only: of the toll of a mill, or market, assise lieth; though it may not be brought of suit to a mill. 8 *Rep.* 46, 47.

An assise was brought of the office of a *flaxer* of the court of Common Pleas, and the demandant counted *de libero tenemento*, and alledged seisin, by taking money for a *capias*, and the *posse* was put in *view* where the officer late. *Dyer* 114.

An assise lieth of the office of *register of the admiralty*, and the demandant laid a prescription to it, viz. *quod quilibet hujusmodi persona*, who should be named by the admiral, should be register of the admiralty for life. *Dyer* 153.

It lieth of offices of *woodward*, *park keeper*, and *keeper of chufes*, *avanner*, &c. but these are not at common law; but by the statute of *West.* 2. c. 25. because they are of profits to be taken in *aliove solo*: it likewise lieth of all other offices and bailiwicks in fee. 8 *Rep.* 47.

In an assise of a *new offer*, it ought to be shewed what profits belong to it; but it is otherwise of an ancient office, because it is presumed, that the profit thereof is sufficiently known. 8 *Rep.* 43, 49.

Tenants in common shall each have a several assise for his moiety, or part, because they are seised by *several titles*; but *twenty jointtenants* shall have but one assise in all their names, because they have but one *joint title*; so if there are three jointtenants, and one of them releaseth all his right to one of his companions, and then the other two are disseised of the whole, they shall have but one assise in both their names, for the two parts, because they had a *joint title* to it at the time of the disseisin, and he to whom the release was given shall have an assise in his own name, because of that part he is *tenant in common*. *Co. Lit.* 196.

If lessee for years, or tenant at will, be ousted, the lessor, or he in remainder, may have assise, because the free-

hold was in him at the time of the disseisin. *Rel.* 169. Assise lies for tithes, by stat. 32 *Hen.* 8. c. 7: *Cro. Eliz.* 559. But not for an annuity, pension, &c. In some cases an assise will lie, where ejectment will not. Ejectment will not lie *de piscariis*, by reason the sheriff cannot deliver possession of it; but an assise will lie for it, as it may be viewed by the recognitors. *Cro. Car.* 534. Assise will sometimes lie where trespass *vi & armis* doth not. *Fid.* 8 *Rep.* 47: 1 *Nelf. Abr.* 276.

By *Magna Charta*, 9 *Hen.* 3. cap. 12, *assises of novel disseisin*, &c. shall be taken in the proper counties, by the king's justices: and for estovers of wood, profit taken in woods, corn to be received yearly in a certain place; and for toll, tonnage, &c. and of offices, &c. an assise shall be; also for common of turbary, and fishing, appendant to freehold, &c.

In an assise, the plaintiff must prove his title, then his seisin and disseisin: but seisin of part of a rent is sufficient to have assise of the whole; and if a man who hath title to enter set his foot upon the land and is ousted, that is a sufficient seisin.

As the writ of assise restores the party to the actual seisin of his freehold, for so are the words of the writ, viz. *faciat tenementum illud seipsum*, &c. consequently the party that brings the writ must found it upon an actual seisin, which he has been deposed of, for otherwise this remedy is not commensurate to his case. See 2 *Rel. Abr.* 463.

Therefore if there be lord and tenant by rent-service, and the lord grants the services to another, and the tenant attorns by a penny, this being given by way of *attornment*, is not sufficient seisin to ground an assise on; *scilicet* if the penny had been given by way of *seisin* of the rent. *Lit. Feud.* 565: *Co. Lit.* 315: 4 *Co.* 9: 10 *Co.* 127.

The first process in this action is an original writ issued out of chancery, directed to the sheriff, commanding him to return a jury, who are called the recognitors of the assise. An assise is to be arraigned on the day the writ is returnable, on which day the defendant is to count, and the tenant is to appear and plead instantly. *Style Reg.* 88.

If in an assise no tenant of the freehold be mentioned, the defendant may plead it; and where one defendant pleads, no tenant of the freehold named in the writ, if this is found, the writ shall abate *quoad* ail. *Dyer* 207.

On such a plea of the defendant, the plaintiff says that he hath made a feoffment to persons unknown, and he himself hath continually taken the profits; if then they are at issue upon the taking the profits, and it be found against the defendant, it shall not be inquired of the points of the assise, for the disseisin is acknowledged. 1 *Dawson. Abr.* 584. And if the deed of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the plaintiff; the assise shall not inquire of the points of the writ, but only of the damages. *Ibid.* 585.

In this suit, if the defendant fail to make good the exception which he pleads, he shall be adjudged a disseisor, without taking the assise; and shall pay the plaintiff double damages, and be imprisoned a year. Stat. 13 *Ed.* 1. cap. 25. In assise the tenant pleads in bar, and the plaintiff makes title, but the tenant doth neither answer nor traverse the title; in this case the assise shall be awarded at large. *Cro. Eliz.* 559. And if any other title is found for the plaintiff, he shall recover. *Bro. Aff.* 281. If a tenant pleads in abatement in an assise, he must at the same

same time plead over in bar; and no imparlance shall be allowed, without good cause: and where there are several defendants, and any of them do not appear the first day, the assise shall be taken against them by default. *Pajeb. 5 W. 3.*

If assise be brought against a lessee, he may not plead *assise non*; for that is the form of the plea in bar for tenant of the freehold: he ought to plead the special matter, viz. his lease, the reversion in the plaintiff, and that he is possessed, and so in without wrong. *Jenk. Cent. 142.* An assise is to be first arraigned, and the plaintiff's counsel prays the court that the defendant may be called; whereupon he is called; and if the defendant appears, then his counsel demand over of the writ of assise, and the return of it; which is granted; and then he prays leave to imparl to a short time after, and the jury is adjourned to that day: at the day given by the court, the defendant is again called, and upon his appearance, he pleads to the assise; and upon this an issue is joined between the parties, and the jurors are sworn to try the issue, the counsel proceeding to give them their evidence: after the trial the court gives judgment, and the plaintiff recovering is to have writ of *seisin*, &c. *1 Lill. Abr. 105, 106.*

The jurors that are to try the assise are to view the thing in demand: by writ of assise the sheriff is commanded, *Quod faciat duodecim hiberos & legales homines de vicineto, &c. Videre tenementum illud, & nomina eorum imbraviari, & quod summonent eos per bonas summonitiones, quod sint eorum iustitiaris, &c. parati inde facere recognitionem, &c.*

By *Westm. 2. cap. 25.* A certificate of assise is given, which is a writ for the party grieved, by a verdict or judgment given against him in an assise, when he had something to plead, as a record or release, which could not have been pleaded by his bailiff; or when the assise was taken against himself by default, to have the deed tried, and the record brought in before the justices, and the former jury summoned to appear before them at a certain day and place, for a further examination and trial of the matter. See *Boorb 215, 287*; *4 Co. 4 b*; *2 Inst. 26*; *F. N. B. 181*; *3 Comm. 38.*

The plaint need not be so certain in assise as in other writs; the judgment being to recover *per assum recognitionem*; and if the plaint be but so certain as that the recognitors may put the demandant into possession, it is sufficient. *Dyer 84.*

To prevent frequent and vexatious disseisin, it is enacted by the statute of *Merton. 20 Hen. III. c. 3.* that if a person disseised recover seisin of the land again, by assise of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *re-disseisin*; and, if he recover therein, the *re-disseisor* shall be imprisoned; and, by the statute of *Marlberge 52 Hen. III. c. 8.* shall also pay a fine to the king: to which the stat. *Westm. 2. (13 E. 1.) c. 26.* hath superadded double damages to the party aggrieved. In like manner by the same statute of *Merton*, when any lands or tenements are recovered by assise of *mort d'ancestor*, or other jury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin*, against him; which subjects the *post-disseisor* to the same penalties as a *re-disseisor*. The reason of all which, as given by *Sir Edward Coke*, (*2 Inst. 83, 84.*) is because such proceed-

ing is a contempt of the king's court, and in despite of the law. *3 Comm. 188*; See *Reg. Orig. 108*; *F. N. B. 190*; *Co. Lit. 154*; *2 Inst. Com. on stat. W. 2*; *New Nat. Br. 417, 420.*

For proceedings in writ of assise of *novel disseisin*, See *Plowd. 411, 412.*

The court of *Common Pleas* or *King's Bench* may hold plea of assises of land in the county of *Middlesex*, by writ out of *Chancery*. *1 Lill. Abr. 105.* And in cities and corporations an assise of *fresh force* lies for recovery of possession of lands, within forty days after the *disseisin*, as the ordinary assise in the county. *F. N. B. 7.*

ASSISE OF MORT D'ANCESTOR, *Assisa mortis antecessoris.* Is a writ that lay where a man's father, mother, brother, sister, uncle, aunt, &c. died seised of lands, tenements, rents, &c. that were held in fee, and after their death a stranger abated. *Reg. Orig. 223.* It is good as well against the abator, as any other in possession of the land; but it lies not against brothers or sisters, &c. where there is privity of blood between the person prosecuting and them. *Co. Lit. 242.* And it must be brought within the time limited by the statute of Limitations, [50 years, *3 Comm. 189.*] or the right may be lost by negligence.

If tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an assise of *mort d'ancestor*, if he have not assets by descent from the tenant by the curtesy; and the same shall be as well where the wife was not seised of land the day of her death, as where she was seised thereof. *New Nat. Br. 489.* A warden of a college, &c. shall have assise of *mort d'ancestor* of rent where his predecessor was seised. And a man may have assise of *mort d'ancestor* of rents, against several persons in several counties; having in the end of the writ several summons against the tenants: and the process in this writ, is summons against the party; and if he makes default at the day of the assise returned, then the plaintiff ought to sue out a re-summons; and if he makes default again, the assise shall be taken, &c. *Bro. Assis. 88.* In a *mort d'ancestor*, if the tenant says, the plaintiff is not next heir, and this is found against him, the points of the writ shall be inquired of: and in this case, the assise may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. *Br. Mort d'An. 47*; *1 Danv. Abr. 584.* Damages shall be recovered in the assise of *mort d'ancestor*; but it lieth not of an estate-tail, only where the ancestor was seised in demesne as of fee. *Bro. Assis.* If a man be barred in assise of *novel disseisin*, upon shewing a discent, or other special matter, he may have *mort d'ancestor*, or writ of entry *sur disseisin*, &c. *4 Rep. 43.*

If the abatement happened on the death of one's grandfather or grandmother, then an assise of *mort d'ancestor* no longer lies, but a writ of *ayle*, or *de aylo*; if on the death of the great grandfather, or great grandmother, then a writ of *heirayle*, or *de proavo*; but if it mounts one degree higher, to the *ireayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before mentioned, the writ is called a writ of *cofinage*, or *de consanguineo*. *Finch L. 266, 267.* And the same points shall be inquired of, in all these actions *ancestral*, as in an assise of *mort d'ancestor*, they being of the very same nature. *stat. Westm.*

Writ. s. (13 E. 1.) c. 20, though they differ in this point of form, that these *ancestral writs* (like all other writs of *præcipe*) expressly assert a title in the demandant, (*viz.* the seisin of the ancestor at his death, and his own right of inheritance) the assise asserts nothing directly, but only prays an inquiry whether those points be so. *2 Inst. 399*. There is also another ancestral writ, denominated a *super assise*, to establish an equal division of the land in question, where on the death of an ancestor, who has several heirs or co-heiresses, one enters and holds the others out of possession. *F. N. B. 197: Finch. L. 293: Leg. Orig. 226: New Nat. Br. 437, 8: Booth on Real Actions*. But a man is not allowed to have any of these actions ancestral for an abatement, consequent on the death of any collateral relation, beyond the 4th degree; (*Hale on F. N. B. 221*.) though in the lineal ascent he may proceed *ad infinitum*. (*Finch. Abr. tit. Cofinage 15.*) *3 Comm. 186*.

It was always held to be law, that where lands were devisable in a man's last will by the custom of the place, there an assise of *mort d'ancestor*, did not lie. For, where lands were so devisable, the right of possession could never be determined by a process, which inquired only of these two points, the seisin of the ancestor, and the heirship of the demandant. And hence it may be reasonable to conclude, that when the statute of wills, *32 Hen. 8. c. 1*, made all socage lands devisable, an assise of *mort d'ancestor* could no longer be brought of lands held in socage. See *1 Leon. 267*; and that now, since the stat. *12 Car. 2. c. 24*, (which converts all tenures, a few only excepted, into free and common socage,) no assise of *mort d'ancestor* can be brought of any lands in the kingdom; but that, in in case of abatements, recourse must be properly had to the writs of entry. *3 Comm. 187*.

It is to be observed moreover, that these writs are now almost obsolete, being in a great measure superseded by the action of ejectment, which answers almost all the purposes of real actions; except in some very peculiar cases.

ASSISE OF DARREIN PRÆSENTMENT. See tit. *Darrein Præsentment*.

ASSISE DE UTRUM, or *assisa juris utrum*.] See tit. *Juris utrum*.

ASSISE OF THE FOREST, *Assisa de foresta*.] Is a statute touching orders to be observed in the king's forest. *Mauwood 35*. The statute of view of frank pledge, anno *18 Ed. 2*, is also called the *assise of the king*; and the statute of bread and ale, *51 H. 3*, is termed the *assise of bread and ale*. And these are so called, because they set down and appoint a certain measure, or order, in the things they contain. There is further an *assise of nuisance*, *assisa de nuisance*, where a man maketh a nuisance to the freehold of another, to redress the same. And besides *Littleton's* division of assises, there are others mentioned by other writers, *viz. assise at large*, brought by an infant to enquire of a disseisin, and whether his ancestor were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right.

Assise in point of assise; *assisa in modum assise*.] Which is when the tenant as it were setting foot to foot with the demandant, without any thing further, pleads directly to the writ, no wrong, no disseisin.

Assise out of the point of assise, is when the tenant pleads something by exception; as a foreign release, or

foreign matter triable in a foreign county; which must be tried by a jury, before the principal cause can proceed.

Assise of right of damages, is where the tenant confesseth an ouster, and referring it to a demurrer in law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the demandant shall have a writ of assise to recover damages. *Bract. lib. 4: F. N. B. 105*. Assises are likewise awarded by default of tenants, &c. —Of the Grand Assise see tit. *Jury*. —For further particulars relative to Assise in general, see *Com. Dig.* and *ante* tit. *Assise*.

ASSISORS, *assiores*.] *Sunt qui assisar condunt aut taverunt inopiam.* —In Scotland, (according to *Shene*) they are the same with our jurors; and the oath is this:

*We shall tell truth say,
And no suit conceal, for naething we may,
So far as we are charged upon this assise,
Be [by] God himself, and be [by] our part of paradise,
And as we will answer to God, upon
The dreadful day of doom.*

ASSISUS, Rented or farmed out for such an assise, or certain assessed rent in money or provisions. *Terra assisa* was commonly opposed to *terra dominica*; this last being held in domain, and occupied by the lord, the other let out to inferior tenants. And hence comes the word to assess or allot the proportion and rates in taxes and payments by *assissors*.

ASSATHMENT, A weregild or compensation, by a pecuniary mulct: from the preposition *ad*, and the Sax. *sith*, *vice*: *quod vice supplicii ad expiandum delictum solvitur*, Blount.

ASSOCIATION, *associatio*.] Is a writ or patent sent by the king, either at his own motion or at the suit of a party plaintiff, to the justices appointed to take assises, or of *oyer and terminer*, &c. to have others associated unto them. And this is usual where a justice of assise dies; and a writ is issued to the justices alive to admit the person associated: also where a justice is disabled, this is practised. *F. N. B. 185: Reg. Orig. 201, 206, 223*. The clerk of the assise is usually associate of course; in other cases, some learned serjeants at law are appointed. It hath been holden, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commission stand in force. *Br. Assis. 386: Mich. 32 H. 6*. The king may make an association unto the sheriff upon a writ of *redisseisin*, as well as upon assise of *novel disseisin*. *New Nat. Br. 416, 417*. See *ante* tit. *Assise*.

ASSOCIATION OF PARLIAMENT, In the reign of King William III. the Parliament entered into a solemn association to defend his majesty's person and government against all plots and conspiracies: and all persons bearing offices civil or military, were enjoined to subscribe the association, to stand by king William, on pain of forfeitures and penalties, &c. Stat. 7 & 8 W. 3. cap. 27.

ASSOLLE, *absolvere*.] To deliver from excommunication. *Stamf. Pl. Cr. 72*. In stat. 1 H. 4. c. 10, mentioned being made of K. Ed. 3, it is added, whom God assails.

ASSUMPSIT, from the Lat. *Assumo*] Is taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another: it comprehends any verbal promise, made upon consideration, and

ASSUMPSIT I.

the civilians express it diversely, according to the nature of the promise, calling it sometimes *pactum*, sometimes *promissum*, or *constitutum*, &c. *Terms de Ley*. An action upon the case on *assumpsit* (or as it is also expressed, *on promissus*) is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express* or *implied* by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 92. *M.* 617.

Here is to be considered,

- I. In what case an *assumpsit* is or is not the proper action.
- II. What words will create an *assumpsit*.
- III. What consideration is sufficient.
- IV. Of the proceedings.

I. In every action upon *assumpsit*, there ought to be a confide action, promise, and breach of promise. 1 Leon. 405. For

The law distinguishes between a general *indebitatus assumpsit* and a special *assumpsit*; for though they come under the denomination of *actiones on the case*, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special *assumpsit* must be brought. 1 New Abr. 183.

An action on the case on assumpsit lies, for not making a good estate of land sold, according to promise; not paying money upon a bargain and sale, according to agreement; not delivering goods upon promise, on demand; this is by express *assumpsit*; an implied *assumpsit* is where goods are sold, or work is done, &c. without any price agreed upon; in an *action on the case* by *quantum meruit* or *quantum valdebat* the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if it be not paid, *indebitatus assumpsit* lies. 1 Danv. Abr. 26. And *indebitatus assumpsit* lies for goods sold and delivered to a stranger *ad requisitionem* of the defendant. *Ibid.* 27. But on *indebitatus assumpsit* for goods sold, you must prove a price agreed on, otherwise the action will not lie; though this is helped by laying a *quantum meruit*, with the *indebitatus assumpsit*, wherein if you fail in proof of the price agreed on, you may recover the value. *Wood's Inst.* 536.

If A. and B. having dealings with each other, mix up their accounts, and B. is found in arrear, and mixes to pay the balance, an *assumpsit* lies against him, on *infruct computassit* and A. need not bring a writ of account. Cro. Jac. 63: *Flet.* 70. S. P.: 1 Rol. Abr. 7. S. P.: 1 Rd. R. p. 396: *Bulst.* 208: *Moor* 854.

So if A. gives money, or delivers goods to B. to merchandize therewith, and B. promises to render an account, *assumpsit* lies on this express promise, as well as account. 1 Salk. 9.

So if a tenant, being in arrear for rents, settles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an *assumpsit* lies on this promise. 1 Rol. Abr. 9: *Bio. Account* 81: *Razm.* 211: 2 Keb. 813: Vide *Syde* 131, 283. *Cro.*

Jac. 602. So on a balanced account between two partners tho' including *items* not connected with the partnership. 2 Term Rep. 479, 483.

But if the obligor in a bond, without any new consideration, as forbearance, &c. promises to pay the money, an *assumpsit* will not lie, but the obligee must still pursue his remedy by action of debt. 1 Rol. Abr. 8: *Hutt.* 34: *Cro. Eliz.* 240 seems *contra*.

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *assumpsit* for the money is the proper action, for *trover* will not lie for the goods, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. 1 New Abr. 167.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *assumpsit* lies, in which the woman shall recover damages. *Carter* 233.

An *indebitatus assumpsit* lies for money by custom due for scavage; adjudged upon a special verdict, by which it was found, that the sum demanded was due by custom, but that there was no express promise to pay it. 2 Lev. 171.

If one receives my rent, under pretence of title, I may have an *indebitatus assumpsit* against him. 2 Mod. 263.

If a feme sole marries a man, who in truth is married to another woman, and he makes a lease of her lands and receives the rents, she may bring an *indebitatus assumpsit* against him for so much money received to her use; adjudged after verdict. 1 Salk. 28.

Where action is brought upon a contract, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the promise *in law*, arising from the debt, there, though he mistakes the sum, he shall recover. *Alley* 29. Every contract made between parties, implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side. *Dyer* 30, 75. When an *assumpsit* or promise is the ground of the action, it must be precisely set forth. 3 L-v. 319. If a promise be made without limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not time during life. 1 Lill. Abr. 112. On promise to deliver a thing such a day, the party is bound to do it without request. 1 Lev. 284. But if a promise be to do any thing upon request, the request is necessary to intitle the plaintiff to the action, on which it shall arise. 1 Lev. 48. Tho' in every *indebitatus assumpsit*, 'tis alledged the defendant promised to pay on request and that he was requested, and refused payment, yet no request is ever proved. The time for the performance of the promise being elapsed, and the promise not performed, the law presumes request, unless in a particular case where a thing is not to be done, until request. Every executory contract, and debt that is not upon record, or on a specialty, which may be turned into damage, imports in it an *assumpsit* in law, and one may have debt or action on the case upon it at his election; for when a man doth agree to pay money, or to deliver any thing, he thereby promises to pay or deliver it. *Plowd.* 128: 1 Cro. 94.

Every

ASSUMPSIT II.

Every contract executory implies an *assumpsit* to pay money at the day agreed, or immediately, if no time be limited. *Mo. 667.*

The *assumpsit* in an agreement that will be binding and give action, must be compleat and perfect, and duly pursued and observed: and if the party that makes the *assumpsit*, and he to whom it is made, agree together, and a bond is given and taken for what is promised; by this the *assumpsit* is discharged. Also where an *assumpsit* is to stand to an award, if the award made be void; it will make the *assumpsit* void. *Yelv. 87; 2 Leon. ca. 223; 1 Leon. 170.* *Indeb. assump.* lies by a *prothonotary* against an attorney, for fees for work done for defendant as attorney. *Holt's Rep. 20.*

Indebitatus assumpsit lies for a customary fine, *super mortem domini*. *Show. 35.* *Indebitatus assumpsit* lies upon a personal contract for a sum in gross, as *pro rebus venditis*; per *Holt Ch. J. Show. 36.*

Indebitatus lies for fees for being knighted. *Show. 78.*

Indebitatus assumpsit lies for money paid by mistake, on an account or deceit; but not for money paid knowingly on illegal consideration, as an usurious bond. *Salk. 22.*

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. *2 Burr. 1005*, which see for many cases where *assumpsit* will lie; as also, *1 Term Rep. 226.*

Indebitatus assumpsit lies on a judgment of a foreign court without declaring upon or proving the grounds or cause of action; and if the judgment was obtained unfairly, defendant must shew it. *Doug. 1, 4.*

Though, *assumpsit* lies not for rent usually reserved on leases; yet if a man promise to pay, without a lease, so much a week as long as *A. B. &c.* permits him to enjoy a warehouse, &c. which is a special cause of promise, this action will lie. *2 Cro. 592.* Now by *11 Geo. 2. c. 19. § 14*, where the demise is not by deed, the landlord may recover his rent in an action on the case, for use and occupation.

Where a person pays money upon a mistake; or if he receives more from another in a reckoning than he ought, or more fees than should be taken, an *assumpsit* lies. *1 Salk. 22; Comb. 447.* If a man receives money for the use of another person, *assumpsit* may be had against him, which supplies the place of action of account: and where money was deposited on a wager, an *indebitatus* lay for money received to a man's use. *Show. 117.*

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for *assumpsit*. *4 Rep. 94.*

The person to whom a promise is made, shall have the action; and not those who are strangers, or for whose benefit it is intended. *Daro. 64.* Nor shall action be brought against one for what another receives, nor at his request, &c. *1 Salk. 23.* But if a man delivers money to *A. B.* to my use, I may have an action on the case against him for this money. If a man accounts, and upon the account is found in arrear to a certain sum, and presently in consideration thereof, assumes to pay the debt at a day; action on the case lies for this after the day. *Yelv. 70.* And on a promise to pay a sum of money at so much a month, an action on the case may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every non-payment, and damages may be recovered. *2 Cro. 504.*—See title *Debt*.

II. Some agreements though never so expressly made are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the statute of frauds and perjuries, *29 Car. 2. c. 3*, enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith. 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And, lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

The same statute provides that no contract for sale of goods for the price of 10*l.* or upwards shall be good, except the buyer actually receive part of the goods sold, or give earnest; or there be some note or memorandum in writing of the bargain being made by the parties or their agents.

A letter written by a party is a sufficient memorandum. *3 Burr. 1663.* And see tit. *Agreement.*

A parol promise of marriage between parties is not within the statute. *Str. 34; 5 Mod. 411; Salk. 24.*

As to promises for the debt, &c. of another.

If a person for whose use goods are furnished be liable at all, any other promise by a third person to pay that debt, must be in writing. *2 Term Rep. 80.*

And there is no distinction between a promise to pay for goods furnished to a third person made before they are delivered, and one after. *2 Term Rep. 80; Cowp. 227.*

But if the credit was given to the promiser originally, and the party furnishing the goods cannot recover against the person for whose use they were furnished, then the person promising is liable; as if one say "let *A.* have goods and I will pay you;" or "look to me for payment." *Com. Dig. tit. Action upon the Case on Assumpsit. (F.3.)*

The intent of the parties by and to whom the promise or *assumpsit* is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but the substance of it: if a promise be to provide wedding cloaths for a woman, this shall be taken for such cloaths to be worn on the wedding or feast-day according to the dignity of the person. *Poph. 182; Yelv. 87; 3 Cro. 53.*

All promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promiser, and are not to be rejected, if they can by any means be reduced to a certainty.

If a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.* this is a good *assumpsit*, though the time of assignment and payment be not appointed; for the 10*l.* shall be paid in a convenient time after the assignment, which also must be done

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done in a convenient time, and he shall not have time during his life. 1 *Roll. Abr.* 14, 15.

If there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 *Sid.* 240.

III. The consideration is the ground of the common action on the case: and no action on the case lieth against a man for a promise where there is no consideration why he should make the promise. 1 *Danv.* 53.

A consideration altogether executed and past was anciently held not to be sufficient to maintain an *assumpsit*, but this doctrine is denied by the court of *K. B.* 3 *Burr.* 1671. See also *Cio. Eliz.* 282, by which it appears that tho' the consideration were executed, it would be sufficient if laid at plaintiff's request.

If an infant promise after full age to pay a debt incurred in his infancy, this will bind him. 1 *Term Rep.* 648.

If *A.* undertakes to do a thing *without hire*, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the *non-performance*; but if he enters on the doing it, action lies for a *misfeasance*, if it be through his own neglect, or *mismanagement*, because it is a deceit; but not if by mere accident; per *Holt*, 1 *Salk.* 26: Vide 3 *Salk.* 11.

Where the doing a thing will be a good consideration, a promise to do that thing will be so too; per *Holt*, Ch. J. 12 *Mod.* 459.

Parting with my note to the defendant is a good consideration. 7 *Mod.* 12, 13.

An *assumpsit* may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger lien than *assumpsit*; nor when the party has a recognizance for the duty, &c. *Jenk. Cent.* 293.

Love or friendship are not considerations to ground actions upon. 2 *Leon.* 30. Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 *Bulst.* 269.

Lastly, it is to be observed, that considerations may be void as being against law, for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer, who, by the duty of his office, is obliged to execute writs, promises, in consideration of money paid him, to serve a certain process, an *assumpsit* will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 *Roll. Abr.* 16.

Implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law: which extends to all presumptive undertakings and *assumpsits*: which, though never perhaps actually made, yet constantly arise, upon this general implication and intentment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much

as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this implied *assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species of implied *assumpsit* is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies, that the person so receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which *ex æquo et bono*, he ought to refund. 2 *Burr.* 1012.

This species of *assumpsit* lies in numberless instances for money the defendant has received from a third person, which he claims title to, in opposition to the plaintiff's right, and which he had by law authority to receive from such third person. 2 *Burr.* 1008.

One great benefit which arises to suitors from the nature of this action, is, that the plaintiff need not state the special circumstances, from which he concludes, that *ex æquo et bono*, the money received by the defendant, ought to be deemed as belonging to him: he may declare generally that the money was received to his use, and make out his case at the trial. 2 *Burr.* 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing, which shews that the plaintiff, *ex æquo et bono*, is not intitled to the whole of his demand, or to any part of it.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. *Corrup.* 790. But it will not lie to recover back winnings paid by the lottery-office-keeper or insurer of lottery tickets. 4 *Burr.* 1984.

If two persons engage jointly in a stock-jobbing transaction and incur losses, and employ a broker to pay the differences, and one of them repay the broker with the privy and consent of the other the whole sum, he may recover a moiety from the other, in an action for money paid to his use. 3 *Term Rep.* 418.

But.

But in such a case of an illegal transaction, if one partner pay money for another, *without an express authority* he cannot recover it back. *ib.*

And, generally, *assumpsit* for money paid, laid out, and expended will not lie when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. *1 Term Rep. 20.*

See title *Consideration*.

IV. The plaintiff must set forth every thing essential to the gift of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all intitled to a verdict. And therefore, in an action upon the case, the plaintiff cannot declare *quod cum* the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, *super se assumpsit* to pay, &c. without shewing the cause of the debt. *10 Co. 77.*

If in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant; and at such a day, &c. *in simul computaverunt* for all debts, reckonings, and demands; and the defendant upon the said account was found to be in arrear the sum of 20*l.* in consideration whereof the defendant promised to pay, &c. this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which in *pote computi* are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action. *Cro. Car. 116.*

If in an *assumpsit* the plaintiff declares, that the defendant did assume and promise to pay to the plaintiff so much money, and also to carry away certain wood before such a day; the defendant as to the money cannot plead that he paid it, and as to the carriage of the wood, *non assumpsit*, for the promise being intire, cannot be apportioned. *March 100.*

On an *assumpsit* in law, payment, or any other matter that excuses payment, may be given in evidence, on the general issue. In an *assumpsit* in deed, it must be pleaded. *Gilb. Evid. 204, 5.*

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*l.* and thereupon, in consideration that the defendant promised to pay the said 30*l.* the plaintiff likewise promised to release and acquit the defendant of all demands, this is a good plea; for by the account the first contract is merged. *2 Mod. 43, 44.*

The defendant cannot plead that he revoked his promise; as if A. is in execution at the suit of B. and J. S. desires B. to let him go at large, and that he will satisfy him; to which B. agrees; though J. S. before any thing is done in pursuance of this promise and agreement, comes to B. and tells him, that he revokes his promise, and that

he will not stand to it; yet such revocation cannot be pleaded in bar to the action. *1 Rel. Abr. 32.*

In an action upon an *assumpsit*, if the consideration be executory; as if one promises, to do something for me, in consideration of something to be done before by me, to or for him, if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promise. *Cro. Jac. 583, 620.* For further particulars see *Com. Dig. tit. Action on the Case on Assumpsit*; and see also *3 Comm. 158*: and this Dictionary tit. *Agreement, Consideration*.

ASSUMPTION, The day of the death of a saint so called, *Quia ejus anima in celum assumitur. Du Camps.*

ASSURANCE of lands, Is where lands or tenements are conveyed by deed: and there is an assurance of ships, goods and merchandise, &c. See *Insurance*.

ASTER, and *Homo Aster*, A man that is resident. *Briston 151.*

ASTRARIUS HÆRES, (from *Astre*, the hearth of a chimney.) Is where the ancestor by conveyance hath set his heir apparent and his family in a house in his life-time. *Co. Lit. 8.*

ASTRUM, A house or place of habitation, also from *astre*. *Placit. Hilar. 18 Ed. 1.*

ATEGAR, A weapon among the Saxons, which seems to have been a hand-dart, from the Sax. *Acton* to sling or throw, and *Gar* a Weapon. *Spelm.*

ATHE, *Adda.*] A privilege of administering an oath, in some cases of right and property; from the Sax. *ath, othe, juramentum*. It is mentioned among the privileges granted by king Hen. 2, to the monks of *Glastonbury*. *Cartular. Abatt. Glaston, MS. fol. 14, 37.*

ATIA, See *odio & atia*. A writ of enquiry whether a person be committed to prison on just cause of suspicion.

ATILIA, Utensils or country implements. *Blount.*

ATRIUM, A court before the house, and sometimes a church-yard.

To ATTACH, *Attachiare*, From the Fr. *attacher*.] To take or apprehend by commandment of a writ or precept. *Lamb. Eiren. lib. 1. cap. 16.* It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that *attaches* keepeth the party attached, and presents him in court at the day assigned; as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an attachment is oftentimes upon his goods. *Kitch. 279.* A *capias* taketh hold of immoveable things, as lands or tenements, and properly belongs to real actions, but attachment hath place rather in personal actions. *Bract. lib. 4: Fleta, lib. 5. cap. 24.*

ATTACHIAMENTA BONORUM, A distress taken upon goods or chattels, where a man is sued for personal estate or debt, by the legal attachiators or bailiffs, as security to answer an action. There is likewise *attachiamenta de spinis & bosco*, a privilege granted to the officers of a forest, to take to their own use, thorns, brush, and wind-fall within their precincts. *Kennet's Paroch. Antiq. p. 209.*

ATTACHMENT, Is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly

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perly grantable in cases of *contempts*, against which all courts of record, but more especially those of *Westminster-hall*, and above all the court of *B. R.* may proceed in a summary manner. *Leach's Hawk. P. C.* ii. c. 22; See 1 *Wils.* 300.

The most remarkable instances of contempts seem reducible to the following heads.—1. Contempts of the king's writs. 2. Contempts in the face of a court. 3. Contemptuous words or writings concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the courts. 6. Forgeries of writs and other deceptions tending to impose on the court. 2 *Hawk. P. C.* c. 22. § 33.

All courts of record have a kind of discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer shall be guilty of a corrupt practice in not serving a writ; as if he refuse to do it, unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such a manner as shall seem proper by attachment. *Dyer* 218. 2 *Hawk. P. C.* c. 22. § 2.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner; but to leave the party to his ordinary remedy against the sheriff, either by action or by rule to return the writ, or by an *alias* and *pluries*, which if he have no excuse for not executing, an attachment goes of course. *Hob.* 62, 264; *Noy* 101; *F. N. B.* 38; *Finch* 237; 5 *Mod.* 314, 315.

Attachment lies against attornies for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempts to the court. 2 *Hawk. c.* 22. § 11. If affidavits to ground an attachment are full as to the charge; yet if the party deny such charge by as plain and positive affidavits, he shall be discharged; but if he take a false oath, he may be indicted of perjury. *Med. Caf. in L.* 3 E. 81.

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrests, and exceeding their power, &c. attachment may be had. For contempts against the king's writs; using them in a vexatious manner; altering the teste, or filling them up after sealed, &c. attachment lies. And for contempts of an enormous kind, in not obeying writs, &c. attachment may issue against peers. 2 *Hawk. c.* 22. § 33, &c. For persuading jurors not to appear on a trial, attachment lies against the party, for obstructing the proceeding of the court. 1 *Lill.* 121. The court of *B. R.* may award attachments against any inferior courts usurping a jurisdiction, or acting contrary to justice. *Salk.* 207. Though it is usual first to send out a prohibition.

Attachment lies for proceeding in an inferior court, after a *habeas corpus* issued, and a *superseas* to stay proceedings. 21 *Cur. B. R.* And attachment may be granted against justices of peace, for proceeding on an indictment after a *certiorari* delivered to them to remove the indictment. 1 *Lill.* 121. But it does not lie against a corporation, the mode of compulsion being by sequestration. *Cowp.* 377. Attachment lies against a lord that refuses to

hold his court, after a writ issued to him for that purpose, so that his tenant cannot have right done him. *New Nat. Br.* 6, 27.

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejectment, arbitrament, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before; or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. 1 *Mod.* 21; 1 *Salk.* 71.

But an attachment is not granted for disobedience of a rule of *Nisi prius*, unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chamber; unless it be entered; nor for disobedience of any rule without personal service. 1 *Salk.* 84.

Also an attachment is proper for abuses of the process of the court; as for suing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making use of the process of a superior court, to bring a defendant within the jurisdiction of an inferior court, and then dropping it, using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. 2 *Hawk. P. C.* c. 22. § 33, &c. It seems also that *counsellors* are punishable by attachment for foul practices. 2 *Hawk. P. C.* c. 22. § 30. *Gashers* are thus punishable for misbehaviour in their offices. *Id. ib.* *Witnesses* for non-attendance on a trial. *Leach's Hawk. P. C.* ii. c. 22. § 33. in n.—*Peers* are liable to attachment for certain outrageous contempts, as a disobedience to a writ of *habeas corpus*, and generally of other writs. *Id. ib.*

Attachments are usually granted on a rule to *show cause*, unless the offence complained of be of a flagrant nature, and positively sworn to; in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him concerning the contempt complained of, or will suffer him to enter into recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise he must answer them, though exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment, and the prosecutor shall be left to proceed against him for the perjury, if he thinks fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. 2 *Hawk. P. C.* c. 22. § 1; 1 *Salk.* 84; 6 *Mod.* 73; 2 *Jones* 178.

Upon all these examinations the master is to make his report, and the party is then and not before acquitted, or adjudged in contempt. *Hardw.* 23; and in the latter case is either immediately sentenced or committed to the marshal; unless the Court waive giving judgment (as they sometimes do from motives of lenity) and order the recognizance to be discharged, 3 *Burr.* 1256; or the

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Attorney General consent that the party may continue on the recognizance to appear under a rule of court at some future time. 2 Burr. 797.

Attachments for non-payment of costs, and for non-performance of an award, are in the nature of civil executions. 1 Term Rep. 266.

Attachment out of Chancery may be had of course, upon affidavit made that the defendant was served with a subpoena, and appeared not; or upon non-performance of any order or decree; also after the return of this attachment, that the defendant *non est inventus*, &c. then attachment with proclamation issues against him, &c. West. Symb. And for contempts, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty, he shall be fined.

On attachment the party is not obliged to answer any interrogatories tending to convict him of any other offence. Stra. 444; or which may subject him to a penalty. Hardw. 239.

ATTACHMENT OF PRIVILEGE is where a man by virtue of his privilege calls another to that court whereto he himself belongs, and in respect thereof is privileged, there to answer some action (as an attorney, &c.); or it is a power to apprehend a man in a place privileged. Book Entr. 431. Corporation courts have sometimes power by charter to issue attachments, and some courts-baron grant attachments of debt. Kitch. 79.

ATTACHMENT FOREIGN, is an attachment of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty. Carth. Rep. 66.

Foreign Attachment under the custom of London is thus; if a plaint be entered in the court of the mayor, or the sheriff against A. and the process be returned *nichil*, and thereupon plaintiff suggests that another person within London is indebted to A. the debtor shall be warned (whence he is called the garnishee,) and if he does not deny himself to be indebted to A. the debt shall be attached in his hands. Com. Dig. tit. Attachment foreign, cites 22 E. 4. 39.

The plaint may be exhibited in the mayor's or the sheriff's court; but the proceeding in the former is the most advantageous. *Id. ib.*

This custom of foreign attachment is said to prevail in Exeter and other places. *Sed qu.*

But a foreign attachment cannot be had when a suit is depending in any of the courts at Westminster. Cro. Eliz. 91, and nothing is attachable but for a certain and due debt: though by the custom of London money may be attached before due, as a debt; but not levied before due. Sid. 327; 1 Nelf. Abr. 282, 283.

Foreign attachments in London, upon plaint of debt, are made after this manner; A. oweth B. 100l. and C. is indebted to A. 100l. B. enters an action against A. of 200l. and by virtue of that action a serjeant attacheth 100l. in the hands of C. as the money of A. to the use of B. which is returned upon that action. The attachment being made, and returned by the serjeant, the plaintiff is immediately to fee an attorney before the next court, or the defendant may then put in bail to the attachment, and nonsuit the plaintiff: four court days must pass before the plaintiff can cause C. the garnishee, in whose hands the money was attached, to shew cause why B. should not condemn the 100l. attached in the hands of C. as the money of A. the defendant in the action (though not in the attachment) to the use of B. the plaintiff: and the garnishee C. may appear in court

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by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his waging of law, by producing two sufficient citizens to swear that the garnishee had either money or goods, in his hands, of A. at the time of the attachment, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of estoppel: then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forth-coming, &c. If the garnishee fail to appear by his attorney, being warned by the officer to come into court to shew cause as aforesaid, he is taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishee appearing to shew cause why the money or goods attached in his hands ought not to be condemned to the use of the plaintiff, having feed an attorney may plead as aforesaid, that he hath no money or goods in his hands, of the party's against whom the attachment is made; and it will then be tried by a jury, and judgment awarded, &c. but after trial, bail may be put in, whereby the attachment shall be dissolved, but the garnishee, &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action: and an attachment is never thoroughly perfected, till there is a bail, and satisfaction upon record. Privileg. Lond.

But the original defendant must be summoned and have notice; otherwise judgment against the garnishee will be erroneous; and the money paid or levied in execution, or it will not discharge the debt from the garnishee to the defendant: (though it was alledged that the custom of the city court is to give no notice.) 3 Wils. 297; 2 Black. Rep. 834; See 1 Ld. Raym. 727.

Where a foreign attachment is pleaded to an action, the custom is to set forth, that he who levied the plaint shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not disprove it within a year and a day; now if the plaintiff in the action below doth not set forth such conditional judgment given by the court, it is wrong, because he doth not bring his case within the custom. Vide 2 Lutw. 955.

In *assumpsit*, &c. there was evidence given, that the debt was attached by the custom of London before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue *non assumpsit*; and it being insisted for the defendant, that this should relate so as to defeat the plaintiff's action, it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given in evidence upon the general issue, because there is an alteration of the property; but if the attachment be only before the action brought, and the condemnation afterwards, the attachment may be pleaded in *negement*, and the condemnation may be pleaded in *bar*, but shall not be given in evidence on the general issue, because by the condemnation the property is altered, but not before. 1 Salk. 280, 291.

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Action of debt, &c. the defendant pleaded in bar, that there was a custom in London to attach the debt before the day of payment came; *et per curiam*, such a custom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtor himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtor in person, or by his attorney, may swear that the debt is due; but this cannot be good as to the attorney: it was agreed, that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was ill, because the defendant did not aver it, *viz. et hoc paratus est verificare. W. Jones 406.*

A sum of money was to be paid at Michaelmas, and it was attached before that day; adjudged, that a foreign attachment cannot reach a debt before it is due; therefore, though the judgment on the attachment was after Michaelmas, yet the money being attached before it was due, it is for that reason void. *Cro. Elia. 194.* For further matter See *Com. Dig. tit. Attachment, foreign Attachment.*

Money due to an executor or administrator, as such, cannot be attached. It would give a simple contract creditor priority over judgments, *See Fisher v. Lane and others, 3 Wils. 297.* Nor trust-money in the hands of the garnishee. See *Doug. 380.*

In an action on the case the plaintiff had judgment against the defendant, and he owing 60*l.* to one G. D. he entered a plea against him in London, and attached the 60*l.* in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom; afterwards the plaintiff brought a *scil. fa.* against the defendant, to shew cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the execution upon the attachment; and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrue by matter of record, cannot be attached by the custom of London; for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature, that they cannot be reached by attachment. *1 Leon. 29.*

Debtor and creditor being both citizens of London, the debtor delivered several goods to the *Exeter* carrier then in London, to carry and deliver them at *Exeter*, and the creditor attached them in the hands of the carrier for the debt due to him from his debtor; adjudged, that the action should be discharged, because the carrier is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. *1 Leon. 189.*

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350*l.* This money is not attachable in his hands by any creditor of his testator, though it is assets in his hands when recovered; because it was not due to the testator *tempore mortis*, and the custom of foreign attachments extends only to such debts. *1 Vent. 111.*

ATTACHMENT OF THE FOREST, Is one of the three courts held there. *Manswood 90, 99.* The lower court is called the attachment; the middle one, the *swainmoot*; the highest, the *justice in Byre's seat.* The court of attachment seemeth to be so called, because the verdict of

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the forest have therein no other authority, but to receive the attachments of offenders against *vert* and *venison*, taken by the rest of the officers, and to enroll them, that they may be presented and punished at the next *justice seat, Manswood 93.* And this attaching is by three means; 1. By goods and chattels. 2. By the body, pledges, and mainprize. 3. By the body only. This court is kept every forty days. See *Crompton*, in his *Court of the Forest.*

ATTAINDER, *attināa* and *attināura.*] The stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence, by the common law, on the pronouncing the sentence of death.

He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for by anticipation of his punishment, he is already dead in law. *3 Inst. 213.* This is after judgment: for there is great difference between a man convicted, and attainted; though they are frequently through inaccuracy confounded together; when judgement is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. *4 Comm. 380, 1.*

A man is attainted by appearance, or by process: *attainder* on appearance is by confession, or verdict, *&c.* Confession, when the prisoner upon his indictment being asked whether Guilty or Not guilty, answers Guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sanctuary; whereupon the offender was to abjure the realm, and this was called *attainder* by abjuration). *Attainder* by verdict is when the prisoner at the bar pleadeth Not guilty, and is found guilty by the verdict of the jury of life and death. And *attainder* by process, (otherwise termed *attainder* by default or outlawry,) is when the party fieth, and is not found, until he hath been five times publickly called or proclaimed in the county, on the last whereof he is outlawed upon his default. *Staundf. Pl. Co. 44. 122. 182.* Also persons may be attainted by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign of king Charles II. when an act was made for the attainder of several persons guilty of the murder of king Charles I. to this time; among which, that for attainting Sir John Fenwick, for conspiring against king William, is the most remarkable; it being made to attaint and convict him of high treason on the oath of one witness, just after a law had been enacted, That no person should be tried or attainted of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, *&c.* *Stat. 7 & 8 W. 3. cap. 3.* But in the case of Sir John Fenwick, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses; though

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but one only was produced against him on his trial. It was alledged Sir John had tampered with, and prevailed on one of the witnesses to withdraw.

The consequences of attainder are forfeiture and corruption of blood; which latter cannot regularly be taken off but by act of parliament. *Co. Lit.* 391. b.

As to forfeiture of lands, &c. by attainder, See this Dict. tit. *Forfeiture*. As to *Corruption of Blood*, this operates upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. See tits. *Tenure*, *Descent*, *Forfeiture*.

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the *Norman* conquest, as appears from its being unknown in those tenures which are indisputably *Saxon*, or *Gravelkind*: wherein, though by treason, according to the ancient *Saxon* laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descent ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore as every other oppressive mark of feudal tenures is now happily worn away in these kingdoms, it is to be hoped that the corruption of blood, with all its connected consequences not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting that, in certain treasons respecting the papal supremacy, *Stat.* 5 *Eliz.* c. 1; and the public coin, *Stats.* 5 *Eliz.* c. 11: 18 *Eliz.* c. 1: 8 & 9 *W.* 3. c. 26: 15 & 16 *Geo.* 2. c. 28; and in many of the new made felonies, created since the reign of *Henry* the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind,) this saving was neglected, or forgotten to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the *stat.* of 7 *Ann.* c. 21, (the operation of which is postponed by *St.* 17 *Geo.* 2. c. 39,) after the death of the sons of the late Pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose,) it will still continue for many sorts of felony. 4 *Comm.* 388, 9.

In treason for counterfeiting the coin, although by the statutes corruption of blood is saved, yet the lands of the offender are forfeited immediately to the king on attainder, it being a distinct penalty from corruption of blood: for the corruption may be saved, and the forfeiture remain, &c. And accordingly so it is provided by some statutes. 1 *Salk.* 85.

Attainders may be reversed or falsified, by writ of error, or by plea. If by writ of error, it must be by the king's

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leave, &c. and when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. 3 *Inst.* 232.

By a king's taking the crown upon him, all attainders of his person are *ipso facto* purged, without any reversal. 1 *Inst.* 26: *Finch.* l. 82: *Wood* 17. This was the declaration of parliament, made in favour of *Henry* the 7th. See 1 *Comm.* 248.

The *Stat.* 8 *W.* 3. c. 5, requires Sir *George Bayley*, major general *Holmes*, and other persons to surrender themselves to the lord chief justice, or secretaries of state; or to be attainted. By the 13 *W.* 3. c. 3, the pretended *Prince of Wales* is under attainder of treason, &c. And by 1 *Geo.* 1. c. 16, the *Duke of Ormond* and others are attainted. And besides these acts of attainder, bills for inflicting pains and penalties are sometimes past; as that against the *bishop of Rochester*; *Stat.* 9 *Geo.* 1. c. 17.

ATTAIN, *attincta*.] A writ that lieth to enquire whether a jury of twelve men gave a false verdict; (*Finch.* 484;) that so the judgment following thereupon, may be reversed: and this must be brought in the life-time of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay at the common law, only upon writs of *assise*; and seems to have been co-eval with that institution by king *Henry* II. at the instance of his chief justice *Glaucil*: being probably meant as a check upon the vast power then reposed in the recognitors of assise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no further than to such instances, where the issue was joined upon the very point of assise (the heirship, disseisin, &c.) and not on any collateral matter; as villainage, bastardy, or any other disputed fact.

In these cases the assise was said to be turned into an inquest or jury, (*assisa vertitur in juratum*;) or that the assise should be taken in *modum jurate*, et non in *modum assise*; that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assise: (*Bract.* l. 4. tr. 1. c. 34. § 2, 3, 4.—tr. 3. c. 17: tr. 5. c. 4. § 1, 2: *Flet.* l. 5. c. 22. § 8: *Co. Ent.* 61. b: *Booth.* 213;) and then it followed, that no attaint lay against the inquest or jury that determined such collateral issue: *Br.* 4. l. 34. 2: *Flet.* l. 5. c. 22. Neither is mention made by our ancient writers, of such a process obtaining after the trial by inquest or jury, in the old *Norman* or feudal actions prosecuted by writ of *entry*. Nor did any attaint lie in *trespass*, *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries. *Year B.* 28 *E.* 3. 15: 17 *Ass. pl.* 15: *Flet.* 5. 22: 16. At length the *st.* of *Westm.* 1. (3 *E.* 1.) c. 38. allowed an attaint to be sued upon inquests, as well as assises, which were taken upon any plea of land or of freehold. But this was at the king's discretion, and is so understood by the author of *Fleta*, (l. 5. c. 22. § 8. and 16,) a writer contemporary with the statute; though Sir *Ed. Coke*, (2 *Inst.* 130. 237.) seems to hold a different opinion. Other subsequent statutes, (1 *E.* 3. *st.* 1. c. 6: 5 *E.* 3. c. 7: 28 *Ed.* 3. c. 8,) introduced the same remedy in all pleas of *trespass*, and the *stat.* 34 *E.* 3. c. 7. extended to all pleas whatsoever, personal as well as real; except only the writ of *rights*, in such cases where the mise or issue is joined on the *mere* right,

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freed from the fear of attain, they have taken a great liberty in giving verdicts; but since the attain is only dissolved, and not taken away, 'tis necessary that a certain matter should be brought before them; and therefore in *trepasses*, the quantity and value of the thing demanded must be so conveniently described, that if the jury find damages beyond such quantities and value, it may be apparently excessive, and they subject to the attain; and so on special contracts, they must be set forth so precisely, that if evidence be given of another contract, and not in the allegations, and yet the jury find for the plaintiff, they may be subject to an attain; and were it otherwise, if the plaintiff had a jury to his turn, and the judge should direct that the plaintiff be non suit, yet if the plaintiff would stand the trial, the judge must give positive directions to find for the defendant; and there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror of an attain, if they did otherwise; so this is the only curb that the law has put in the hands of the judges to restrain jurors from giving corrupt verdicts. *Gilb. H. C. B.* 1. 8

III. The process to be issued is directed by *stat.* 23 H 8 c. 3, already mentioned: and by the said statute if any of the petit jury appear at the return of the writ of attain, the plaintiff shall assign the false oath of the verdict untrue given. And if the defendant, or any of the petit jury appear not on distress, the grand inquest shall be taken by default.

The petit jury can plead no plea, but such as may excuse them of the false oath. 1 *Rel. Abr.* 235.

In the court of King's Bench and Common Pleas, and the court of Husting of London, attain may be brought; and the plaintiff setting aside the verdict, shall have restitution, &c. But if the first verdict be affirmed, the plaintiff shall be imprisoned and fined. 11 *J. 7. c.* 21.

In attain the parties and the jury appeared and demandedoyer of the record upon which the attain was founded, which record being in the Common Pleas, they had it, and thereupon the plaintiff assigned the false oath; the defendants pleaded, that they made a good and lawful oath; upon which they were at issue, and in the same term the record was removed by a writ of error into the King's Bench; adjudged, that notwithstanding it was thus removed, the court of Common Pleas might proceed if the process for the grand jury were returned. *Dyer* 284.

Attain was brought in the Common Pleas against a jury, for a verdict given in the King's Bench, whereupon the record was removed from that court to the Common Pleas, and there the verdict was affirmed; adjudged, that the plaintiff in the action shall have execution according to the verdict, for the record is in the King's Bench, and nothing but the tenor thereof in the Common Pleas; but if the verdict had been set aside, and execution had been had upon it before it was set aside, then the court of Common Pleas might have awarded restitution to the party grieved. *Cro. Eliz.* 371.

A non-suit in attain is peremptory: and no *superfedeas* is grantable upon attain. *Co. Lit.* 227.

An attain as well as a writ of error shall follow the nature of the action upon which it is founded; so that if summons and severance lies in the first action, it shall do so likewise in the attain, but this is not a *superfedeas*, as a writ of error is; adjudged likewise, if damages are recovered against several in a nation of conspiracy, all of

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them must join in an attain, and the non-suit of one of them shall not hurt the rest. 6 *Rep.* 25.

In an attain the plaintiff shall recover against all the jurors, tenants, and defendants, the costs and damages, which he shall sustain by delay or otherwise in that suit; and if the defendant's plea in bar be found against him, the plaintiff will have judgment to be restored to what he lost, with damages. *stat.* 11 H 6. c. 4. and 15 H. 6. c. 5.

ATTAINED See ATTAINDER.

ATTAL SARISIN, The term by which the inhabitants and miners of Cornwall, call an old deserted mine, that is given over, i. e. the leavings of the *Sarastus*, *Sassins*, or *Saxons*. *Cowel*.

AT REGIA, From the Lat. *ad* and *rego*.] A little house. *Ethelwerd*, lib. 4. *Hist. Angl. cap.* 3. *Blount*.

ATTENDANT, *attendens*.] Signifies one that owes a duty or service to another, or in some sort depends on him. Where a wife is endowed of lands by a guardian, &c. she shall be attendant on the guardian, and on the heir at his full age. *Titms de Ley*.

ATTERMINING, From the Fr. *atterminer*.] The granting a time or term for payment of a debt. *Ordinatio de libertatibus perquirendis*, ann. 27 Ed. 1. And see *stat.* W. 1. 2. c. 4.

ATTILÉ, *Attilium*, *attilamentum*.] The rigging or furniture of a ship. *Fle a. lib.* 1. c. 25.

AT TORNARE REM, To *attorn* or turn over money and goods, viz. to assign or appropriate them to some particular use and service. *Kennet's Paroch. Antiq.* p. 283.

AT TORNATO FACIENDO VEL RECIPIENDO, A writ to command a sheriff or steward of a county-court, or hundred court, to receive and admit an attorney, to appear for the person that owes suit of court. *F. N. B.* 156. Every person that owes suit to the county-court, court-baron, &c. may make an attorney to do his suit. *stat.* 20 H. 3. c. 10.

ATTORNEY, *attornatus*] Is one that is appointed by another man to do any thing in his absence. *West. Symb. Crimpt. Jurisdic.* 105. An attorney is either publick, in the courts of record, the King's Bench and Common Pleas, &c. and made by warrant from his client: or private, upon occasion for any particular business, who is commonly made by letter of attorney. In ancient times, those of authority in courts had it in their power whether they would suffer men to appear or sue by any other but themselves: and the king's writs were to be obtained for the admission of attorneys: but, since that, attorneys have been allowed by several statutes. Attornies may be made in such pleas whereon appeal lieth not: in criminal cases there will be no attorneys admitted. See *stat. Glouc.* 6 Ed. 1. *stat.* 1. c. 8. An infant ought not to appear by attorney, but by guardian, for he cannot make an attorney, but the court may assign him a guardian; 1 *Lill. Abr.* 138. Infants, after they come to full age, may sue by attorney, though admitted before by guardian, &c. In action against baron and feme, the feme being within age, she must appear by guardian: but if they bring an action, the husband shall make attorney for both. 1 *Danv. Abr.* 602. Where baron and feme are sued, though the wife cannot make attorney, the husband may do it for both of them. 2 *Sand.* 213. One *non compos mentis*, being within age, is to appear by guardian; but after he is of age he must do it by attorney. *Co. Lit.* 135. An idiot is not to appear by attorney, but in proper person. A corporation cannot

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cannot appear otherwise than by attorney, who is made by deed under the seal of the corporation. *Plowd.* 91.

ATTORNEYS AT LAW, Are such persons as take upon them the business of other men, by whom they are retained.

Before the statute of *West. 2. c. 10.* [13 *Ed. 1. A. D.* 1285,] all attainies were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. These patents, where they were obtained, seemed to have been inrolled by a proper officer, called the clerk of the warrants; and also the courts inrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. *Gillb. H. C. P.* 32, 33.

The said statute of *West. 2. c. 10.* gives to all persons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a *fiere fac'* or an action of debt on the judgment. *Gillb. H. C. P.* 33.

The attainies of *B. R.* are of record as well as the attainies of *C. B.* 1 *Roll.* 3. And it is now the common course for the plaintiff and defendant to appear by attorney. *F. N. B.* 25. D. But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *ib.* 262. Outlawry is excepted by stat. 4 & 5 *W. & M. c. 18.* unless where the court orders special bail. By stat. 13 *W. 3. c. 6.* attainies are to take the oaths to government under penalties and disability to practise. By stat. 1 *H. 5. c. 4.* "no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff shall be attorney in the king's courts during the time he is in office with any such sheriff."

In *Trinity Term* 31 *Geo. 3.* a rule of court was made to prevent the admission of persons under irregular articles of clerkship, &c. chiefly to prevent the clerks of attainies from acting as principals. See 4 *Term Rep.* 379.

Parties to fines, as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto others in pleas of *warrantia chartæ*, *covenant*, &c. before the fines pass, shall appear personally, so that their age, ideocy, or other default (if any be) may be discerned: provided that if any, by age, impotency, or casualty, is not able to come into court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the exchequer and justices shall not admit attainies, but in pleas that pass before them, and where they be assigned. Reserving to the Chancellor his authority in admitting attainies, and to the Chief Justices. Stat. 15 *Ed. 2. stat. 1.*

In respect of the several courts, there are attainies at large, and attainies special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retainer: one may be attorney on record, and another do the business; and there are attor-

nies who manage business out of the courts, &c. Stat. 4 *H. 4. c. 18.* was enacted, that the justices should examine attainies, and remove the unskilful; and attainies shall swear to execute their offices truly, &c. and by stat. 33 *H. 6. c. 7.* the number of attainies in *Norfolk* and *Suffolk* werelimited.

By 3 *Jac. 1. c. 7.* attainies, &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof. If they delay their client's suit for gain; or demand more than their due fees and disbursements, the clients shall recover costs and treble damages; and they shall be for ever after disabled to be attainies. None shall be admitted attainies in courts of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting 20*l.* to be divided between the king and the party grieved. This statute, as to fees to counsel, doth not extend to matters transacted in inferior courts, but only to suits in the courts of *Westminster Hall.* *Carth.* 147.

By the stat. 12 *Geo. 1. cap. 29.* If any who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor in any suit or action in any court, the judge where such action shall be brought hath power to transport the offender for seven years, by such ways, and under such penalties as felons.

The act 2 *Geo. 2. c. 23.* ordains, That all attainies shall be sworn, admitted and inrolled, before allowed to sue out writs in the courts at *Westminster*; and after the first of *December* 1730 none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn and admitted in open court; and attainies shall not have more than two clerks at one time, &c. Every writ and copy of any process served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth; and no attainies or solicitors shall commence any action for fees till a month after the delivery of their bills subscribed with their hands: also the parties chargeable may in the mean time get such bills taxed, and upon the taxation the sum remaining due is to be paid in full of the said bills, or in default the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a sixth part. A penalty of 50*l.* inflicted, and disability to practise, for acting contrary to this statute.

By *stat. 6 Geo. 2. cap. 27.* Attainies of the courts at *Westminster* may practise in inferior courts.

By 12 *Geo. 2. c. 13.* Attainies, &c. that act in any county-court, without being admitted according to the statute 2 *Geo. 1. c. 23.* shall forfeit 20*l.* recoverable in the courts of record; and no attorney, who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c. is to be strack off the roll. But suits commenced before by them may be carried on. A quaker serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney.

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By the stat. 22 Geo. 2. c. 46, Persons bound clerks to attorneys or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk, and none to be admitted till the affidavits be produced and read in court; no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time, and make affidavits thereof. Persons admitted sworn clerks in *Chancery*, or serving a clerkship to such, may be admitted solicitors. By the stat. 23 G. 2. c. 26, Any person duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment, whereon his admission shall be written, in the same manner as by stat. 2 Geo. 2. c. 23. § 20, Attornies may be admitted solicitors.

By stat. 25 Geo. 3. c. 80, Every admitted attorney, solicitor, notary, proctor, agent or procurator, shall annually take out a stamp certificate [with a $\frac{1}{2}$ l. stamp if within the bills of mortality, and $\frac{3}{4}$ l. if elsewhere,] from the courts in which they practise, on penalty of 50*l*.

Attornies of courts; &c. shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause *ac etiam billæ*, &c. where special bail is not required by law. *Pa. b. 15 Car. 2.* See tit. *Appearance*. Action upon the case lies for a client against his attorney, if he appear for him without a warrant; or if he plead a plea for him, for which he hath not his warrant. 1 *Lill. Abr.* 140. But if an attorney appear without warrant, and judgment is had, against his client, the judgment shall stand, if the attorney be responsible: *contra*; if the attorney be not responsible. 1 *Salk.* 88.

Action lies against an attorney for suffering judgment against his client by *nil dicit*, when he had given him a warrant to plead the general issue: this is understood where it is done by covin. 1 *Danv. Abr.* 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of deceit against the attorney, and recover all in damages. *Ibid.* An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished. *Hob.* 9.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 4 *Inst.* 117: 1 *Mod.* 209. Though, where an attorney or solicitor is found guilty of a gross neglect, the court of *Chancery* has in some cases ordered him to pay the costs. 1 *P. Wms.* 593. He who is attorney at one time, is attorney at all times, pending the plea. 1 *Danv.* 609. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attorneys; nor until his fees are paid. *Mich.* 14 *Car.* A cause is to proceed notwithstanding the death of an attorney therein; and not be delayed on that account: For if an attorney dieth, the plaintiff or defendant may be required to make a new attorney. 2 *Keb.* 275.

Attornies are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill practice, attended with fraud and corruption, and committed against the obvious rules of jus-

tice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears, that the matter complained of was rather owing to neglect or accident than design; or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251, 318, 410, 583, 657. 4 *Mai.* 367.

If an attorney, defendant in an action, does not appear in due time, plaintiff may sign a *forejudger*, which enables him to strike the defendant off the roll, and then he may be sued as a common person (stat. 2 H. 4. c. 8.) and cannot be proceeded against by bill.—On making satisfaction to the plaintiff, an attorney so forejudged, may be restored. See *Impey's Instructor Clericalis C. P.* 521.

Sometimes attorneys are struck off the roll on their own application, for the purpose of being called to the bar, &c. and in this case, they must be disbarred by their inn, before they are re-admitted attorneys. *Dougl.* 144.

An attorney convicted of felony struck off the roll. *Cowp.* 829.

They are also liable to be punished for base and unfair dealings towards their clients, in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been entrusted in the way of business; or money which has been recovered and received by them to their client's use, and for other such like gross and palpable abuse. 2 *Hawk. P. C.* 144: 8 *Mod.* 306: 12 *Mod.* 516.

In a criminal case the attorney for defendant may be his bail. *Doug.* 467. See tit. *Bail*.

Payment to the attorney, is payment to the principal. *Doug.* 623: 1 *Black. R.* 8.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence, 3 *Will.* 325:—But the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it; if he apply to the court, they will prevent it's being paid over until his demand is satisfied. If the attorney give notice to the defendant not to pay till his bill be discharged, a payment by the defendant after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. *Dougl.* 238.

The court under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, tho' they came into his hands as steward of a court, and receiver of rents. 3 *Term R.* 25 See 1 *Salk.* 89: 1 *Lill.* 148: *Mod. Caf. Law & Eq.* 306, the latter that an attorney cannot detain papers delivered to him on a special trust for money due to him in that very business.

Attornies have the privilege to sue and be sued only in the courts at *Westminster*, where they practise: they are not obliged to put in special bail, when defendants; but when they are plaintiffs, they may insist upon special bail in all bailable cases. 1 *Fent.* 299: *Wood's Inst.* 450 But an attorney of one court, may in that court, hold an attorney of

of another court to bail. Attorneys shall not be chosen into offices, against their wills. See tit. *Advocatus*, *Procurator*.

ATTORNEY OF THE DUTCHY COURT OF LANCASTER, *Attornatus curiæ ducatus Lancastrie*. Is the second officer in that court: and seems for his skill in law to be there placed as *assessor* to the chancellor, and chosen for some special trust reposed in him, to deal between the king and his tenants. *Cowel*.

ATTORNEY GENERAL, Is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal; and to file bills in the *Exchequer*, for any thing concerning the king in inheritance or profits; and others may bring bills against the king's attorney. His proper place in court, upon any special matter of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown: but this is only upon solemn and extraordinary occasions; for usually he does not sit there, but within the bar in the face of the court.

ATTORNEYMENT, *Attornamentum* from the French *tourner*, to turn. [—Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his feignory without the consent of his feudatory, *Wright's Tenures* 30, 31. It is certain that this doctrine formerly prevailed in England; if not at least to equal extent in other countries.

This necessity of the consent of the tenant to the alienation of the lord gave rise in our old law to the doctrine of *attornment*; which at common law, signified only the consent of the tenant to the grant of the feignory, whereby he agreed to become the tenant of the new lord. But after the statute *quia emptores terrarum*, (*4 Ed. I. c. 1*), was passed, by which subinfeudation was prohibited, it became necessary that when the reversion or remainderman after an estate for years, for life or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee. The necessity of attornment was, in some measure; avoided by the statute of uses; (*27 H. 8. c. 10*); as by that statute the possession was immediately executed to the use; and by the statute of *Wills*; (*36 & 35 H. 8. c. 5*) by which the legal estate is immediately vested in the devisee.

Attornments however still continued to be necessary in many cases; but both their necessity and efficacy are now almost totally taken away; for by stat. *4 Ann. c. 16*, &c. It is enacted, That all grants and conveyances of manors, lands, rents, reversions, &c. by fine, or otherwise, shall be good without the attornment of the tenants; but notice must be given of the grant, to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor, or for breach of the condition for non-payment. And by stat. *11 Geo. 2. c. 19*, attornments of lands, &c. made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlord's possession not affected thereby: though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord; or to a mortgagee on a forfeited mortgage.

Until the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these acts having made attornment both unnecessary and unoperative, the learning upon it may be

said to have become almost entirely obsolete. See *1 Inst.* 309.

AVAGE, or *Avage*. A small payment by tenants of the manors in the county of Essex, upon St. Leonard's day, 6 November, for the privilege of pasture in the lord's woods, viz. for every pig under a year old, an half-penny; for every yearly pig, one penny; and for every hog above a year old, two pence. *Blount*.

AUCTIONEER, *Auctionarius*, Sellers, negotiators, or retailers. *Placid. Par.* 188. 1. But more properly brokers.

AUCTIONS and AUCTIONEERS, Under stat. *17 Geo. 3. c. 50*; *19 Geo. 3. c. 25*; *56*; *41 Geo. 3. c. 17*; *21 Geo. 3. c. 66*; *32 Geo. 3. c. 11*, every Auctioneer must take out an annual licence, paying within the bills of mortality *1s. 3d.* and without *5s. 9d.* and under these statutes and stat. *27 Geo. 3. c. 13*, (explained by statutes *29 Geo. 3. c. 63*; *30 Geo. 3. c. 26*; *31 Geo. 3. c. 41*, containing certain exemptions), duties are imposed on goods sold by auction; which duties are a charge on the auctioneer, not on the purchaser.

The practice of passing at it is called, at auctions was in *Dexwell v. Christie*, (*Eq. 395*.) considered as illegal; but the legislature having enacted that property put up to sale at auction shall, upon the knocking down the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act be shown to have been bought in by the owner himself, or by some person by him authorised, seems indirectly to have given a sanction to this practice which may materially affect the authority of the decision in *Walker v. Gascogne*, and the opinion in *Dexwell v. Christie*: see *2 Bro. C. R.* 326 and the stat. *28 Geo. 3. c. 37. § 20*. *Fonblanque's Treatise of Equity*, i. 215.

AUDIENCE COURT, *Curia audientie Cantuariensis*] A court belonging to the archbishop of Canterbury, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It was held in the archbishop's palace; and in former times the archbishops were wont to try and determine a great many ecclesiastical causes in their own palaces, but before they pronounced their definitive sentence, they committed the matter to be argued by men learned in the law, whom they named their auditors; and so in time it grew to one special man, who at this day is called *causarum negotiorumque audientie Cantuariensis auditor officialis*. And to the office of auditor was formerly joined the chancery of the archbishop, which meddled not with any point of contentious jurisdiction, that is, deciding of causes between party and party, but only such as are of office, and especially as are *voluntarie jurisdictionis*; as the granting the custody of spiritualties, during the vacancy of bishopricks, institutions to benefices, dispensations, &c. but this is now distinguished from the audience. The auditor of this court anciently by special commission was *vicar general* to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of Canterbury. *4 Inst.* 337. But now these three great offices of official principal of the archbishop, dean or judge of the pecuhara, and official of the audience are, and have been for a long time past, united in one person under the general name of *Dean of the arches*. *Johns.* 254.

The archbishop of York hath in like manner his court of audience. *Johns.* 255. See *Archbishop's court*.

AUDIENDO ET TERMINANDO, See title *Oyer and Terminer*, *Assise*, *Justices*.

AUDITA QUERELA.

AUDITA QUERELA is a writ whereby a defendant, against whom judgment is rendered, and who is therefore in danger of execution, or perhaps actually in execution, for on a statute-merchant, statute-dues or recognizance, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff having given him a general release, or if the defendant hath paid the debt to the plaintiff without providing a release, or not entered on the record. In these and the like cases, when in the defendant's oath good matter is shown, but hath had no opportunity of pleading it, either at the beginning of the suit, or just before execution, which must always be before judgment, or at least before the return of a bill in equity, or be relieved against the oppression of the plaintiff. In *Levy v. Aris* directed to the court stating that the complaint of the defendant had been heard (*audita querela defendantis*), and then, setting out the matter of the complaint, in as brief and concise the court to call the party before them, and, having heard their allegations and proofs, to cause justice to be done between them, *Stur. L. 488: F. N. B. 102.* It is also for *Bail*, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the Bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*; (*3 Rel. Abr. 308*;) which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath good defence, is too late to make it in the ordinary forms of law. But the indulgence now shewed by the courts in granting a summary relief upon motion, in cases of such evident oppression, (*Levy v. Aris*, 439: *1 Bull. 93*;) has almost rendered obsolete the writ of *audita querela* and driven it quite out of practice. *3 Comm. 406.*

Some part of the old law on this subject is here stated, to give the student a general idea of this circuitous proceeding — If necessary to enter more at large into this learning, let him look into *Four's Abridgement*, and *Comyn's Digest*.

On a statute, the cosutor or his heir may bring *audita querela*, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. *1 Dav. Abr. 530: 3 Rep. 73.* If a lessee covenants for him and his assigns to repair, and the lessee assigns over, and the covenant is broken; if the lessor sues one of them and recovers damages, and then sues the other, he may bring *audita querela* for his relief. *Bro. 74.* And where a man hath goods from me by my delivery, and another takes them from him, so that he is liable to both our suits: and one of us sue and recover against him, and then the other sues him, his remedy is by this writ. *Dyer 232.* One binds himself and his heirs in an obligation, if the obligee recover of the heir, and after sue the executor for the same cause; *Et. they may have the writ audita querela. Plowd. 439.* If two joint and several obligors are sued jointly, and both taken in execution, the death or escape of one will not discharge the other, so as to give him this action; but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. *Hob. 58: 5 Rep. 87. judg-*

ment is had against a sheriff on an escape of a person in execution, and after the first judgment is reversed for error, the sheriff shall have relief by *audita querela*. *3 Rep. 342.*

If a plaintiff, that sues an administrator, and recovers judgment and sees out execution, has his letters of administration revoked; the defendant must be relieved by *audita querela*. *Style 417.*

If *A.* being within age becomes bail for *B.* and after two *scire fac.* and *nil* returned, judgment is given against *A.* *Et.* he may have an *audita querela*, and avoid the recognizance, and so the judgment thereupon of consequence shall be avoided. *Yelv. 155.*

But if *A.* being within age enters into a bond for *B.* who procures *C.* without any warrant, to appear for *A.* and confesses a judgment thereupon, yet *A.* shall not have an *audita querela*, but he must take his remedy by action of *assumpsit* against the attorney. *Gr. Jac. 694.*

The writ of *audita querela* may be had, where a recognizance or statute entered into is defective, and not good; or being upon an usurious contract, by darts of imprisonment, or where there is a defence upon it, *15. Mod. Cr. 1697: 1 Brownl. 301: 2 Bull. 320.* So upon showing an acquittance of the cognizee, on a suggestion that he had agreed to deliver up the statute. *1 Rel. 379.* Where one enters into a statute, and after sells his lands to divers purchasers; or judgment is had against a man, who leaves land to several heirs, *Et.* and one of the purchasers, or one heir alone is charged, he may have this writ against the rest to contribute to him. *3 Rep. 44: 2 Bull. 15.*

Where a statute or recognizance is acknowledged before one who hath not power to take it, and afterwards the cognizee makes a feoffment of the land to another, and the cognizee takes out execution, in such case the feoffee may have an *audita querela*, and avoid the execution. *Dyer 27. 35.*

If *A.* enters into a statute to *B.* and pays the money in the day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.* in which *A.* may release himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared; which the cognitor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended cosuee. *F. N. B. 104.*

If upon an *assumpsit* the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moiety, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a disseisin by the entry, but only voidable by *audita querela*. *1 Rel. Abr. 305.*

If two executors sue execution for damages recovered by the testator, where one hath released, an *audita querela* lies against both. *1 Rel. Abr. 314.*

If *A.* cognizee of a statute releases to the tenant all right, interest, and demand, together with all suits and executions, and afterwards sues execution, the tertenant shall have an *audita querela* to set aside this execution. *Gr. Elm. 40: 1 And. 133.*

So in trespass or other action, if it be found for the plaintiff by *nisi prius*, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an *audita querela* upon this matter; because he could not plead the release at the day in bank. 1 *Rol. Abr.* 307.

In an *audita querela*, the process is a *venire facias*, *disstringas*, *alias*, *pluries*; and if *non est inventus* be returned, or that be bath nothing, the plaintiff shall have a *capias* against the defendant. *F. N. B.* 104: *Dyer* 297. *b.*

If an *audita querela* is founded on a record, or the person bringing it is in custody, the process upon it is a *scire facias*; but if founded on matter of fact, or the party is at large, then the process is a *venire*. 1 *Salk.* 92.

And if there be a default by the defendant upon a *scire feci*, or two *nibils* returned, the plaintiff shall have judgment. 1 *Salk.* 93. But, where an *audita querela* is sued *quia timet*, and the party is at large, there shall never be a *scire facias*. 1 *Salk.* 92: 1 *Inst.* 100. *a.*

An *audita querela* shall be granted out of the court, where the record upon which it is founded, remains, or it may be returnable in the same court. *F. N. B.* 105. *b.* And therefore if a man recover in *B. R.* or *C. B.* the defendant, having a release after judgment, and before execution, shall sue the *audita querela* out of *B. R.* or *C. B.* where the record is. *F. N. B.* 105. So, if a recognizance be acknowledged in *C. B.* and execution be sued upon it after release, the defendant shall sue the *audita querela* out of *C. B.* *F. N. B.* 105. But an *audita querela* may be by original; and upon a judgment in *C. B.* it goes out of chancery returnable in *C. B.* *F. N. B.* 105.

The writ of *audita querela* shall be allowed only in open court. 1 *Bulst.* 140: 2 *Bulst.* 97: 2 *Shew.* 240.

Upon *audita querela* brought, a *superfedeas* shall go to stay execution: and the judgment in this action is, to be discharged of execution. *Hob.* 2. If an *audita querela* be unduly gotten, upon a false surmise, it may be quashed. 1 *Bulst.* 140. This writ lies not after judgment upon a matter which the party might have pleaded before. *Cro. Eliz.* 35. A bare surmise is not sufficient to avoid a judgment; but generally some specialty must be shewn. *Cro. Jac.* 579. Upon a release or other deed pleaded, no *superfedeas* will be granted till the plaintiff in the *audita querela* hath brought his witnesses into court to prove the deed: and if execution be executed before, bail is to be put in by allowance of the court. 1 *Lill. Abr.* 151.

Upon a motion for an allowance of an *audita querela*, it was held, that bail must be given in court and not elsewhere; unless in cases of necessity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

A man nonsuited in an *audita querela*, may have a new writ. *F. N. B.* 104. When lands are extended on any statute, &c. before the time, *audita querela* lieth. 22, 46 *E.* 3. A writ in the nature of an *audita querela*, has been made out returnable in *B. R.* on a special pardon, setting forth the whole matter. *Jenk. Cent.* 109.

AUDITOR, *Lat.*] An officer of the king, or other person or corporation, who examines yearly the accounts of all under-officers, and makes up a general book, which shews the difference between their receipts and charge, and their several allowances, commonly called *allocations*: as the auditors of the *exchequer* take the accounts of

those receivers who collect the revenues. 4 *Inst.* 106. Receivers general of fee-farm rents, &c. are also termed auditors, and hold their *audits* for adjusting the accounts of the said rents at certain times and places appointed. And there are auditors assigned by the court to audit and settle accounts in actions of account, and other cases, who are proper judges of the cause, and pleas are made before them, &c. 1 *Brownl.* 24.—See tit. *Account*.

AUDITOR OF THE RECEIPTS, An officer of the *exchequer*, that files the tellers' bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received; he makes debentures to the tellers, before they pay any money; and takes their accounts: he also keeps the *black book* of receipts, and the treasurer's key of the treasury, and seeth every teller's money locked up in the treasury. 4 *Inst.* 107.

AUDITORES, the same with *audientes*, i. e. the catechumens, or those who were newly instructed in the mysteries of the Christian religion before they were admitted to baptism; and *auditorium* was that place in the church where they stood to hear, and be instructed, now called the *nave* of the church: and in the primitive times, the church was so strict in keeping the people together in that place, that the person who went from thence in sermon time was excommunicated. *Blount*.

AUDITORS OF THE IMPREST, Officers in the *exchequer*, who formerly had the charge of auditing the great accounts of the king's customs, naval and military expenses, &c. But who are now superseded by the Commissioners for auditing the publick accounts. See title *Accounts Publick*.

AVENAGE, from the *Lat. avena*.] A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties. *Blount*.

AVENOR, *avenarius*, from the *Fr. avoine*, oats.] An officer belonging to the king's stables, that provided oats for his horses; mentioned *Stat.* 13 *Car.* 2. *cap.* 8.

AVENTURÆ, *Adventures* or trials of skill at arms; military exercises on horseback.—*Affisa de armis*: *Brady's Append. Hist. Eng.* 250: *Addit. Mat. Paris*, p. 149.

AVENTURÆ, (properly *adventure*). A *misfame* causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. *Co. Lit.* 391.

AVERA, *quasi overa*, from the *Fr. ouvrage* and *ouvrage*, *velut operagium*.] Signifies a day's work of a ploughman, formerly valued at 8 *d.* It is found in *Domesday*. 4 *Inst.* 269.

AVERAGE, *averagium*.] Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea, for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a tempest. It is in this sense called *average*, because it is proportioned and allotted after the rate of every man's goods carried. See title *Insurance*.

Average is likewise a small duty, paid to masters of ships when goods are sent in another man's ship, for their care of the goods, over and above the freight.

AVERAGE OF CORN FIELDS, The stubble or remainder of straw and grafs left in corn fields after the harvest is carried away. In *Kent* it is called the *gratten*, and in other parts the *roughings*, &c.

AVE

AVERCORN, Is a reserved rent in *corn*, paid by ~~ers~~ and tenants to religious houses: and signifies, by ~~corn~~ corn drawn to the lord's granary, by the working cattle of the tenant. 'Tis supposed that this custom was owing to the Saxon *cyriac fecat*, a measure of corn brought to the priest annually on St Martin's day, as an oblation for the first-fruits of the earth: under which title the religious had corn-rent paid yearly; as appears by an inquisition of the estate of the abbey of *Glastonbury*. *A. D.* 1201.

AVERLAND, Seems to have been such lands as the tenants did plough and manure, *cum averiis suis*, for the proper use of a monastery, or the lords of the soil. *Mon. Angl.*

AVER PENNY, (or *average penny*). Money paid towards the king's *averages* or carriages, or to be freed thereof.—*Rastal*.

AVER SILVER, A custom or rent formerly so called. *Cowel*.

AVERIA, Cattle: *Spelman* deduces the word from the Fr. *ouvier*, to work, as if chiefly working-cattle: though it seems to be more probably from *avoir*, to have or possess: the word sometimes including all personal estate, as *catalla* did all goods and chattels. This word is used for oxen or horses of the plough; and in a general sense any cattle.—*Averia elongata*; see *Elongata*.

AVERIIS CAPTIS IN WITHERNAM. A writ for the taking of cattle to his use, who hath cattle unlawfully distrained by another, and driven out of the county where they were taken, so that they cannot be replevied by the sheriff. *Reg. Orig.* 82. See tit. *Distr.*

AVERMENT, *verificatio*, from the Fr. *averer*, *i. e.* *verificare, testari*.] Is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action: and it signifies the act, as well as the offer, of justifying the exception; and not only the form, but the matter thereof. *Co. Lit.* 362. *Averment* is either general, or particular; general, which concludes every plea, &c. containing matter affirmative, and ought to be with these words, *and this he is ready to verify*, &c. Particular *averment* is when the life of tenant for life, or of tenant in tail, &c. is *averred*. *Ibid.* As to general *averments* see tit. *Pleading*. With respect to particular *averments*, the following quotations may serve as examples.—See further *Vin. Abr.* tit. *Averment*.

He that *claims estate from tenant for life, or in tail, or from parson of a church*, ought to aver his life. *Br. Estat.* pl. 18.

Where one thing is to be done in consideration of another, on contracts, &c. there must be an *averment* of performance, but where there is promise against promise, there needs no *averment*; for each party hath his action, 1 *Lev.* 87. The use of *averment* being to ascertain what is alledged doubtfully, deeds may sometimes be made good by *averment*, where a person is not certainly named; but when the deed itself is void for uncertainty, it cannot be made good by *averment*. 5 *Rep.* 155. *Averment* cannot be made against a record, which imports in itself an uncontrollable verity. *Co. Lit.* 26: *Jenk.* 232.

Where a statute is recited, there one may not aver that there is no such record; for generally an *averment*, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an *averment* is but the allegation of the party, and not so much credit in law to be given to it. *Lil. P. R.* 155.

AVERMENT.

Averment lies not against the proceedings of a court of record. 2 *Hawk. P. C. c.* 1. *sect.* 14. Nor shall it be admitted against a will concerning lands. 5 *Rep.* 68. And an *averment* shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 *Rep.* 44. One may not aver a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation, and before witnesses, and therefore not to be contradicted by a bare *averment*. 1 *Lill. Abr.* 156.

An *averment* of a wicked and unlawful consideration of giving a bond, may well be pleaded, though it doth not appear on the face of the deed: and any thing which shews an obligation to be void may well be *averred*, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments in the case of *Collins and Blantern*, C. B. *Easter*, 7 *Geo.* 3: 2 *Wilson*, 347.

If an heir is sued on the bond of his ancestor, it must be *averred* that the heirs of the obligor were expressly bound. 2 *Saund.* 136. In declaring you shew that the obligor bound his heirs.—Another consideration than that mentioned in a deed, may be *averred*, where it is not repugnant or contrary to the deed. *Dyer* 146. But a consideration may not be *averred*, that is against a particular express consideration; nor may *averment* be against a consideration mentioned in the deed, that there was no consideration given. 1 *Rep.* 176: 8 *Rep.* 155. If an estate is made to a woman that hath a husband, by fine or deed, for her life; in this case it may be *averred* to be made to her for her jointure, although there be another use or consideration expressed. 4 *Rep.* 4. *Averment* may be of a use upon any fine, or common recovery; though not of any other use than what is expressed in it: it may be received to reconcile a fine, and the indenture to lead the uses. *Dyer* 311: 2 *Bull.* 235: 1 *And.* 312.

If one has two manors known by the name of *W.* and levies a fine or grants an annuity out of his manor of *W.* he shall by *averment* ascertain which of them it was; *per cur.* 6 *Mod.* 235: *Chas. Rep.* 138.

If a piece of ground was anciently called by one name, and of late is called by another, and it is granted to me by this new name; an *averment* may be taken that it is all one thing, and it will make it good. *Dyer* 37, 44. No *averment* lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive; and against certificates upon commissions out of any court: also against the returns of bailiffs of franchises, so that the lords be not prejudiced by it. *Dyer* 348: 8 *Rep.* 121: 2 *Cro.* 13.

As to *Averments* in actions on the case for words, See tit. *Action II.* 1.

A special *averment* must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. *Hob.* 67. A person may aver he is not the same person on appeal of death in favour of life. 1 *Nell. Abr.* 305.

Where a man is to take a benefit by an act of parliament, there in pleading he must aver, *that he is not a person excepted*; but where he claims no benefit by it, but only to keep that which he had before, in such case it is not necessary to make such *averment*. *Plow. Com.* 87, 488.

Pleas merely in the negative, shall not be *averred*, because they cannot be proved: nor shall what is against presumption of law, or any thing apparent to the court. *Co. Lit.* 362, 373. By statute 4 & 5 *An. c.* 16, no exception or advantage shall be taken upon a demurrer, for want of *averment* of *hoc paratus est*, &c. except the same be specially set down for cause of demurrer. See tit. *Amendment*.

AVERRARE. To carry goods in a waggon, or upon loaded horses, a duty required of some customary tenants. *Cartular. Glouster. MS. f.* 4.

AUGEA, A cistern for water. *Reg. Eccl. Well. MS.*

AUGMENTATIO, *augmentatio.*] The name of a court erected 27 *H.* 8; for determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses, as were given to him by act of parliament. It took its name from the *augmentation* of the revenues of the crown, by the suppression of religious houses: and the office of *augmentation*, which hath many curious records, remains to this day, though the court hath been long since dissolved. *Terms de Ley* 68.

AVISAMENTUM, Advice, or counsel—*De avisamento & consensu concilii nostri concessimus*, &c. was the common form of our ancient kings' grants.

AULA, *i. e.* A court-baron, *aula ibidem tenet die*, &c. *Aula ecclesiæ* is that which is now termed *navis ecclesiæ*. *Eadm. lib.* 6. p. 141.

AULNAGE See **ALNAGE**.

AUMONE, *Fr. aumône*, alms.] Tenure in *aumone* is where lands are given in alms to some church, or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul. *Brit.* 164. Vide *Frankalmoin*.

AUNCCEL or **AUNSEL-WEIGHT**, *quasi hand-sale-weight*, or from *ansa*, the handle of the balance.] An ancient manner of weighing, by the hanging of scales or hooks at each end of a beam or staff, which by lifting up in the middle with one's finger or hand, discovered the equality or difference between the weight at one end and the thing weighed at the other. This weighing, being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead. But notwithstanding, it is still used in some parts of England: and what we now call the *stilliards*, a sort of hand-weighing among butchers, being a small beam with a weight at one end, (which shews the pounds by certain notches) seems to be near the same with the *auncel-weight*.—See tit. *Weights and Measures*.

AUNCIATUS.] Antiquated. *Brompton, lib. 2. cap. 24 par. 6.*

AVOIDANCE, In the general signification, is when a benefice is void of an incumbent; in which sense it is opposed to plenary. Avoidances are either in *fact*, as by death of the incumbent; or in *law*: and may be by cession, deprivation, resignation, &c. See tit. *Advowson*.

AVOIRDUPOIS, or *averdupuis*. *Fr. avoir du poids*, *i. e. habere pondus, aut justè esse ponderis*.] A weight different from that of troy-weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces: and in this respect it is probably so called, because it is of greater weight than the other. It also signifieth such merchandizes as are weighed by this weight; and is mentioned in divers statutes. See tit. *Weights*.

AVOW See *Advow.*

AVOWEE, Of a church benefice. *Britt. c.* 29. *Advocate.*

AVOWRY, Is where a man takes a distress for rent or other thing, and the party on whom taken sues forth a *replevin*, then the taker shall justify his plea for what cause he took it; and if in his own right, he must shew the same, and *avow* the taking: but if he took it in right of another, he must make *cognisance* of the taking, as bailiff or servant to the person in whose right he took the same. *Terms de Leys* 70: 2 *Lill.* 454. The *avowry* must contain sufficient matter for judgment to have return: but so much certainty is not required in an *avowry* as in a declaration; and the *avowant* is not obliged to alledge seisin within the statute of limitations. Nor shall a lord be required to *avow* on any person in certain; but he must alledge seisin by the hands of some tenant within forty years. *Stat. 21 Hen. 8. c.* 19: 1 *Inst.* 268. In *avowry* seisin in law is sufficient, so that where a tenant hath done homage or fealty, it is a good seisin of all other services to make an *avowry*, though the lord, &c. had not seisin of them within sixty years. See *Stat. 32 H. 8. cap. 2: 4 Rep.* 9. A man may distrain and *avow* for rent due from a copyholder to a lord of a manor; and also for heriots, homage, fealty, amercements, &c. 1 *Nelf. Abr.* 315.

If a person makes an *avowry* for two causes, and can maintain his *avowry* but for one of them, it is a good *avowry*: and if an *avowry* be made for rent, and it appears that part of it is not due, yet the *avowry* is good for the rest: supposing sufficient rent due to justify a distress. An *avowry* may be made upon two several titles of land, though it be but for one rent; for one rent may depend upon several titles. 1 *Lill. Abr.* 157: *Saund.* 285. If a man takes a distress for rent reserved upon a lease for years, and afterwards accepts a surrender of the lands, he may nevertheless *avow*, because he is to have the rent due, notwithstanding the surrender. 1 *Danv. Abr.* 652. Where tenant in tail aliens in fee, the donor may *avow* upon him, the reversion being in the donor, whereunto the rent is incident. *Ibid.* 650. If there be tenant for life, remainder in fee, the tenant for life may compel the lord to *avow* upon him: but where there is tenant in tail, with such remainder, and the tenant in tail makes a feoffment, the feoffee may not compel the lord to *avow* upon him. 1 *Danv. Abr.* 648: *Co. Lit.* 268. If the tenant enfeoffs another, the lord ought to *avow* upon the feoffor for the arrérages before the feoffment, and not upon the feoffee. 1 *Danv.* 650. The lord may *avow* upon a disseisor. 20 *Hen.* 6. And if a man's tenant is disseised, he may be compelled to *avow*, by such tenant or his heir. A defendant in replevin may *avow* or justify; but if he justifies he cannot have a return. 3 *Lev.* 204. The defendant need not *aver* his *avowry* with an *hoc paratus est*, &c. By *Stat. 21 Hen. 8. c.* 19, it is enacted, That if in any *replegiare* for rents, &c. the *avowry*, cognisance, or justification be found for the defendant, or the plaintiff be nonsuit, &c. the defendant shall recover such damages and costs as the plaintiff should have had, if he had recovered. See *Bull. N. P.* 57, that this statute does not extend to an *avowry* for a *nomine pæne* or *estray*. And by *Stat. 17 Car. 2. c.* 7, When a plaintiff shall be nonsuit before issue in any suit of replevin, &c. removed or depending in any of the courts

courts at *Westminster*, the defendant making suggestion in the nature of an *avowry* for rent, the court on prayer shall award a writ to inquire of the sum in arrear, and the value of the distress, &c. upon return whereof the defendant shall recover the arrears, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may distress for the residue. See titles *Distress* and *Writ*.

AURUM REGINÆ. The queen's gold.—This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c. by the king to him; and it is due in the proportion of one-tenth part more, over and above the entire fine to the king. 1 *Comm.* 221.

AUSCULTARE. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone or accent, to make an impression on their hearers, which was required before they were admitted to read publicly in the church; and this was called *auscultare*. See *Lanfrancus in Decretis pro ordine Benedicti*. c. 5.

AUSTURCUS, and *Osturcus*, A goshawk; from whence we usually call a falconer, who keeps that kind of hawks, an *ostringer*. In ancient deeds there has been reserved, as a rent to the lord, *unum austurcum*.

AUTER DROIT, An expression used where persons sue or are sued *in another's right*; as executors, administrators, &c.

AUTERFOITS ACQUIT, Is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 *Inst.* 213. Except by appeal of death which is a private suit. See tit. *Appeal*. There is also plea of *auterfoits convicted*, and *auterfoits attaint*; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, *auterfoits acquit*, or *auterfoits attaint*, upon indictment of the same death, is no plea. *H. P. C.* 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death. 2 *Hawth. P. C. c.* 35, 36.

AUTHORITY, Is nothing but a power to do something: it is sometimes given by word, and sometimes by writing: also it is by writ, warrant, commission, letter of attorney, &c. and sometimes by law. The authority that is given must be to do a thing lawful; for if it be for the doing any thing against law, as to beat a man, take away his goods, or dispossess him of his lands, this will not be a good authority to justify him that doth it. *Dyer* 102: *Keilw.* 89. An authority given to another person, to do that which a man himself cannot do, is void: and where an authority is lawful, the party to whom given must do the act in the name of him who gave the authority. 11 *Rep.* 87. Where an authority is given by law, it must be strictly pursued; and if a person acting under such authority, exceeds it, he is liable to an action for the excess.

An authority in some cases cannot be transferred.—Thus a

person who has an authority to do any act for another, must execute it himself, and cannot transfer it to another: for this being a trust and confidence reposed in the party, cannot be assigned to a stranger whose ability and integrity were not so well thought of by him for whom the act was to be done. 9 *Co.* 77 b: 1 *Roll. Abr.* 330.

Some authorities likewise determine with the life of the person who gave them.

The authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me that am to be represented. 2 *Roll. Abr.* 9: *Co. Lit.* 52.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death: because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good. *Co. Lit.* 52: 2 *Roll. Abr.* 12.

It is a rule that every authority shall be countermandable, and determine by the death of him that gives it, &c. But where an interest is coupled with an authority, there it cannot be countermanded or determined. *And.* 1: *Dyer* 190: and See *Viner's Abridgment* tit. *Authority*.

A devise to another to have the disposing, selling, and letting his land; so a devise to his son, but that his wife shall take the profits; so a devise, that his executor shall have the oversight and dealing of his lands; so a devise to an infant in tail, but that G. D. shall have the oversight of his will, and the education of his son till of age, and, to receive, set, and let for him; these and such like words give the devisee an authority, but no interest. *Dyer* 26. b, 3; 1: 2 *Leon.* 221: 3 *Leon.* 78. 216: *Moor* 635. *S. P. Cro. Eliz.* 674, 678, 734.

The law makes a difference where lands are devised to executors to sell, and where the devise is, that his lands shall be sold by his executors; for in the first case an interest passes to the executor, because the lands are expressly devised to them, but in the other case they have only an authority to sell. *Goldf.* 2: *Dyer* 219: *Moor* 61: *Keilw.* 107 b: 1 *And.* 145.

The testator devised, that his executors should receive the issues and profits of his lands till his son came of age, to pay his debts and legacies, and to breed up his younger children; the testator died, so did the executor, during the minority of the son, having first made J. S. his executor; adjudged, that this executor of an executor may dispose of the issues and profits for the purposes mentioned in the will during the infancy of the son; because the first executor had not only a bare authority, but an interest vested in him. *Dyer* 210.

Where the testator gives another authority to sell his lands, he may sell the inheritance, because he gave him the same power he had himself, and in such case the purchaser shall be in by the devise. 2 *Rep.* 53.

An authority may be apportioned or divided, but an interest is inseparable from the person, and where an act, which is in its nature indifferent, will work two ways, the

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the one by an *authority*, and the other by an *interest*, the law will attribute it to the *interest*. But where an *interest* and *authority* meet, if the party declare, that the thing shall take effect by virtue of his *authority*, there it shall prevail against the *interest*. 6 Rep. 17.

In many cases *authorities* must be strictly executed according to the power given.

If a man devise that his executors shall sell his land, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law; and in this case, all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. Co. Lit. 112 b: 113 a: 181 b.

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. Co. Lit. 113 b: 181 b.

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney delivers seisin absolutely, the livery is not good; because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. 2 Rol. Abr. 9.

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two; or if the attorney had authority to make livery of *Black-Acre*, and he made livery of *Black-Acre* and *White-Acre*, though the attorney has in these cases done more, yet there is no reason that shall vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void. Perk. sec. 7. 189.

If a letter of attorney be given to two jointly to take livery, and feoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery, are to be considered but as one. Co. Lit. 49. b: 2 Rol. Abr. 8.

But if a letter of attorney be made to three *conjunctim & divisim*, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. Dyer 62: 1 Rol. Abr. 329: Co. Lit. 181 b: 1 Rol. Rep. 299: Yelv. 26.

If a letter of attorney be given to A. to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, whilst the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore, to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. Co. Lit. 52: Popb. 103: Dyer 131 a: 340 a.

If a sheriff makes a warrant to four or three, or a *capias* jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. Co. Lit. 181: Palm. 52: 2 Rol. Rep. 137.

So if the lord gives licence to a copyholder for life, to lease the copyhold for five years, if the copyholder *am-*

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diu vixerit, and he leases it for five years generally without limitation, this is a good execution, and pursuant to the licence; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation, 1 Rol. Abr. 330, 331: Cro. Jac. 436. S. C.—See further tit. Power, and Vin. Abr. tit. Authority.

AUTUMN. The decline of the summer. Some computed the years by *autumns*; but the *English Saxons* by winters; Tacitus says, that the ancient *Germans* knew the other divisions of the year, but did not know what was meant by *autumn*.

AUTUMNALIA, Those fruits of the earth which are ripe in *autumn* or harvest.

AUXILIUM AD FILIUM MILITEM FACIENDUM ET FILIAM MARITANDAM. A writ formerly directed to the sheriff of every county where the king or other lord had any tenants, to levy of them an aid towards the knighting of a son, and the marrying of a daughter. F.N.B. 82: See tit. Aid, Tenure.

AUXILIUM CURIÆ, A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. Kenner's Paroch. Antiq. 477.

AUXILIUM FACERE ALICUI IN CURIA REGIS. To be another's friend and solicitor in the king's courts; an office undertaken for and granted by some courtiers to their dependants in the country. Paroch. Antiq. 126.

AUXILIUM REGIS, The king's aid, or money levied for the king's use, and the public service; as where taxes are granted by parliament. See title Aid, Taxes.

AUXILIUM VICECOMITI, A customary aid or duty anciently payable to sheriffs, out of certain manors for the better support of their offices. See Mon. Angl. tom. 2. p. 245. An exemption from this duty was sometimes granted by the king; and the manor of *Stretton* in *Warwickshire* was freed from it by charter. 14 H. 3. M. 4.

AWAIT, Seems to signify what we now call *way-laying*, or lying in wait to execute some mischief. By stat. 13 R. 2. c. 1, It is ordained that no charter of pardon shall be allowed before any justice for the death of a man slain by *await*, or malice prepensed, &c.

AWARD, from the Fr. *Agard*.] Perhaps because it is imposed on both parties to be observed by them. *Distum quod ad custodiendum seu observandum partibus imponitur*, Spelm.

That act by which parties refer any matter in dispute between them, to the private decision of another party (whether one person or more) is called a *Submission*; the party to whom the reference is made an *Arbitrator* or *Arbitrators*: when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called an *Umpire*. The judgment given or determination made by an arbitrator or arbitrators is termed an *Award*; that by an umpire an *Umpirage*, or less correctly an *award*.

The following system of the law on this subject is chiefly collected from, and follows the plan of *Kyd's Treatise on the Law of Awards*, 8vo. 1791.

The subject may be conveniently distributed under the following heads;

AWARD I. II.

- I. *The Submission.*
- II. *The Parties thereto.*
- III. *The Subject of the Reference.*
- IV. *The Arbitrators and Umpire.*
- V. *The Award or Umpirage.*
- VI. *The Remedy to compel Performance, on an Award or Umpirage properly made.*
- VII. *Of the Means of procuring Relief against it, when improperly made. And*
- VIII. *The Effect, in precluding the Parties from suing on the original Cause of Action, or Subject of Reference.*

I. THE SUBMISSION may be purely by the act of the parties themselves; or it may be by their act, with the interposition of a court of justice: in either case it may be either verbal or in writing; the general practice, as well as the most safe is to prefer the latter.

When the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in a certain sum penal, on condition, to be void on performance of the award; but such bonds may be given to a third person or even to the arbitrator himself (*Comb.* 100); and they may be given by other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award. The submission may also be by indenture, with mutual covenants to stand to the award. *2 Mod.* 73.

It is usual in articles of co-partnership, to insert a provision, that all disputes between the partners shall be referred to arbitration. This has so far the effect of a submission, that one of the parties cannot sue another either at law or in equity, for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and a refusal by the defendant. See *2 Atk.* 585, (569): *2 Brownl.* c. 336.

All the cases of awards reported in the books, for a long series of years, appear to have been made on submissions, by the act of the parties only; but when mercantile transactions came to be frequently the subject of discussion in the courts, it was soon found, that a judge and jury were very unfit to unravel a long and intricate account; and it therefore became a practice, in cases of that kind, and others, which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of *nisi prius*; which was afterwards made a rule of that court, out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period shew, that it was not before the latter end of that reign, that the courts granted their interference without reluctance. Their utility, however, was at length so well understood, that by *Stat.* 9 & 10 *W.* 3. c. 15. it was enacted, "That it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration, any controversy, suit or quarrel, for which there is no other remedy, but by personal action, or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record; and to insert such their agreement in their submission, or the condition of the bond or promise whereby they oblige themselves respectively; which agree-

ment being so made and inserted, may on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitrator or umpirage, the party neglecting or refusing, shall be subject to all the penalties of contemning a rule of court."—On this statute, and awards made in consequence, see *1 Stra.* 1, 2: *2 Stra.* 1178: *10 Mod.* 332, 3: *Barnes* 55, 8: *1 Salk.* 72: *Comyns* 114: *1 Ld. Raym.* 664.

The extent of the submission may be various, according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them.

It is proper to fix a time, within which the arbitrators shall pronounce their award: but where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the submission. *4 Keb.* 10, 20.

The submission, being the voluntary agreement of the parties, the words of it must be so understood, as to give a reasonable construction to their meaning, and to make their intention prevail: and where there is a repugnancy in the words of the submission, the latter part shall be rejected, and the former stand. *Poph.* 15, 16.

It has been said, that as all authority is in its nature revocable, even though made irrevocable, therefore a submission to an award may be revoked by either of the parties; such at least was the determination under the old law as reported in the year-books, and ancient reporters, but now it may reasonably be supposed, that the courts would sustain an action on the case, for countermanding the authority of the arbitrator. A case is reported in two books, one being evidently nothing more than a loose note; *1 Sid.* 261; the other report is at length, and the manner of the pleadings distinctly given; the breach being assigned in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court without much hesitation in favour of the plaintiff *2 Keb.* 10, 20. 24.

This applies only, however, to the case of an express revocation; not to that which must necessarily be implied by construction of law from another act of the party. Thus, if a woman while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage operates as a revocation. *W. Jones* 388: *3 Keb.* 9745.

II. EVERY ONE who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil capacity of contracting. Therefore a married woman cannot be party to a submission, whatever may be the subject of dispute, whether arising

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arising before or after her marriage; but the husband may submit for himself and his wife. *Str.* 351.

On the principle that an *infant* cannot bind himself for any thing but necessities, it is clear he cannot be party to a submission; whether the matter in dispute be an injury done to him, or an injury done by him to another; but a guardian may submit for an infant, and bind himself that he shall perform the award. See *Comb.* 318, *Roberts v. Newbold*; which established this principle, in contradiction to former determinations.

An *executor* or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate; but it is at his own peril; for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects. See *Dyer* 216 b; 217 a: *Con. Dig. Admin.* (l. i.): 3 *Leon.* 53: and *Barry v. Ruff*, 1 *Term Rep.* 691.

So the *assignees of a bankrupt* may submit to arbitration any disputes, between their bankrupt and others, provided they pursue the directions of the stat. 5 *Geo.* II. c. 30 § 34; on the construction of which see 1 *Atk.* 91.

Those only who are actually parties to the submission shall be bound by the award.—For the case of partners see 2 *Mol.* 228.—Of co-parishioners, *Mudry v. Osam*, *Litt.* 30.

So, in general, a man is bound by an award, to which he submits for another, *Alfop v. Senior*, 2 *Keb.* 707, 718. And see *Bacon v. Dubarry*; the case of an attorney submitting for his principal without authority from him. 1 *Ld. Raym.* 246: See *Kyd on Awards*, p. 27: and *Colwill v. Child*, 1 *Rep. Ch.* 104: 1 *Ca. Ch.* 86.

But if a man *authorize* another on his behalf, to refer a dispute, the award is binding on the principal alone. *Dyer* 216 b; 217. unless the agent binds himself for the performance of the principal. 1 *Wils.* 28, 58.

When there are several claimants on one side, and they all agree to submit to arbitration, and *some only enter into a bond* to perform the award, the award shall bind the rest. *Wood & al. v. Thompson & al.* *M.* 24 *Car. B. R.* *Rel. Abr.* tit. *Arbitr.* F. 11.

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general, that they shall do one entire thing, both shall be bound to performance of the whole. *Cro. Car.* 434.

If the husband and wife submit to arbitration, any thing in right of the wife, the wife shall after the death of the husband, be bound by the award. *Lumley v. Hutson*, 1 *Rel. Rep.* 2: 8, 9.

An award creates a duty which survives to executors or administrators; they shall therefore on the one hand be compelled to the performance it made against their testator or intestate; and on the other may take advantage of it, if made in his favour. 2 *Vent.* 249: 1 *Ld. Raym.* 248.

And it is a general rule, that all those who would be bound by an award may take advantage of it.

Generally speaking, a submission of all matters between the parties, when there are more persons than one, either on one or both sides, is the same as a submission of all matters between the parties, *any or either of them.* *Comyns* 328. and therefore on submission by A. and B. on the one side, and C. and D. on the other, the award may be of matters between A. and C. alone, or between A. and B. together, with C. alone, or *vice versa*; and

money may be awarded to be paid accordingly. This rule however may be controlled by the words of the mission, in which it is in this case more particularly requisite to be very exact. See *Kyd on Awards* 141: 8 *Co.* 98. a: *Hardr.* 399: 1 *Vern.* 259: *Com.* 547: *Rel. Abr.* tit. *Arbitr.* D. 5. and O. 8.

III. THOUGH the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection, because the subjects on which they were made were not the proper objects of such reference.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is, to have an amicable and easy settlement of something which in its nature is uncertain. An award therefore is of no avail when made of debt on a bond for the payment of a sum certain, whether it be single or with a condition to be void on the payment of a less sum; nor if made of debt for arrears of rent ascertained by a lease; nor of covenant to pay a certain sum of money; *Blake's Case*, 6 *Co.* 43, 4; nor of debt on the arrears of an account as formerly taken before auditors in an action of account; 1 *Lev.* 292. nor of damages recovered by a judgment; *Gouldsb.* 91, 2. for in all these cases the demand is ascertained. But see *Lumley v. Hutson*, *Rel. Abr.* tit. *Arbitr.* B. 8. and *Coxal v. Sharp*, 1 *Keb.* 917; as it seems that when joined with other demands of an uncertain nature, those which are certain may also be submitted; even in the case of a verdict and judgement.

But in general where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration; as any demand not ascertained by the agreement or contract of the parties though the claimant demand a sum certain; as a claim of 5*l.* for different expences in the service of the other party. *Sower v. Bradfield*, *Cro. Eliz.* 422. So an action of account may be submitted; for till the account be taken, the sum remains uncertain. *Rel. Abr.* tit. *Arbitr.* R. 4.

It is said, and it appears justly, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury may be submitted to arbitration; where the injury done to the individual, is not considered, by the policy of the state, as merged in the publick crime, which latter can never be the subject of arbitration.

In the case of deeds when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand, being for damages for a breach, may be submitted to award. *Blake's Case*, 6 *Co.* 43, 4: *Cro. Jac.* 99. However in all cases where the demand arises on a deed, the submission ought also to be by deed; because a specialty cannot be answered but by a specialty. *Lumley v. Hutson*, before quoted.

Much doubt and uncertainty seems anciently to have prevailed on the question, "How far a dispute concerning land could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond,

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it was almost universally held, that the party who did not reform the award forfeited the bond. *Kilway* 43, 45.

"The present rule of law therefore is that "Where the parties might by their own act have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done, which the parties themselves might do by their own agreement." *Knight v. Dutton*, 6 Mod. 231: *Trustee v. Ascare*, Cro. El. 223: Dy. 183. in marg.

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission as well as the award, [and whatever act, is by the award, directed to be performed by the parties, as to real property,] must also be by deed.

IV. Every one whom the law supposes free, and capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or Umpire: because he is appointed by the choice of the parties themselves, and it is their folly if they choose an improper person.

An idiot cannot be an arbitrator; nor a married woman, nor a man attainted of treason or felony. But an unmarried woman may be an arbitratix. *Duchess of Suffolk's case*, 8 E. 4. 1. B. 37.

It is a general rule of law, founded on the first principles of natural justice, that a man cannot take on himself to be judge in his own cause; but should he be nominated an arbitrator, by or with the consent of the opposite party the objection is waived; and the award shall be valid. *Matthew v. Linterton*, Comb. 218: 4 Mod. 226: *Hicks v. Bennison*, Har. 43.

The nomination of the Umpire is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial, and that it shall not even be left to chance, an election being an act of the will and understanding. 2 Vent. 85.

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the Umpire. The time when the power of the Arbitrators ceases, and that of the Umpire begins; the time when the Umpire may be nominated; and the effect of his nomination have, each in its turn, proved questions of sufficient magnitude to exercise and distract the genius of the lawyers. The time limited for the Umpire to make his umpirage, has sometimes been the same with that limited for the Arbitrators to make their award. It is now however most usual, and certainly more correct to prolong the time beyond that period.

In this case of a prolongation of time, the authority of the Arbitrators is determined, and that of the umpire immediately begins on the expiration of the time specified to be allowed to the Arbitrators. *Lumley v. Hutton*.

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators can authorise the Umpire to make his umpirage before the expiration of the time limited for their making their award.

On this head the following seems to be undeniably the clearest and most accurate opinion. If the Arbitrators do

in fact make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place; and there is here no confusion as to the concurrence of authority with respect to the time. The Umpire has no concurrence absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the Umpire is confined to the same time with the arbitrators, and to that where a further time is given to him. *Chase v. Dore*, Sir T. Jones 168: see also, *Godb.* 241: 1 Lev. 174, 285: 1 Ld. Raym. 671: 12 Mol. 512: *Lutw.* 541, 4: *Cro. Car.* 263: 1 Mod. 274: Sir T. Raym. 205: 1 Salk. 71.

It is now finally determined that the Arbitrators may nominate an Umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire. 2 Term Rep. 645. And it is in fact not unusual for the parties to make it a condition in the submission that the umpire shall be chosen by the Arbitrators, before they do any other act. They may also, when a further day is given to the Umpire, and the choice left to them in general terms, choose him at any time after the expiration of their own time, provided it be before the time limited for him. 3 Keb. 387: *Freem.* 378: 2 Mod. 169.

From the opinion that the arbitrators having once elected an Umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business they could not elect another. This opinion has been supported by two Chief Justices, but over-ruled (surely with propriety) by determinations of the Court. 3 Lev. 263: 2 Vent. 113: *Palm.* 289: 2 Saund. 129: 1 Salk. 70: 1 Ld. Raym. 222: 12 Mod. 120.

When the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties or to their attorneys; if the submission be by rule of reference at nisi prius, the witnesses should be sworn at the bar of the court, or afterwards, (if neglected) before a judge.

The parties must attend the arbitrators, according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves, and call for any other information.

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is by the mere act of the parties, that prolongation may be made by their mutual consent; otherwise a rule of court is necessary for the purpose.

The law has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator on due notice given to proceed without his attendance. *Waller v. King*, 9 Mod. 63: 2 Eq. Ab. 92. c. 3; or the willing party may press his opponent by rule of court to attend the arbitrator, who on failure may make his award without such attendance. *Hesley v. Hesley*, in *Scac.* Mich. 1789.

It has been formerly held that an Umpire cannot proceed on the report of the arbitrators, but must hear the whole matter anew; but there seems to be no good reason

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son why the Umpire, if he think proper, may not take those points on which the arbitrators agree to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it, and by adopting their opinion as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination. And in this manner Umpires do usually act: and they are justified in so doing unless requested to re-examine the witnesses. 4 Term Rep. 589.

Though the words in the submission which regulate the appointment of an Umpire, be not perfectly correct; but might from the grammatical order seem to imply that the Arbitrators and the Umpire, should all join together to make an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of the submission. *Rel. Abr. tit. Arbitr. p. 6.*—And on the other hand, an umpirage made by the umpire jointly with the arbitrators is good; their approbation, shewn by joining with him, being mere surplusage, does not render the instrument purporting to be his umpirage in any degree less the act of his judgment. *Soulby v. Hodgson, 2 Blackst. 453.*

Unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso is made, all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent. *Barnes 57.*

As to the necessity imposed on the arbitrators or umpire of giving notice of their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done before that day, unless they have notice; but they must take notice at their peril of any thing ordered at the day. 8 E. 4: 1: Br. 37: *Kelway 175*: see *Cro. El. 97*; *Cro. Car. 132, 3.*

It has long been the practice to guard against the consequences of the want of notice, by inserting a proviso in the condition of the arbitration-bond not only that the award shall be made, but that it shall be delivered to the parties by a certain day; and then the bond will not be forfeited by non performance, unless the party not performing had notice; and the award ought to be delivered to all the persons who are parties on either side. *Hungate's Case, 5 Co. 103*: *Cro. El. 885*: *Mo. 642.*

The object of every reference is a final and certain determination of the controversies referred. A reservation of any point for the future decision of the arbitrator, or of a power to alter the award, is inconsistent with that object; and therefore it is established as a general rule that such a reservation is void: but the reservation of a mere ministerial act, as the measuring of land, the calculation of interest at a rate settled, &c. does not vitiate the award. 12 Mod. 139: 2 Ro. Rep. 189, 214, 215: *Palm. 110, 146*: *Cro. Jac. 315*: *Hob. 218*: *Lutw. 550*: *Hardw. 43.*

The submission to the decision of an individual, arises from the confidence which the parties repose in his integrity and skill; and is merely personal to him; it is therefore inconsistent that the arbitrators or umpire should delegate any part of their authority to another; and such delegation is absolutely void. But it was deter-

mined in the case of *Lingood v. Eade, 2 Atk. 501, (515.)* that arbitrators where they award the substance of things to be done, may refer it to another to settle the manner in which it shall be put in execution.

Since the introduction of references at nisi prius, there can be no question, but the arbitrator has a jurisdiction over the costs of the action, as well as over the subject of the action itself; unless some particular provision is made to the contrary by the form of the submission. Instead of ascertaining the costs, the arbitrator may refer them to be taxed by the proper officer of the court, but to no one else. 2 Atk. 504, (519): 1 Salk. 75: 6 Mod. 195: *Hardw. 181*: *Barnes 56, 8*: 1 Sid. 358: *Str. 737, 1035*: *Com. 330.* When it is agreed that costs shall abide the event, it means the legal event. See 3 Term Rep. 139. And also as to awarding the costs of the arbitration, 2 Term Rep. 645. And the arbitrators may award damages to either party, though in point of law there was no cause of action. 2 Vent. 243. If the arbitrator takes no notice of the costs, but awards mutual releases, it shall be presumed to be meant that each party shall pay his own costs. See *Kyd, 143.*

V. EVERY AWARD should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence.—Therefore,

1 The Award must not extend to any matter not comprehended in the submission: thus if the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void as far as it respects them. 2 Mod. 309.

If two submit to the award of a third person all demands between them; without more; the word, demands, implies all matters between them concerning the lands of both parties which are the subjects of variance. 1 *Ld. Raym. 115*: *Kelw. 99.*

If the submission be, “of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands,” an award, “to release all bonds, specialties, judgments, executions and extents,” is within the submission; for as all debts are submitted, of course a release may be awarded of the securities for them. 2 *Saund. 190.*

Where the submission is, “of all debts, trespasses and injuries,” an award “to release all actions, debts, duties and demands,” does not exceed the submission; the word injuries comprehending demands. 3 *Bull. 312.*

The rule however is not so strictly interpreted as to extend to every thing literally beyond the submission; if the award be of any thing depending on the principal, it is good. *Rel. Arb. B. 2*: *C. 4, 5, 6.*

Thus if the submission be of all trespasses, and the award be, “that one shall pay to the other 10*l.* and that he shall enter into a bond for the sum;” this is good, because it only renders the award more effectual. *Kyd. 96.*

In like manner if it can reasonably be presumed that nothing is in reality awarded beyond the submission it has in general been supported. 10 Co. 131, 2: *Jenk. 264*: *Rel. Arb. 21*: see 6 Mod. 232.

On the submission of a particular difference when there are other matters in controversy, though an award of a general release is void; yet the proof of such other disputes existing is thrown on the party objecting. 2 Mod.

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309: 1 *Sid.* 154: *Wilde Hob.* 190. (See *post. Div.* 3. of this head).

If in a similar case the arbitrators award "that all suits shall cease," this shall be confined to suits relating to the subject of the submission, and void only for the residue. 1 *Ro. R.p.* 362: 2 *Ro. Rep.* 192: *Cro. Jac.* 661.

On a dispute between a parson and one of his parishioners, whether the tithes should be paid in kind or not; the arbitrator awarded that the parson should have 7*l.* for the tithes due before the submission, and that the parishioner should pay 4*l.* annually for the future tithes. This was held to be a good award, because the submission comprehended a question concerning the future rights. *Rel. Arb.* D. 8. But an award made on the 23d of June, ordering so much rent to be paid, which by the award itself appeared not to be due till the 24th, was held bad. 10 *Mol* 204.

If partners refer all matters in difference between them, the arbitrators may dissolve the partnership. 1 *Black. Rep.* 475.

Where the submission is by reference at *non prius*, the order in which the words are placed in the rule of reference, gives no material distinction with respect to the power of the arbitrator. If the reference be "of all matters in dispute in the cause between the parties," the power of the arbitrator is confined solely to the matters in dispute in that suit. If it be "of all matters in difference between the parties in the suit," his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them. 2 *Black.* 1118: 2 *Term Rep.* 644, 5: 3 *Term Rep.* 626.

As an award of a thing out of the submission cannot be enforced by an action at law, so neither shall a man by such an award be precluded from claiming his right in equity. *Finch. Rep.* 141.

2. The award should not extend to any who is a stranger (that is, not a party) to the submission. Thus if two submit to arbitration concerning the title to certain lands, and the arbitrators award that all controversies touching the land shall cease; and that one of the parties, his wife and son, his heir apparent, by his procurement, shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission. *Rel. Arb.* N. 9: and see *Samon's Ca.* 5 *Rep.* 77 b.

Lord Coke (10 *Rep.* 131 b.) says, that an award is void, which directs money to be paid by one of the parties to a third person not included in the submission; but this must be understood to hold good only when such payment can be of no benefit to the other party; for an award that one of the parties shall pay so much to the creditor of the other, in discharge of a debt, is unquestionably good. 1 *Ld. Raym.* 123: *Rel. Arb.* E. 6. F. 8.

And in general a distinction is taken between the case of an act awarded to be done by a stranger, and that of an act awarded to be done to him, by a party to the submission: in the latter case the award is said to be good; and if the stranger will not accept the money awarded to be paid to him the party's obligation is saved. 3 *Leon.* 62.

So where a stranger is only an instrument to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants of

the mansion who shall present the surrender; this award is good. *Rel. Arbitr.* E. 7, 8: 1 *Keb.* 569: and see *Division* 4 of this head.

If the persons comprehended in the award were in contemplation of the submission, though they were not directly parties to it, yet the award is good. *Lutw.* 530, 571: 1 *Mar.* 78: *Comyns* 183: *Rel. Arb.* B. 18.

An award shall not affect the rights of persons not parties to the submission. *Finch.* 180, 4. and see *Id.* 147.

3. The award ought not to be of part only of the things submitted. This however must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, it will be good. 8 *Co.* 98: *Rel. Arb.* L. 5.

If a submission be "of all the premises or of any part of them," in this case the arbitrator may undoubtedly make an award of part only. *Rel. Arb.* L. 6.

If an award be made of all matters except a bond; and of this it be awarded that it shall stand, the award is good; for it shall be presumed there was no cause to discharge the bond. *Cro. Jac.* 277, 400: *Bridg.* 91.

If arbitrators award for one thing, and say that they will not meddle with the rest, all is void; because they have not pursued their authority. *Cro. El.* 858: see *Dy.* 216, 217.

Where a submission is of certain matters specifically named, with a provisional clause "so that the award be made of and upon the premises," the arbitrator ought to make his award of all, otherwise it will be void. 8 *Co.* 98: *Goldsb.* 125: *Rel. Arbitr.* L. 9.

But where the submission is general of all matters in difference between the parties; though there should happen to be many subjects of controversy between them, if only one be signified to the arbitrator, he may make his award of that: he is, in the language of Lord Coke, in the place of a judge, and his office is to determine according to what is alledged and proved. It is the business of the parties grieved, who know their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him. 8 *Co.* 98 b: 1 *Brownl.* 63: 2 *Brownl.* 309.

In the case of such a general submission, if an award concerning one thing only be made, it shall be presumed (till the contrary be shewn by the party objecting) that nothing else was referred. *Cro. Jac.* 200, 355: 1 *Burr.* 274 *et seq.* But the arbitrators ought to decide on all matters laid before them, or they cannot do complete justice. And it is said that on a reference by rule of a court of equity, the award ought to comprehend all the matters referred. 1 *C. C.* 87, 186.

It is however no valid objection to an award that the arbitrator had notice of a certain demand, and that he made no award of that, if in other respects the award be good; as, though the sum in question may not be mentioned in the award, the arbitrator may have shewn his opinion that the demand was unfounded; as, by ordering general releases, &c. See 1 *Saund.* 32.

An award of one particular thing for the ending of an hundred matters in difference is sufficient, provided it concludes to them all. 1 *Keb.* 738: 1 *Lev.* 132, 3.

4. If an award be to do any thing which is *against law*, it is *void*, and the parties are not bound to perform it. *Rol. Arbitr.* G: 1 *Sid.* 12: 2 *Cent.* 243. So also is an award of a thing which is not physically or morally possible, or in the power of the party to perform; as that he shall deliver up a deed which is in the custody or power of a person, over whom he has no controul. 12 *Mod.* 585: and see *Rol. tit. Arbitr.* And an award that the defendant shall be bound with sureties such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff. 3 *Mod.* 272, 3. But in this case the party should enter into a bond himself and tender it to the plaintiff.

Where an award is that one of the parties shall procure a stranger to do a thing, there is a distinction taken between the case where he has no power over the stranger, to compel him, and where he has power either by the common law or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good. *Rol. Arbitr.* F. 1: 248 n. 11: *March.* 18: 1 *Mod.* 9.—(See ante Division 2.)

Neither must an award be to do a thing *unreasonable*; nor by the performance of which the party awarded to do the acts may subject himself to an action from another. *Rol. Arbitr.* E. 2, 3; F. 10: 2 *Bull.* 39: 1 *Keb.* 92: 1 *Ro. Rep.* 6: *Cro. Car.* 226: 3 *Lev.* 153.

What shall or shall not be unreasonable, is however matter of construction in which the cases differ considerably. See *Rol. Arb.* B. 12; J. 4. 5: 2 *Mod.* 304.

An award must not be of a thing which is merely *negatory*, without any advantage to the parties. *Rol. Arb.* J. 10—15. And if a man and a woman submit to arbitration, and it be awarded that they shall intermarry, this is said not to be binding (*Id. ib.*) for one reason among others, that it cannot be presumed to be advantageous to them. Mutual releases are advantageous, and therefore an award of them is good. *Freem.* 51.

5. The Award must be *certain* and *final*. As the intention of the parties in submitting their disputes to arbitration, is to have something ascertained, which was uncertain before, it is a positive rule that the award ought to be so plainly express, that the parties may certainly know what it is they are ordered to do. 5 *Co.* 77 b: 78 a.

On the construction of certainty and uncertainty the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. "The rule therefore serves better to regulate the conduct of arbitrators, than the numerous exceptions: as it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the *manner, time and place* of their doing it. Though the two latter have been deemed immaterial (*Stra.* 905,) yet it is safest to specify them.

Awards are now so liberally construed, that trifling objections are not suffered to prevail against the manifest intent of the parties. See 1 *Burr.* 277. and post Division 6. In favour of the equitable jurisdiction of the arbitrators, if that, to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of, and circumstances atten-

dant on the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. See 2 *Ld. Raym.* 1076: 12 *Mod.* 585: *Lutw.* 545: *Stra.* 903. Where there is no date to the award, it shall be taken as dated from the day of the delivery which may be ascertained by averment; and all other uncertainties may be helped by proper averments in pleading. 1 *Ld. Raym.* 245, 672: *Cro. Eliz.* 676: *Sty.* 28: 2 *Saund.* 252.

As an award must be certain, so also must it be *final*; (at the time of making it; see 1 *Sid.* 59: *Lut.* 51: *Comb.* 456); in order to prevent any future litigation on the subject of the submission.

On this principle, an award that each party shall be *non-suited* in the action which he has brought against the other, is not good; because (amongst other reasons) a nonsuit does not bar them from bringing a new action: but an award that a party shall *discontinue* his action, or enter a *retraxit*, is good. *Godb.* 276: *Rol. Arbitr.* F. 7.

An award—that all suits shall cease—or, that a bill in chancery shall be dismissed—or, that a party shall not commence or prosecute a suit—is final; for it shall be taken to mean, that the *debts* and *actions* shall *cease forever*; that alone being a substantial performance of the award. 6 *Mod.* 33, 232: 2 *Ld. Raym.* 961, 4: 1 *Salk.* 74, 5: *Rol. Arb.* O. 7. But see 2 *Stra.* 1024.

Lastly the Award must be *mutual*; not giving an advantage to one party without an equivalent to the other.

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done should be a final *discharge*, and *satisfaction* of all debts and claims by the party in whose favour the award is made, against the other, for the matters submitted; and therefore the present rule amounts to nothing more than a different form of expression of that which requires that an award should be final. See *Comb.* 439: 1 *Ld. Raym.* 246: *Cro. Eliz.* 904: *Comyns* 328.

6. The rules which at present govern the construction of awards are, that they shall be interpreted, as deeds, according to the intention of the arbitrators. That they shall not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators. 1 *Burr.* 277: 2 *Atk.* 504 (519)—That *all actions* mentioned in the award, shall be construed to mean, all actions over which the arbitrators have power by the submission—That if there be any contradiction in the words of an award, so that the one part cannot stand consistently with the other, the first part shall stand and the latter be rejected; but that if the latter be only an explanation of the former, both parts shall stand. *Palm.* 108: 3 *Bull.* 66, 7.—And that where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award. 6 *Mod.* 35.

Much unnecessary difficulty occurs in all the old reports on the construction that ought to be put on the award of a *Release*; but it is now clearly settled, that an award of releases up to the time of making the award, is not altogether void; but that it shall be construed so as to support the award; and that for two reasons. 1st. That it shall be presumed that no difference has arisen since the time of the submission, unless it be specially shewn that there

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there has: ad. That a release to the time of the *submission* is a good performance of an award, ordering a release to the time of the *award*; not because the meaning of the arbitrators is so, but because their meaning must be controuled so far as it is void, by construction of law. 10 *Mod.* 201; 6 *Mod.* 43; 5: 2 *Ld. Raym.* 964, 5: 1 *Ld. Raym.* 116. See 12 *Mod.* 8, 116, 589: *Godb.* 164, 5: 2 *Keb.* 431: 1 *Sid.* 365.

Formerly, if one part of an award was void, the whole was considered so: now however, it is the rule of the courts, in many cases, to enforce the performance of that; which had it stood by itself, would have been good, notwithstanding another part may be bad. 12 *Mod.* 534: but if that part of the award, which is void, be so connected with the rest, as to affect the justice of the case between the parties, the award is void for the whole. *Cro. Jac.* 584.

When, from the tenor of the award, it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then that which is awarded on the one side, be void, so that performance of it cannot be enforced, the award is void for the whole, because that mutuality, which the arbitrator intended, cannot be preserved. *Yel.* 98: *Brown.* 92: *Roll. Arb. K.* 15: *Cro. Jac.* 577, 8.

If one entire act awarded to be done on one side, comprehend several things, for some of which it would be good, and for others not, the award is bad for the whole, because the act cannot be divided. *Cro. Jac.* 639.

When it appears clearly that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest. 1 *Ld. Raym.* 114: *Lutw.* 545: and see 12 *Mod.* 588.

An award ought regularly to be made in writing, signed and sealed by the arbitrators, and the execution properly witnessed: It may however be made by parol, if it is so expressly provided in the submission.

7. It is not in all cases absolutely necessary that performance should be exactly according to the words of the award; if it be substantively and effectually the same, it is sufficient. 3 *Bull.* 67. And if the party, in whose favour the award is made, accept of a performance differing in circumstances from the exact letter of the award, that is sufficient; for *consensus tollit errorem*. 3 *Bull.* 67.

Where the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part without request from the other, 1 *Ld. Raym.* 233, 4. and see *Roll. Arb. Z.* 6.—If an award order that the defendant shall re-assign to the plaintiff, certain mortgaged premises, it will be a breach if he do not re-assign without request. 1 *Ld. Raym.* 234.

If the award be to pay at, on or before a particular day, payment before the day is equivalent to payment on the day. 3 *Keb.* 675, 6.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it. *Finch. Rep.* 384: nor can the statute of Limitations (21 *Jac.* 1. c. 16. § 3) be pleaded in bar. 2 *Saund.* 64.

On an award, that one party shall enter into a security for money, (note, bond, &c.) the giving the se-

curity is a performance of the award; and on non-payment, the person to whom it is given can only proceed against the other on that security, and not on the submission or arbitration bond. *Bendl.* 15: *Str.* 903, 1082.

VI. THE REMEDY to compel performance of an award is various, according to the various forms of the submission.

Though the submission be verbal, an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act. 1 *Ld. Raym.* 122: and see ante Division 1.

Where the award is either verbal, or in writing, for the payment of money, and made on a submission, either by parol or by deed, the action on the award may be an action of debt: it may also be an action of *assumpsit*; and in all other cases on a parol submission, an *assumpsit* is the only species of action that can be maintained.

1 *Leon.* 72: *Cro. Jac.* 354.

In all actions on the award, it must necessarily be shewn, in direct unequivocal terms, that the parties submitted; before the award can be properly introduced; 2 *Str.* 923. the submission too must be so stated as to correspond with the award, and to support it. 2 *Lev.* 235: 2 *Show.* 61.

When the action is on a mutual *assumpsit*, to pay a certain sum on request, if the defendant should not stand to the award; an actual request to pay that sum, before the action brought, must be positively stated.

1 *Saund.* 33: 2 *Keb.* 126.

When the submission is by bond, if the award be for payment of money, an action of debt on the award lies, as well as an action on the bond; but the latter is the action most usually brought; in this the order of pleading commonly observed is, that the plaintiff declares on the bond, as in ordinary cases of action on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made no award; then the plaintiff replies, not barely alledging that they did, but setting forth the award at large, and assigning the breach by the defendant: (as to which see post. and *Winch* 121: *Yelv.* 24, 78, 153: 1 *Ld. Raym.* 114, 123: 2 *Vent.* 221: 3 *Lev.* 293:) and on that the whole question arises as on an original declaration.—The defendant then either rejoins, that they made “no such award,” (*Jenk.* 116: *Cro. Jac.* 207: *Palm.* 511.) on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer. *Vid. Str.* 923: *Freem.* 410, 415: 1 *Sid.* 370: 3 *Burr.* 1729, 30: 5 *E.* 4. 108: *Brooke pl.* 33: *Cro. Eliz.* 838.

Every thing necessary to shew that the award was made according to the terms of the submission, must be stated by the plaintiff. *Lutw.* 536: 2 *Ld. Raym.* 989, 1076. Where also by the terms of the award, performance on the part of the plaintiff, is a condition precedent to that on the part of the defendant; there the plaintiff must shew that he has done every thing necessary to entitle him to call on the opposite party.—But tender by the plaintiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other. *Hurd.* 43, 44.

A material variance between the real award and that set forth in the pleadings, will be fatal to the plaintiff; and

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and if on the trial the jury doubt whether the variance is material or not, a special verdict may be taken for the opinion of the court. 1 *Salk.* 72: 1 *Ld. Raym.* 745. S. C.: 1 *Burr.* 278.

In an action on the award, the defendant may plead 'that he did not submit;' but in an action on the bond such a plea is not good. 1 *Sid.* 290: 2 *Str.* 923.

More exactness is required in setting forth a written than a verbal award—in the former nothing must be alleged by inducement. 2 *Vent.* 242. The breach must also be assigned, with such precision, as to shew that the award was made of the thing in which the breach was alleged. 1 *Roll. Rep.* 8: *Cro. Jac.* 339: 2 *Bull.* 93. and in an action on the assumption, to perform the award, the plaintiff may assign several breaches. *Jenk.* 264, and see *Tyle.* 35. But in an action on the arbitration bond, where several things are ordered to be done by the defendants, it is not necessary to assign breaches of every matter, because the breach of any one is a forfeiture of the penalty of the bond; and when the plaintiff has once recovered, then he can never maintain another action on the same bond, to recover the penalty again on a second breach. 2 *Will.* 276, 9. and see *Ld.* 293. S. P.

If the defendant set forth the award, and alleged the performance generally, and then on a breach being assigned in the replication, he rejoin and shew a special performance, this will be a departure. 1 *Ld. Raym.* 234.

It has several times happened, that the defendant by setting forth an award, partially, has imposed considerable difficulty on the plaintiff how to answer him. (See 1 *Keb.* 568: 1 *Saund.* 326: 3 *Lev.* 165: *Lutw.* 525). In this case if the plaintiff demand oyer of the award, and have it set forth at full length, assigning a breach in the same manner as if the defendant had pleaded no award, he will be secure against any objection from the manner of pleading. *Lutw.* 451: and see *Godb.* 255: 1 *Roll. Rep.* 6.

If from the default of the defendant no award has been made within the time limited, the plaintiff may, to the plea of no award, reply that default of the defendant. See 8 *Co.* 81.—On a submission by bond, providing that the award shall be made within a limited time, though that time is enlarged by mutual consent, and the award made within the enlarged time, an action cannot be maintained on the bond to recover the penalty for non-performance. 3 *Term Rep.* 529. n.—And as to such enlargement of time, see 2 *Term Rep.* 643, 4: 3 *Term Rep.* 601.

On the practice obtaining, of references at *Nisi Prius*, performance of the award was consequently enforced by means of an attachment, and the following is the present course of proceeding to obtain that remedy.—The award must be tendered to the party bound to perform it, and on his refusal to accept it, affidavit must be made of the due execution of the award, and of such tender and refusal; and on that, application made to the court to make the order of *Nisi Prius* a rule of court; a copy of this rule must be personally served on the party, and if he still refuse to accept the award, an affidavit must be made of such service and refusal; on which the court will grant an attachment of course. 1 *Crompt. Pract.* 264. When the award is accepted, but the money being demanded is not paid, an affidavit must be made of such refusal, and of the due execution of the award. 2 *Black. Rep.* 990, 1.—Where there is any dispute as to the proper performance of an award, it is discretionary

in the court to grant or refuse an attachment. 1 *Str.* 695: 1 *Burr.* 278.

When an award is not for the payment of money, but for the performance of any collateral act, it may sometimes be enforced by a bill in equity, on which the court will decree a specific performance. See 1 *Atk.* 74, (62): 1 *Eq. Ab.* 51: 1 *C. R.* 46: 3 *C. R.* 20: 2 *Vern.* 24: 3 *P. Wms.* 187, 9, 190. But though a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach by which he may charge himself with the penalty of a submission bond. *Bishop v. Bishop*, 1 *C. R.* See the next Division.

VII. RELIEF may be obtained against an award, made contrary to the prescribed rules of law, when the award is put in suit. But when the submission is by the mere act of the parties, the defendant is not permitted to impeach the conduct of the arbitrators, at law; so as to make it a defence to an action on the award or submission bond. See 1 *Saund.* 327: 2 *Will.* 149. In such case the only relief is in equity. 2 *Vern.* 315. But a court of equity will not interfere to set aside an award, where the submission is voluntary, (or by order of *Nisi Prius*, 1 *C. C.* 140: 1 *Vern.* 157), except for corruption or improper conduct in the arbitrators: or where the award appears on the face of it to be contrary to the rules of equity; as, to the prejudice of an infant, *Se. 146. C.* 276, 279, 280: 3 *Atk.* 529. (496): 2 *Eq. Ab.* 63, 4: 3 *C. R.* 49: *Ambl.* 245.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; together with the party in whose favour the award is made. *Finch. Rep.* 141: 3 *Atk.* 644, 397. The arbitrators may plead the award in bar; but they must shew themselves impartial, or the court will make them pay costs. 2 *Atk.* 396, (412).

Where the submission is by order of *Nisi Prius*, or under the stat. 9 & 10 *W.* 3. a court of equity will not entertain a bill to relieve against an award for corruption or partiality, unless the court of law has not afforded that relief, on application; or the time for complaining at law under the statute is elapsed. 2 *Atk.* 155, (162), 396, (412): 2 *Vern.* 316, 7: See *Bunb.* 265.

By the stat. 9 & 10 *W.* 3. c. 15. It is enacted, That "any arbitration or umpirage, procured by corruption, or undue means, shall be void; and be accordingly set aside by any court of law or equity, so as complaint be made to the court, where the rule for submission is made, before the last day of the next term after such arbitration made and published to the parties." See 1 *Str.* 301: 2 *Burr.* 701: *Barnes* 55, 7. But it seems that a court of equity may relieve, on manifest grounds, after the time required, by the act, for complaint at law, though no such complaint is made at all in the common law courts. *Bunb.* 265: 1 *Barn. K. B.* 75, 152.

Where the submission is by reference at *Nisi Prius*, there is no time limited for making an application to set aside an award for any cause. 2 *Atk.* 155, (162): *Sir.* 301: 2 *Burr.* 701.—When the submission is according to the statute, no application can be made to have the award set aside till the submission be actually made a rule of court, which may be either before or after making the award. 1 *Str.* 301: 2 *Vern.* 317: 2 *Str.* 1178: 3 *P. Wms.* 362.

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The most frequent subject of complaint against an award, arises from some imputed *misconduct* of the arbitrators, and when the complaint is made out, it is generally successful: as if one of the arbitrators unjustly exclude the rest from the award; or hold private meetings with one of the parties. 2 *Vern.* 515: or appoint an umpire by lot. *Id.* 485: or manifest any other undue partiality. *Id.* 101, 251: 3 *P. Wms.* 262: 2 *Ven.* 216, 8: 1 *Fen.* 317.

If it appear that the arbitrators went on a plain mistake, either as to the law or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. 2 *Vern.* 705.—So if the arbitrators appear to have an interest in the subject of reference. 2 *Vern.* 251. So also where any circumstance is suppressed or concealed from either of the arbitrators, and the arbitrator declares that had he known the circumstance, he would have made a different award. 1 *Atk.* 77, (64).

Where the submission is under the statute, or by reference at *Nisi Prius*, the court will on some occasions send back the award to be re-considered, on suggestion that the arbitrator had not sufficient materials before him, and perhaps too to rectify any trifling or apparent mistake; but such application must be made in the former case within the time prescribed by the statute. 2 *Term Rep.* 781.

VIII. AN AWARD may be pleaded in bar to every action brought, for a cause or complaint which had been previously referred to the arbitrators, on which the award was made. See 4 *Term Rep.* 146.

The award thus pleaded, must have all the qualities necessary to constitute a good award; and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alleged, as it may be (Sec. 1 *Ro. Rep.* 7, 8: *Cro. Jac.* 339: 2 *Bull.* 93; *Roll. Arbitr.* f. 2: *Al.* 86: 3 *Leon.* 62:) even a void award may frequently be a good bar. An award however which is in itself uncertain, and cannot be ascertained by averment, cannot be pleaded in bar. 2 *Saund.* 292; 2 *Keb.* 736.

The cases which have determined an award not to be pleadable in bar, where it does not create a new duty, seem unreconcilable to the present state of the law on the subject—particularly as they allow that an action may be maintained on the submission, whether that is by bond or otherwise. 1 *Ld. Raym.* 248: 12 *Mod.* 130: *Comb.* 445: 1 *Salk.* 69: *Lutw.* 56, 7.

An award however which does not extend to the whole of the thing demanded, is reasonably not a good plea to an action on the demand. *Al.* 5: 1 *Ld. Raym.* 612. See *Lutw.* 51. And in order to make an award a good plea, it must appear that both parties were equally bound by it.

Where the plaintiff lays several counts in his declaration, and the award from the terms of it, can only be a bar to one of them; if in reality they are all for the same cause, the best way of pleading seems to be, to plead the award to that count to which it is answerable in terms; and the general issue to the rest. *Kyd.* 245.

There were antiently some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the thing awarded, which are not now essential, for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant in pleading an award in bar of

an action, to allege performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it. 1 *Ld. Raym.* 122.

FORM OF AN AWARD; ON A SUBMISSION.

TO all people to whom this present writing indented of Award shall come, greeting. Whereas there are several accounts depending, and divers controversies and disputes have lately arisen between A. B. of, &c. Gent. and C. D. of, &c. all which controversies and disputes are chiefly touching and concerning, &c. And Whereas, for the putting an end to the said differences and disputes, they the said A. B. and C. D. by their several hands or obligations bearing date, &c. are become bound each to the other of them in the penal sum of, &c. to stand to and abide the award and final determination of us E. F. G. H. &c. so as the said award be made in writing, and ready to be delivered to the parties in difference on or before, &c. next, as by the said obligations, and the condition thereof may appear. Now Know ye, That we the said Arbitrators, whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do, for the settling amity and friendship between them, make and publish this our award, by and between the said parties, in manner following, that is to say; First, We do award and order, that all actions, suits, quarrels and controversies whatsoever bad, moved, arisen or depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said, &c. to the day of the date hereof, shall cease and be no further prosecuted, and that each of the said parties shall pay and bear his own costs and charges, in any wise relating to or concerning the said premises. And we do also award and order that the said A. B. shall pay, or cause to be paid to the said C. D. the sum of, &c. within the space of, &c. And also at his own costs and charges do, &c. And we do award and order that, &c. And lastly, we do award and order that the said A. B. and C. D. on payment of the money abovementioned, shall in due form of law release each to the other of them general releases, sufficient for the releasing by each to the other of them his executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of, &c. last, In witness, &c.

THE READER is thus presented with a complete abridgment of the law on this subject. Were it accurately attended to, and were the arbitrators uninfluenced by motives of partiality, arbitration would be a very desirable way to put an end to many suits, instead of affording grounds of new proceedings, as they now too frequently do.—As it is, the subjects most proper for arbitration seem to be (in the words of the author, to whom we have confessed ourselves so much indebted on this subject) “Long and intricate accounts”—Disputes of so trifling a nature, that it is of little importance to the parties in whose favour the decision may be given, provided at all events there be a decision—and—questions on which the evidence is so uncertain, that it is much better to have a decision whether right or wrong, than that the parties should be involved in continual litigation.”

A W M

AWM, or *aume*, (Teut. *ohm. i. e. cadus vel mensura*) A measure of Rhenish wine, containing forty gallons; mentioned in some statutes. This word is otherwise written *awame*.—The rood of Rhenish wine of *Dordrecht* is ten *awmes*, and every *awme* 50 gallons: The rood of *Antwerp* is fourteen *awmes*, and every *awme* 35 gallons.

A W N

AWNHINDE. See *Third-night-awn-hinde*.

AYLE. See *Aile*.

AZALDUS, A poor horse or jade. *Clauſ. 4 Ed. 3.*

B.

B A C

BACA, A hook or link of iron, or staple. *Conſuetudin. domûs de Farendon, 118. f. 20.*

BACINIUM, or *Bacina*, A baſon or veſſel to hold water to waſh the hands. *Simcon Dunelm. anno 1126. Mon. Angl. tom. 3. p. 191: Petrus filius Petri Picot tenet medietatem Heydenæ per ſervantiam ſerviendi de bacinis.*—This was a ſervice of holding the *baſon*, or waiting at the *baſon*, on the day of the king's coronation. *Lib. Rub. Scaccar. f. 137.*

BACHELERIA, The commonalty or yeomanry, as diſtinguiſhed from the baronage. *Annal. Burton, p. 426. ſub an. 1259.*

BACHELOR, *Baccalaureus*, from the Fr. *bachelor*, viz. *tyro*, a learner:] In the univerſities there are *bachelors of arts*, &c. which is the firſt degree taken by ſtudents, before they come to greater dignity. And thoſe that are called *bachelors* of the companies of *London*, are ſuch of each company, as are ſpringing towards the eſtate of thoſe that are employed in council, but as yet are inferiors; for every of the twelve companies conſiſts of a *maſter*, two *wardens*, the *livery*, (which are aſſiſtants in matters of council, or ſuch as the aſſiſtants are choſen out of) and the *bachelors*, in other companies called the *yeomanry*. The word *batchelor* is alſo uſed and ſignifies the ſame with *knight-batchelor*, a ſimple knight, and not knight banneret, or *knight of the Batb*. The name of batchelor was alſo applied to that ſpecies of eſquire, ten of whom were retained by each knight banneret on his creation. *Anno 28 E. 3*, a petition was recorded in the *Tower*, beginning thus: *A noſtre Seigneur le Roy monſtrent votre ſimple batchelor, Johan de Bures, &c.* Batchelor was anciently attributed to the admiral of *England*, if he were under the degree of a baron. In *Pat. 8 R. 2.* we read of a *baccalaureus regis*. Touching the further etymology of this word, See *Spelman*.

The term batchelor alſo denotes in law a man who has never been married; and as ſuch, taxes have at times been levied, or the taxes laid on others increaſed, if paid by batchelors: as in the caſe of the duty on ſervants under ſtat. 25 *Geo. 3. c. 43.*

BACKBERINDE, *Sac.*] Bearing upon the back, or about a man. *Bracton* uſeth it for a ſign or circumſtance

B A J

of theft apparent, which the civilians call *furtum manifestum*; *Bract. lib. 3. tract. 2. cap. 32.* *Manwood* remarks it as one of the four circumſtances or caſes, wherein a foreſter may arreſt the body of an offender againſt vert or veniſon in the foreſt: by the aſſiſe of the foreſt of *LANCASTER* (ſays he) taken with the manner, is when one is found in the king's foreſt in any of theſe four degrees, *ſtable ſtand*, *dog-draw*, *backbear*, and *bloody-band*. *Manw. 2 part, Foreſt Laws.*

BACO, A bacon hog, uſed in old charters. *Blount.*

BACTILE, A candleſtick properly ſo called, when formerly made *ex baculo* of wood, or a ſtick. *Clodſingham Hiſt. Dunelm. apud Wartoni Ang. Sac. p. 1723.*

BADGER, From the Fr. *baggage*, a bundle, and thence is derived *bagagier*, a carrier of goods.] One that buys corn or victuals in one place, and carries them to another to ſell and make profit by them: and ſuch a one was exempted in the ſtat. 5 & 6 *Ed. 6. c. 14.* from the puniſhment of an ingroſſer within that ſtatute. But by 5 *Eliz. c. 12.* *Badgers* are to be licenſed by the juſtices of peace in the ſeſſions; whoſe licences will be in force for one year, and no longer; and the perſons to whom granted muſt enter into a recognizance that they will not by colour of their licences foreſtal, or do any thing contrary to the ſtatutes made againſt foreſtallers, ingroſſers, and regrato. s. If any perſon ſhall act as a *Badger* without licence, he is to forfeit 5 *l.* one moiety to the king, and the other to the proſecutor, leviable by warrant from juſtices of peace. *&c. Vide 13 El. c. 25. ſect. 20.*

BAG, An uncertain quantity of goods and merchandise, from three to four hundred. *Lex Mercat'.*

BAGA, A bag or purſe. *Mon. Angl. tom. 3. p. 237.*

BAGAVEL, The citizens of *Exeter* had granted to them by charter from *K. Edw. 1.* the collection of a certain tribute or toll, upon all manner of wares brought to that city, to be ſold, towards the paving of the ſtreets, repairing of the walls, and maintenance of the city, which was commonly called in old Engliſh *begavel*, *be-thugavel*, and *chippinggavel*. *Antiq. of Exeter.*

BAHADUM, A cheſt or coffer. *Fleta, lib. 2. c. 21.*

BAJARDOUR, *Lat. bajulator.*] A bearer of any weight or burthen. *Petr. Bleſ. Contin. Hiſt. Croyland, p. 120.*

BAIL,

BAIL I.

BAIL, *ballium*, from the Fr. *bailler*, which comes of the Greek *βαλλω*, and signifies to deliver into hands.] Is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. *Bract. lib. 3. tract 2. cap. 8.* The reason why it is called *bail*, is because by this means the party restrained is delivered into the hands of those that bind themselves for his forth-coming, in order to a safe keeping or protection from prison: and the end of *bail* is to satisfy the condemnation and costs, or render the defendant to prison.

With respect to bail in *civil cases* it is to be observed, that there is both *common* and *special bail*: common bail is in actions of small concernment, being called common, because any sureties in that case are taken; whereas in causes of greater weight, and value, *special bail* or surety must be taken, and they according to the value. *4 Inst. 179.* See tit. *Appearance.*

By stat. 23 Hen. 6. c. 9, Sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their days in such place, &c. as the writs require.

Bail and *mainprize* are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, *that they save a man from imprisonment in the common gaol*; his friends undertaking for him before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him, in a legal way. *2 Hawk. P. C. c. 15, § 29; 4 Inst. 180.* The chief difference is, that a man's *mainperners* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a Sunday, and confine until the next day, and then render him. *6 Mod. 231; Ld. Raym. 706; 12 Mod. 275.*

Special bail, are two or more persons who undertake generally or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal; generally there are but *two persons* who become bail for a defendant.

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, he must at the return of the writ, to discharge such bond, appear thereto, namely, by putting in *special bail*, or, as it is termed, *bail above*, so called, in contradistinction to the sheriff's bail, or *bail below*; nor can he render himself in discharge of such bond, without *first putting in bail above*. *5 Burr. 2683.*

By rule M. 1654, no attorney shall be bail for a defendant in any action; nor his clerk. *Corup. 228 n: Vide Dougl. Rep. 466*, that an attorney may be admitted as bail in a criminal case.

No sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in K. B. nor persons outlawed after judgment. *R. M. 14 Geo. 2.* The keeper of the *Poultry Compter* was rejected. *Dougl. 466.*

I. Of BAIL in CIVIL CASES—In actions of battery, trespass, slander, &c. though the plaintiff is likely to recover large damages, *special bail* is not to be had, unless

BAIL L.

less by order of court, and the process is marked for *special bail*: nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the testator, unless they have wasted the testator's goods. *1 Davy. Abr. 681.*

If baron and feme are sued, the husband must put in bail for both, but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. *Goldf. 127; Cro. Eliz. 370; Cro. Jac. 445; Style 475; 1 Mod. 8; 6 Mod. 17, 105.*

A feme covert was discharged out of custody, because she was arrested without her husband; though the writ was sued against both, and *non est inventus* returned as to the husband. *1 Term Rep. 486; See tit. Arrest.*

In all actions brought in B. R. upon any penal law, the defendant is to put in but common bail. *Yelv. 53.* In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an *ac etium* in the writ: and in action of *scandalum magnatum* the court on motion ordered special bail. *Raym. 74.* When bail is taken by the chief justice, or other judge on a *habeas corpus*, the bail taken in the inferior court is dismissed; though the last bail be not filed presently, nor till the next term. *Yelv. 120, 121.* Yet it has been held, where a cause is removed out of an inferior court by *habeas corpus*, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of London. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff: so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in London. *1 Salk. 97.*

In London it is said, *special bail* is to be given in action of account, &c. But on removal by *habeas corpus* into B. R. that court will accept common bail. *2 Keb. 404.*

There is not only bail to appear, &c. on writs of error; but also in *audita querela*, a recognizance of bail must be acknowledged; and upon a writ of *attaint*, to prosecute, &c. *Jenk. Cent. 129.*

By the stat. 3 Jac. 1. c. 8, No execution shall be delayed by any writ of error or *superfedeas* thereupon, unless bail shall be given, in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

If a cause removed from an inferior court, be remanded back by *procedendo* the same term, the original bail in the inferior court are chargeable, but not if remanded in another term. *Cro. Jac. 363.* One taken on a writ of execution is not bailable by law; except an *audita querela* be brought; but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him, at the request of the bail, though he be present in court. *1 Nelf. Abr. 331.* The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. *Cro. Jac. 384.*

On *capias ad satisfaciendum* against the defendant returned *non est inventus*, *scire facias* is to issue against the bail, or an action may be brought. Where a defendant renders

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renders his body in discharge of the bail, the plaintiff is by the rules of the court to make his choice of proceeding in execution, whether he will charge body, goods or lands. 1 Lill. 183. And if the principal after judgment renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him or proceed against his bail: but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal; and if the principal be taken, he may not after meddle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. Cro. Jac. 320: 2 Bulst. 68. If a principal render himself, and there is none to require his commitment, the court is *ex officio* to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. Moor, Cas. 1249: 1 Leon 59: See Hob. 210.

There must be an *exoneretur* entered, to discharge the bail. If the defendant dies before a *capias ad satisfac.* against him returned and filed, the bail will be discharged. 1 Lill. 177.

The Bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognisance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. 1 Lill. Abr. 173: 2 Cro. 402: 3 Mod. 87. Nor can the Bail in such case surrender the principal, though he become a bankrupt pending the writ of error. 1 Term Rep. 624.

Before a *scire facias* taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second *sci. fac.* against them, they shall be discharged. 1 Rol. Abr. 250: 1 Lill. 471. Anciently the bail were to bring in the principal upon the first *scire fac.* or it would not be allowed. 3 Bulst. 182.

If the bail mean to acquit themselves of their recognisance entirely, and run no hazard of the death of the defendant, then they must render him in their discharge, before the return of the *ca. sa.*; as the death of the principal afterwards will not discharge them. 2 Wils. 67: 2 Cro. 165: Jon. 139: Str. 511. But if they do not, then they have until the return day, (if the proceedings be by bill) *sedente curia*, of the first *scire facias*, if it be returned *scire feci*, but if a *nihil* is returned thereon, then until the return day, *sedente curia* of the second *sci. fa.* *N on R. E.* 5 Geo. 2. And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *scire feci*; if not, then till the *quarto die post* of the return day of the second. 4 Burr. 2134: 1 Wils. 270. If an action be brought then eight days in full term after the return. *R. Trin.* 1 An.—See further *Impey's* and the other books of practice.

If Bail surrender the principal at or before the return of the second *scire facias*, it is good, although there be no immediate notice of it to the plaintiff; and if, through want of notice, he is at further charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges: if at any time, after the return of the *capias*, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the tipstaff, from whom he escapes, &c. this will not be a good surrender: but if it be before or on a *capias* returned, it is otherwise, the one being an indulgence, and the other matter of right. *Mod. Cas.* 238.

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When a person makes his escape out of prison, and is retaken and bailed; the bail shall be discharged on writ to the sheriff commanding him to keep the prisoner in discharge of the bail. *Stat. 1 Ann. st. 2. c. 6. § 3.*

The judges of the courts at Westminster have power by statute to appoint commissioners in every county to take recognizances of bail, in causes depending in their courts; and to make such rules for justifying the bail as they shall think fit, &c. *Stat. 4 & 5 W. & M. c. 4.*

The commissioners are to take bail, but are obliged by rule of court to keep a book wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognisance was duly acknowledged in his presence: on such affidavit the judges make a conditional *allocatur*, and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days, and if he excepts, the bail may justify by affidavit before the commissioners in the country. *Gilb. H. C. R.* 32.

If a defendant puts in bail by a wrong name, the proceedings shall nevertheless be good; for otherwise every man impleaded may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. *Goltsb.* 138. But it hath been held, that if the bail be entered in one name, and the declaration and all the proceedings are by a contrary name, it will be erroneous. *Cro. Eliz.* 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy: though where a *habeas corpus* and *bail piece* were lost in *B. R.* new ones were ordered to be made out. *Style* 261.

Stat. 21 Jac. 1. cap. 26, enacts, That it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; provided that it shall not corrupt the blood, or take away dower.

Stat. 4 & 5 W. & M. cap. 4. s. 4, enacts, That any person representing or personating another before commissioners appointed to take bail, shall be adjudged guilty of felony.

Special bail, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed; after twenty days notice given of putting in special bail before a judge, on a *cepi corpus*, if there be no exception, the bail shall be filed in four days. 1 Lill. Abr. 174. Upon a *cepi corpus* twenty days are allowed to except against the bail: so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days rule to put in better bail: in all other cases, notice must be given. Upon a *habeas corpus*, eight and twenty-days are appointed to except against the bail, and after that, if it be not excepted against, it shall be filed in four days. 1 Salk. 98: *R. M.* 8 An.

The exception to bail put in before a judge, must be entered in the bail-book, at the judge's chambers at the side of the bail there put in, after this manner: *I do except against this bail, A. B. attorn. for the plaintiff.* And if there be no such exception, the defendant's attorney may take the *bail-piece* from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record: but it shall be accounted good, till the same is questioned and disallowed.

Bail cannot be justified before a judge in his chamber, except it be by consent, or for necessity in vacation; but in

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in the latter case they ought to be justified *again in term*, and upon that the defendant is compelled to accept a declaration to go to trial at the assizes, if it be an issuable term; and upon putting in bail, it is not enough to give notice of their being put in, but it *ought to be of their names, places of abode, and trade or vocation*, that the plaintiff may know how to enquire after them. 6 *Mod.* 24, 25.

It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined *per cur.* that for the future Sunday shall not be counted one, (it not being a proper day to enquire after bail); but *two days notice must be given, of which Sunday shall not be one*; upon motion for defendant to justify bail, notice was served Saturday June 23, to justify bail Monday 25; the notice being insufficient, the bail was not suffered to justify. *Notes in C. B.* 220.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail, (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves; [or by affidavit, if taken before commissioners in the country,] and the plaintiff may oppose them by his counsel; if it appear they are insufficient, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

Bail coming to justify and not being present at the sitting of the court, must wait until the rising.

Generally, bail are opposed on *five* grounds with effect. 1st, That there is some mistake in the notice to justify; namely, that it should have been given *two days* previous, instead of one; 2dly, That the bail have assumed names that are either *feigned, or belong to other persons*, contrary to the *Stats.* 21 *Jac.* 1: and 4 & 5 *W. & M.* But the court will not vacate the proceeding; against the party personated, until the offender be convicted. 1 *Vent.* 301; nor can a conviction take place, until the bail-piece be filed. 2 *Sid.* 90: 3d. A third ground of opposing bail is, that they are not house-keepers; if they be, the rent paid is immaterial, though under 10*l.* *Loft* 148; nor is it necessary they should have been assessed to the poor's rate. *Ibid* 328. 4thly. They may be opposed on the ground of their not being worth *double the sum sworn to*, after payment of all their debts. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been *twice bankrupts*, and not paid 15*s.* in the pound. *M.* 24 *Geo.* 3. Lastly, after the expiration of the rule to bring in the body. *Loft* 438: *M.* 20 *Geo.* 3.

If the bail do not justify at the day given (being the last day they have) they are out of court. Nor can they justify after the rule upon the sheriff, to bring in the body is expired; without leave of the court. *Loft.* 88.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he *has lost a trial*; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time, if in *vacation*, he may apply and obtain a judge's order, which will be granted, upon putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading *issuably*, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security. But the court of *K. B.* has not yet said, that the plaintiff

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shall take judgment on the actions upon the bond, although the practice in the *Common Pleas* is so.

If the bond be irregularly assigned, defendant may move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief.* *Salk.* 519; nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer.* 3 *Term-Rep.* 572.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the mean-time; the court agreed that the proceedings were totally *suspended*, by an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made *too soon.* 4 *Term-Rep.* 176.

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken, when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant's attorney with the privity of the plaintiff's attorney, is an acceptance of the bail.

When a sheriff hath taken good bail of the defendant, he will on a rule return a *cepi*, and assign the bail-bond to plaintiff, which may be done by indorsement without stamp; so as it be stamped before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, *i.e.* as assignee of the sheriff. *Stat.* 4 & 5 *Ann.* c. 16. The action must be brought in the same court, where the original writ was sued out. 3 *Burr.* 1923: 1 *Burr.* 643. The *venue* may be laid in any county. *Str.* 727: 2 *Ld. Raym.* 1455. But if the plaintiff takes an assignment of the bail-bond, though the bail is insufficient, the court will not amerce the sheriff. 1 *Salk.* 99.

In case the defendant doth not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a *cepi corpus* no bail is returned, a rule will be made out to bring in the defendant's body. Though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. *Lill. Abr. Trin.* 23 *Car. B. R.*

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable for the surplus. 1 *Salk.* 102.

A bail cannot be witness for the defendant at the trial; but the court, on motion, will discharge the bail, upon giving other sufficient bail. *Wood's Inst.* 582. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom.—For further matter see the books of practice.

II. As to BAIL for CRIMES. At common law bail was allowed for all offences except murder, 2 *Inst.* 109. And if the party accused could find sufficient sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. 2 *Inst.* 186. But by statute it was after enacted, that in case of homicide the offender should not be bailed; and by our statutes, murderers,

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derers, out-laws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are accused of larceny, as accessaries to felony, or under light suspicion, they may be admitted to bail. *Stat. 3 Ed. 1. c. 15.*

One indicted and found guilty of the death of a man by misadventure, as by casting a stone over a house, and by chance killing a man, woman, or child, is not bailable. *3 Ed. 3. Corone 354.*

One indicted of conspiracy, viz. that he with others conspired falsely to indict another of murder or felony, by means whereof he was indicted, and afterwards convicted, shall not be bailed. The resolution of all the judges, upon the question demanded by King Ed. III. himself, as appears. *27 Aff. 1.*

One indicted for burglary may be bailed. *29 Aff. 44.*

One indicted on suspicion of robbery was outlawed, and taken on the outlawry, and brought writ of error, and being brought to B. R. by habeas corpus, prayed to be bailed, and took two exceptions to the indictment; 1st. That he was in prison, and knew nothing of the outlawry; 2dly. That the charge is too general, and no body prosecutes; but per Roll Ch. J. He cannot be bailed. *Sty. 418.* But see *Stat. 4 & 5 W. & M. c. 18*, which enacts, that persons outlawed, except for treason or felony, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court: and that persons arrested upon any *capias utlagatum*, except for treason or felony, may be discharged by an attorney's engagement to appear: and in cases where special bail is required, the sheriff may take bond with sureties.

By the common law the sheriff might bail persons arrested on suspicion of felony, or for other offence bailable; but he hath lost this power by the *Stat. 1 E. 4. c. 2.* Justices of peace may let to bail persons suspected of felony, or others bailable, until the next sessions: though where persons are arrested for manslaughter or felony, being bailable by law, they are not to be let to bail by justices of peace but in open sessions, or where two justices (*quorum unus*) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. *3 H. 7. c. 3: 1 & 2 P. & M. c. 13. § 3:* not to restrain justices in London and Middlesex, and towns corporate. *1 & 2 P. & M. c. 13. § 6.* If a person be dangerously wounded, the offender may be bailed till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. *2 Inst. 186.* A man arrested and imprisoned for felony, being bailable, shall be bailed before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be bailed. *4 Inst. 178.*

It is to be observed, that the *Stat. West. 1, 3 Ed. 1. c. 15.* above mentioned, doth not extend to the judges of B. R. &c. only to sheriffs and other inferior officers. *H. P. C. 98, 99*—Likewise, justices of gaol delivery not being within the restraint of the statute of *Westm. 1.* may bail persons convicted before them of homicide by misadventure, or self defence, the better to enable them to purchase their pardon. *Crompt. 154 a: H. P. C. 101: F. N. B. 2, 6: S. P. C. 15.*

Also it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances; as if the evidence against him were slight,

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or if he had purchased his pardon. *H. P. C. 101: Crompt. 153.*

The court of B. R. has power to bail in all cases, whatsoever, and will exercise their discretion in all cases not capital; in capital cases where innocence may be fairly presumed; and in every case where the charge is not alledged with sufficient certainty. *Leach's Hawk. P. C. ii. c. 15. § 80.* in note, where several cases are enumerated.

It is to be observed, that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of *Westm. 1*; yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irreplevisable, without some particular circumstances in his favour. *2 Inst. 185, 186, 189: H. C. P. 104: 1 Salk. 61: 3 Bulst. 113: 2 Hawk. P. C. c. 15. § 80: 5 Mod. 454.*

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail; without some special motive to induce the court to grant it. *Kelynge 90: Dyer 79: 1 Bulst. 87: 2 Hawk. P. C. c. 15. § 80.*

Upon a commitment of either house of parliament, when it stands indifferent on the return of the *habeas corpus*, whether it be legal, or not, the court of B. R. ought not to bail a prisoner. *Leach's Hawk. P. C. ii. c. 15. § 73.* But if it be demanded in case a subject should be committed by either of the Houses for a matter manifestly out of their jurisdiction, what remedy can he have? I answer (says the learned and cautious Serjeant Hawkins) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See *Leach's notes, 2 Hawk. P. C. cap. 15. § 73.* from the cases cited there (viz. *The Hon. Alex. Murray's, 1 Wilf. 299: John Wilkes's, 2 Wilf. 158: Entick v. Carrington, 11 St. Tr. 317: Brads Case's, 3 Wilf. 188: 2 Blackst. 755.*) it appears that the courts in Westminster Hall have been positively of opinion, "that they have no power to decide on the privileges of Parliament; that the rights of the House of Commons are paramount to the jurisdiction of those courts; that the Commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in execution by another court."

However, a person committed for a contempt, by order of either House of Parliament, may be discharged by B. R. after a dissolution or prorogation, which determine all orders of parliament: also it is said on an impeachment, when the parliament is not sitting, and the party has been long in prison, B. R. may bail him. The court of B. R. hath bailed persons committed to the Fleet Prison by the Lord Chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. *2 Hawk. P. C. c. 15. § 76.*

And B. R. having the control of all inferior courts, may at their discretion bail any person unjustly committed by any of those courts. In admitting a person to bail in the court of B. R. for felony, &c. a several recognisance

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is entered into to the king in a certain sum from each of the *bail*, that the prisoner shall appear at a certain day, &c. And also that the *bail* shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to *bail* for felony, to take the recognisance in a certain sum, or body for body: but where a person is *bailed* by any court, &c. for a crime of an inferior nature, the recognisance ought to be only in a certain sum of money, and not body for body. 2 *Hawk* c. 15. § 83. And the *bail* are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognisance is forfeited, the *bail* are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. *Wood's Inst.* 618. If *bail* suspect the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 *Rep.* 99.

The courts of *King's Bench*, *Common Pleas* and *Exchequer*, in term time, and the *Chancery* in the term or vacation, may *bail* persons by the *habeas corpus* act; see title *Habeas Corpus*.

To refuse *bail* when any one is *bailable* on the one hand; or on the other to admit any to *bail* who ought not by law to be admitted, or to take slender *bail*, is punishable by fine; &c. 2 *Inst.* 291: *H. P. C.* 97. And see farther, 3 *Edw.* 1. c. 15: 27 *Edw.* 1. St. 1. c. 3: 4 *Edw.* 3. c. 2: 1 & 2 *P. & M.* c. 13: & 31 *Car.* 2. c. 2.

No person shall be *bailed* for felony by less than two; and it is said not to be usual for the *King's Bench* to *bail* a man on a *habeas corpus*, on a commitment for treason or felony, without four sureties; the sum in which the sureties are to be bound, ought to be never less than 40*l.* for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the *bail*; and if a person be *bailed* by insufficient sureties, he may be required either by him who took the *bail*, or by any other who hath power to *bail* him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 *Hawk* P. C. c. 15. § 4: *H. P. C.* 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of *bail*; for this is looked upon as a great grievance, and is complained of as such by 1 *W. & M. St.* 2. c. 2, (the bill of rights); by which it is declared, that excessive *bail* ought not to be required. 2 *Hawk* P. C. c. 15.

If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be *bailed*, or committed to prison; but if there is no felony done, he may be discharged: *H. P. C.* 98, 106.

Persons committed for treason or felony, and not indicted the next term, are to be *bailed*. 31 *Car.* 2. c. 2. § 7.

Where *bail* may have writ of detainer against the prisoner, See 1 *Ann. St.* 2. c. 6. § 3.

Justices of peace are required to *bail* officers of customs and excise, who kill persons resisting. 9 *Geo.* 2. c. 35. § 35.

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The court of *King's Bench* and *Justiciary* in *Scotland*, not restrained from *bailing* persons committed for felonies, against the laws of customs or excise. 9 *Geo.* 2. c. 35. § 38: 19 *Geo.* 2. c. 34. § 12.

For further particulars relative to *bail* in criminal cases, see *Leuch's Hawk* P. C. ii. c. 15. very much at large.

BAILIFF, *ballivus*.] From the *French* word *bayliff*, that is, *praefectus provinciae*, and as the name, so the office itself was answerable to that of *France*; where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament there were several provinces to which justice was administered by certain officers called *bailiffs*: and in *England* we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants, by the officer whom we now call *sheriff* or *viscount*; (one of which names descends from the *Saxons*, the other from the *Normans*;) and though the *sheriff* is not called *bailiff*, yet it is probable that was one of his names also, because the county is often called *balliva*: as in the return of a writ, where the person is not arrested, the *sheriff* saith, *Infra-nominatus A. B. non est inventus in balliva mea*, &c. *Kitch. Ret. Brev. fol.* 285. And in the statute of *Magna Charta*, cap. 28, and 14 *Ed.* 3. c. 9, the word *bailiff* seems to comprise as well *sheriffs*, as *bailiffs* of hundreds.

As the realm is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice administered to them by the several officers of every hundred, which were the *bailiffs*. And it appears by *Bracton*, (*lib.* 3. tract. 2. cap. 34.) that *bailiffs* of hundreds might anciently hold plea of appeal and approvers: but since that time the hundred courts, except certain franchises, are swallowed in the county-courts; and now the *bailiff's* name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties. Though in other respects, the name is still in good esteem; for the chief magistrates in divers towns, are called *bailiffs*: and sometimes the persons to whom the king's castles are committed are termed *bailiffs*, as the *bailiff* of *Dover Castle*, &c.

Of the ordinary *bailiffs* there are several sorts, *viz.* *bailiffs* of liberties; *sheriffs' bailiffs*; *bailiffs* of lords of manors; *bailiffs* of husbandry, &c.

Bailiffs of liberties are those *bailiffs* who are appointed by every lord within his liberty, to execute process and do such offices therein, as the *bailiff errant* doth at large in the county; but *bailiffs* errant or itinerant, to go up and down the county to serve process, are out of use.

Bailiffs of liberties and franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them and *sheriffs*, &c. and shall be punished for malicious distresses, by fine and treble damages, by ancient statutes. Vide 12 *Ed.* 2. St. 1. c. 5: 14 *Ed.* 3. St. 1. c. 9: 20 *Ed.* 3. c. 6: 1 *Ed.* 3. St. 1. c. 5: 2 *Ed.* 3. c. 4: 5 *Ed.* 3. c. 4: 11 *H. 7.* c. 15: 27 *H. 8.* c. 24: 3 *Geo.* 1. c. 15. § 10.

The *bailiff* of a liberty, may make an inquisition and extent upon an *elect*. The *sheriff* returned on a writ of *elect*, that the party had not any lands but within the liberty of *St. Edmund's Bury*, and that *J. S. bailiff* there had the execution and return of all writs, and that he inquired

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quired and returned an extent by inquisition, and the bailiff delivered the moiety of the lands extended to the plaintiff, who by virtue thereof entered, &c. This was held a good return. *Cro. Car.* 319. These bailiffs of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, (unless it be on a *quo minus*, or *capias utlagatum*) without clause in his writ, *Non omittas propter aliquam libertatem*, &c. If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him; though the execution of the writ may stand good. 1 *Vent.* 496: 2 *Inst.* 453.

Sheriffs' bailiffs are such who are servants to sheriffs of counties to execute writs, warrants, &c. Formerly bailiffs of hundreds were the officers to execute writs; but now it is done by special bailiffs, put in with them by the sheriff. A bailiff of a liberty is an officer which the court takes notice of; though a sheriff's bailiff is not an officer of the court, but only the sheriff himself. *Pascb.* 23 *Car.* 1. B. R. The arrest of the sheriff's bailiff is the arrest of the sheriff; and if any rescous be made of any person arrested, it shall be adjudged done to the sheriff: also if the bailiff permit a prisoner to escape, action may be brought against the sheriff. *Co. Lit.* 61, 168. Sheriffs are answerable for misdemeanors of their bailiffs; and are to have remedy over against them. 2 *Inst.* 19. The latter are therefore usually bound in an obligation for the due execution of their offices, and thence are called *bound bailiffs*; which the common people have corrupted to a more humble appellation.

There are thirty-six serjeants at mace in London who may be termed bailiffs, and they each give security to the sheriffs.

By *Stat.* 14 E. 3. c. 9, Sheriffs shall appoint such bailiffs for whom they will answer; and by *Stat.* 1 H. 5. c. 4, no sheriff's bailiff shall be attorney in the king's court. *R. M.* 1654.

Bailiffs of lords of manors are those that collect their rents, and levy their fines and amercements: but such a bailiff cannot distrain for an amercement without a special warrant from the lord or his steward. *Cro. Eliz.* 698. He cannot give licence to commit a trespass, as to cut down trees, &c. though he may licence one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. *Cro. Jac.* 337, 377. A bailiff may by himself, or by command of another take cattle damage-feasant upon the land. 1 *Don v. Abr.* 685. Yet amends cannot be tendered to the bailiff, for he may not accept of amends, nor deliver the distress when once taken. 5 *Rep.* 76. These bailiffs may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. *Lit. Rep.* 70.

Bailiffs of courts-baron summon those courts, and execute the process thereof; they present all pound breaches, cattle-strayed, &c.

Bailiffs of husbandry are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour; they also sell trees, repair houses, hedges, &c. and collect the profits of the land for their lord and master, for which they render account yearly, &c.

Besides these there are also bailiffs of the forest, of which see *Manwood*, part 1. page 113.

BAILMENT.

An Appointment of a Bailiff of a Manor.

KNOW all men by these presents, That I W. B. of, &c. Esq; lord of the manor of D. in the county of G. Have made, ordained, deputed and appointed, and by these presents do make, ordain, depute, and appoint J. G. of, &c. my bailiff, for me and in my name, and to my use, to collect and gather, and to ask, require, demand and receive of all and every my tenants, that have held or enjoyed, or now do, or hereafter shall hold or enjoy, any messuages, lands, or tenements, from, by, or under me, within my said manor of D. all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing or belonging to me, within the said manor; and, in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do also further empower and authorize the said J. G. to take care of and inspect into all and every my messuages, lands and woods within the said manor, and to take an account of all defects, decays, wastes, spoils, trespasses, or other misdemeanors, committed or permitted within my said manor, or in any messuages, lands or woods there; and from time to time, to give me a just and true account in writing thereof; and further to act and do all other things that to the office of a bailiff of the said manor belongs and appertains, during my will and pleasure. In witness, &c.

BAILIWICK, *balliva*.] Is not only taken for the county; but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a bailiff with such powers within his precinct, as an under-sheriff exerciseth under the sheriff of the county; such as the bailiff of Westminster, &c. *Stat.* 27 Eliz. cap. 12: *Wood's Inst.* 206.

BAILMENT, from *bailier* Fr. to deliver.] "A delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the bailee:" [the person to whom they are delivered.] 2 *Coom.* 451. which see: to which Sir W. Jones adds, "and the goods re-delivered as soon as the time or use, for which they were bailed shall have elapsed or be performed." *Law of Bailment*, p. 117.

It is to be known that there are six sorts of bailments which lay a care and obligation on the party to whom goods are bailed; and which consequently subject him to an action, if he misbehave in the trust reposed in him.

1. A bare and naked bailment, to keep for the use of the bailor, which is called *depositum*; and such bailee is not chargeable for a common neglect, but it must be a gross one to make him liable. 2 *Str.* 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called *accommodatum*, which is a lending *grati*; and in such case the borrower is strictly bound to keep them: for if he be guilty of the least neglect, he shall be answerable, but he shall not be charged where there is no default in him. See *post*.

3. A delivery of goods for hire, which is called *locatio* or *conductio*; and the hirer is to take all imaginable care, and restore them at the time; which care if he so use, he shall not be bound.

4. A delivery by way of pledge, which is called *vadum*; and in such goods the pawnee has a special property;

BAILMENT.

perty; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril; as jewels pawned to a lady, if she keep them in a bag, and they are stolen, she shall not be charged; but if she go with them to a play, and they are stolen, she shall be answerable. So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge; and if notwithstanding all his diligence he lose the pledge, yet he shall recover the debt. But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer; after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action of *assumpsit*, and declare that the defendant promised to return the goods upon request; or trover, the property being vested in him by the tender.

5. A delivery of goods to be carried for a reward, of which enough is said under title *Carrier*. It may here be added, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. And if a price be alleged in the declaration, it ought to be proved the usual price for such a stage; and if the price be proved there need no proof, the defendant being a common carrier: but there need not be a proof of a price certain.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called by *Bracton*, *mandatum*, in *English*, an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person, in the way, without any neglect of his, he would not be liable, being to have no reward.

The above is taken from Lord Chief Justice *Holt's* opinion, in the case of *Ciggs v. Bernard*, 2 *Ld. Raym.* 909. as abridged, *Bull. N. P.* 72. See also Sir *W. Jones's* Essay on the Law of Bailment, p. 35: *Com. Rep.* 133. with Mr. *Rufe's* notes; and on this subject 2 *Inst.* 89: 4 *Rep.* 83: 1 *Rel. Ab.* 338: 1 *Inst.* 89 b: *Doct. & St.* 129: 1 *New Ab.* 243.

Having mentioned Sir *W. Jones's* Essay on the Law of Bailment, we cannot help recommending it to the attention of the rational student; and for the use of such, extracting the following analysis, which will in general be found to be consonant with the determinations in the books, and convey much knowledge in a short compass. Sir *W. Jones* differs in a few points from Lord *Holt*, and Lord *Coke*, and his reasons are deserving of much attention.

"I. DEFINITIONS.—1. *Bailment*, as before at the beginning of this article.—2. *Deposit* is a bailment of goods to be kept for the bailor without recompence.—3. *Mandate* is a bailment of goods, *without reward*, to be carried from place to place, or to have some act performed about them.—4. *Lending for use* is a bailment of a thing for a certain time to be used by the borrower without paying for it.—5. *Pledging*, is a bailment of goods by a debtor to his creditor, to be kept till the debt be discharged.—6. *Letting to hire* is, (1) a bailment of a thing to be used by the hirer for a compensation in money; or (2) a letting out of, work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed,

and that for a pecuniary recompense; or (3) of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward.—7. *Innominate bailments* are those where the compensation for the use of a thing, or for labour and attention is not pecuniary; but either (1) the reciprocal use or the gift of some other thing; or (2) work and pains reciprocally undertaken; or (3) the use or gift of another thing in consideration of care and labour; and conversely.—8. *Ordinary neglect*, is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.—9. *Gross neglect*, is the want of that care which every man of common sense, how inattentive soever, takes of his own property. See *Post.* II. 8.—10. *Slight neglect* is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.—11. *A naked contract* is a contract made without consideration or recompence.

"II. THE RULES which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these—1. A bailee who derives no benefit from his undertaking, is responsible only for gross neglect.—2. A bailee who alone receives benefit from the bailment, is responsible for slight neglect.—3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect.—4. A special agreement of any bailee to answer for more or less, is in general valid.—5. All bailees are answerable for actual fraud, even though the contrary be stipulated.—6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement.—7. Robbery by force is considered as irresistible; but a loss by private stealth, is presumptive evidence of ordinary neglect.—8. Gross neglect is a violation of good faith.—9. No action lies to compel performance of a naked contract.—10. A reparation may be obtained by suit for every damage occasioned by an injury.—11. The negligence of a servant acting by his master's express or implied order, is the negligence of the master.

"III. From these rules the following PROPOSITIONS are evidently deducible.—1. A depositary is responsible only for gross neglect; or in other words for a violation of good faith.—2. A depositary whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.—3. A mandatary to carry is responsible only for gross neglect, or a breach of good faith.—4. A mandatary to perform a work is bound to use a degree of diligence adequate to the performance of it.—5. A man cannot be compelled by action to perform his promise of engaging in a deposit or a mandate; but.—6. A reparation may be obtained by suit for damage occasioned by the non-performance of a promise to become a depositary, or a mandatary.—7. A borrower for use is responsible for slight negligence.—8. A pawnee is answerable for ordinary neglect.—9. The hirer of a thing is answerable for ordinary neglect.—10. A workman for hire must answer for ordinary neglect of the goods bailed, and must apply a degree of skill equal to his undertaking.—11. A letter to hire of his care and attention, is responsible for ordinary negligence.—12. A carrier for hire by land or by water is answerable for ordinary neglect.

"IV.

BAILMENT.

"IV. EXCEPTIONS, to the above rules and propositions.—1. A man who spontaneously and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect.—2. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more can be required of him, than a fair exertion of his ability.—3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed; on a lawful demand.—4. A borrower and a hirer are answerable in all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.—5. A depositary and a pawnee are answerable in all events if they use the things deposited or pawned.—6. An inn-keeper is chargeable for the goods of his guest within his inn, if the guests be robbed by the servants or inmates of the keeper.—7. A common carrier by land or by water, must indemnify the owner of the goods carried if he be robbed of them.

"V. It is no exception but a **COLLATERARY** from the rules that Every bailee is responsible for a loss by accident or force, however inevitable or irresistible; if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable."

The cases cited and commented on by Sir Wm. Jones, besides the above of *Coggs v. Bernard*, and which lead to the whole law on this subject, are 1 *Sir.* 128, 145: 2 *Sira.* 1039: *Allcu.* 93: *Fitz. Detinue* 59, (*Bonion's* case, the earliest on the subject): 8 *Rep.* 32: 1 *Wilf.* 281: *Burr.* 2208: 1 *Vent.* 121, 190, 238: *Carth.* 485, 7: 2 *Bulff.* 280: 1 *Ro. Ab.* 2, 4, 10: 2 *Ro. Ab.* 567: 12 *Mod.* 480, 2: *Raym.* 220: *Moor.* 462, 543: *Owen* 141: 1 *Leon.* 224: 1 *Cro.* 219: *Bro. tit. Bailment: Hob.* 30: 2 *Cro.* 339, 667: *Palm.* 548: *W. Jo.* 159: 4 *Rep.* 83 b. (*Southcote's* case): 1 *Inst.* 89 a. Many of them however more peculiarly applicable to carriers.

The following cases may serve to illustrate the above principles.

A man leaves a chest locked up with another to be kept, and doth not make known to him what is therein; if the chest and goods in it are stolen, the person who received them shall not be charged for the same, for he was not trusted with them. And what is said as to stealing is to be understood of all other inevitable accidents: but it is necessary for a man that receives goods to be kept, to receive them in a special manner, *viz.* to be kept as his own, or at the peril of the owner. 1 *Lill. Abr.* 193, 174. And vide 1 *Rel. Abr.* 338: 2 *Show. pl.* 166.

If I deliver 100*l.* to A. to buy cattle, and he bestows 50*l.* of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c. but for the rest I shall recover. *Hob.* 207.

If one deliver his goods to another person, to deliver over to a stranger; the deliverer may countermand his power, and require the goods again; and if the bailee refuse to deliver them, he may have an action of account for them. *Co. Litt.* 286.

If A. delivers goods to B. to be delivered over to C. C. hath the property, and C. hath the action against B. for B. undertakes for the safe delivery to C. and hath no property or interest but in order to that purpose. 1 *Rel.*

Abr. 606: see 1 *Bulff.* 68, 69, where it is said that in case of conversion to his own use the bailee shall be answerable to both.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor bring trover, he reduces the property again in himself, for the action amounts to a countermand; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered; and in trover the property must be proved in the plaintiff. 1 *Bulff.* 68: see 1 *Leon.* 30.

And where a man delivers goods to another to be delivered to the deliverer at such a day, and before that day the bailee doth sell the goods in market overt; the bailor may at the day seize and take his goods, for the property is not altered. *Godb.* 160.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away; for the continuance of all property is to be taken from the form of the original bargain, which in this case was limited till the appointed journey was finished. *Telv.* 172. But the owner may have an action on the case against the bailee for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 *Rel. Rep.* 128.

As to borrowing a thing perishable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them; otherwise it could not supply the uses for which it was lent; and therefore he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed. *Dr. & Stud.* 129.

But if one lend a horse, &c. he must have the same restored. If a thing lent for use be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it, though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it; or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service than that for which borrowed, he must make it good: so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God, (or rather, as Sir Wm. Jones says it ought more reverentially to be termed, by *inevitable accident*;) in the right use of them; as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 *Inst.* 89: 29 *Aff.* 28: 2 *H.* 7, 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use; or if I deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence; or if the bailee of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 5 *Rep.* 13: 15 *E.* 4. 20 b: 12 *E.* 4. 13.

If a man deliver goods to another, the bailee shall have a general action of trespass against a stranger, because he

is answerable over to the *bailor*; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury, and in amends there to do himself right. 13 Co. 69; 14 Hen. 4. 28; 25 H. 7. 14.

BAIRMAN, A poor insolvent debtor left *bare* and naked. *Stat. Wil. Reg. Scot. cap. 17.*

BAKERS. See *Bread*.

BALANCE OF TRADE, A computation of the value of all commodities which we buy from foreigners, and on the other side the value of our own native products, which we export into neighbouring kingdoms; and the difference or excess between the one side and the other of such account or computation is called the *balance of trade*.

BALCANIFER, or *laldakinifer*, i. e. A standard bearer. *Matt. Paris. Anno 1237.*

BALCONIES To houses in *London*, are regulated by the Building Act, 14 Geo. 3. c. 78. § 48, &c.

BALE, (Fr.) A pack, or certain quantity of goods or merchandize; as a *bale* of silk, cloth, &c. This word is used in the statute 16 R. 2. c. 3, and is still in use.

BALENGER, By the *Stat. 28 H. 6. c. 5*, seems to have been a kind of *barge*, or water vessel. But elsewhere it rather signifies a man of war. *Walsing. in R. 2.*

BALEUGA, A territory or precinct. *Chart. Hen. 2. See Rannum.*

BALISTARIUS, A *balister* or cross-bow man. *Gervard de la War* is recorded to have been *balistarius domini regis*, &c. 28 & 29 Hen. 3.

BALIVA, A bailiwick, or jurisdiction. See tit. *Bailiwick*.

BALIVO AMOVENDO, A writ to remove a *bailiff* from his office, for want of sufficient land in the bailiwick. *Reg. Orig. 78. See tits. Bailiff, Sheriff.*

BALKERS, Are derived from the word *balk*, because they stand higher, as it were on a balk or ridge of ground, to give notice of something to others. *Shep. Epitom. vide Conders.*

BALLARE, To dance, *Spelm.* Perhaps in this sense it may be understood in *Fletu. lib. 2. c. 87. de castatrice; Anglice Dairy maid.*

BALLAST, Is gravel or sand to poise ships, and make them go upright; and ships and vessels taking in *ballast* in the river *Thames*, are to pay so much a ton to *Trinity House Deptford*; who shall employ *ballast-men*, and regulate them, and their lighters to be marked, &c. on pain of 10*l.* *Stat. 6 Geo. 2. c. 29.*

BALLIUM, A fortress or bulwark. *Matt. Westm. An. 1265.*

BAN, or *bans*, from the Brit. *ban*. i. e. *clamor*.] A proclamation, or public notice; any public summons, or edict, whereby a thing is commanded or forbidden. It is a word ordinary among the feudills; and for its various significations, see *Spelman v. hannum*. The word *bans* in its common acceptance is used for the publishing matrimonial contracts, which is done in the church before marriage; to the end that if any man can speak against the intention of the parties, either in respect of kindred, precontract, or for other just cause, they may take their exception in time, before the marriage is consummated; and in the canon law, *Bannæ sunt proclamationes sponsi & sponsæ in ecclesiis fieri solitæ*. But there may be a faculty or licence for the marriage, and then this ceremony is omitted. See tit. *Marriage*.

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BANCALE, A covering of ease and ornament for a bench, or other seat; *Monasticon tom. 1. p. 222.*

BANE, from the Sax. *bana*, a murderer.] Signifies destruction or overthrow; as, I will be the *bane* of so. h a man, is a common saying; so when a person receives a mortal injury by any thing, we say it was his *bane*: and he who is the cause of another man's death, is said to be *le bane*, i. e. malefactor. *Bract. lib. 2. tract. 8. cap. 1.*

BANERET, *bancrētus*, *miles vexillarius*] Sir Thomas Smith, in his *Repub. Angl. cap. 18*, says, is a knight in the field, with the ceremony of cutting off the point of his standard, and making it as it were a *banner*, and accounted so honourable that they are allowed to display their arms in the king's army as barons do, and may bear arms with supporters. See *Camden* and *Spelman*, from whom it appears *bannerets* are the degree between barons and knights. *Spelm. in v. Bancrētus*. It is said that they were anciently called by summons to parliament: and that they are next to the barons in dignity, appears by the *stats. 5 R. 2. Stat. 2. cap. 4*; and 14 R. 2. c. 11.—*William de la Pole* was created *bancrēt* by K. Edward the Third by letters patent, *Anno Regni sui 13*. And those *bancrēts*, who are created *sub vexillis regis, in exercitu regali, in aperto bello, & ipso rege personaliter præseste, explicatis*, take place of all barons; as we may learn by the letters patent for creation of baronets. 4 *Inft. 6*. Some maintain that knights *bancrēts* ought not to be made in a civil war: but *Hen. 7.* made divers *bancrēts* upon the Cornish commotion, in the year 1495. See *Selden's Titles of Honour*, f. 799.

BANISHMENT, Fr. *bannissement*; *Exilium, abjuratio*.] is a forsaking or quitting of the realm; and a kind of civil death, inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called *abjuraton*, and the other upon compulsion for some offence. *Staundf. Pl. Cr. f. 117. See tits. Abjuratio, Transportation.*

BANK, Lat. *bancus*, Fr. *banque*.] In our common law, is usually taken for a seat or bench of judgment; as *Bank le Roy*, the King's Bench, *Bank le Common Pleas*, the Bench of Common Pleas, or the Common Bench; called also in Latin *Bancus Regis*, and *Bancus Communium Placitorum*. *Crompt. Just. 67, 91. Jus Banci*, or the privilege of the Bench, was anciently allowed only to the king's judges, *qui summam administrant justitiam*; for inferior courts were not allowed that privilege.

There are, in each of the terms, stated days, called *days in bank*, *dies in banco*, that is, days of appearance in the court of Common Pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term. See tit. *Dry*.

A *bank*, in common acceptance, signifies a place where great sum of money is deposited, returned by exchange, or otherwise disposed of to profit.

THE BANK OF ENGLAND is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the company make dividends of the profits half yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed: and the Company of the

BANKRUPT I.

Bank is to continue a corporation, and enjoy annuities till redeemed, &c. During the continuance of the *Bank*, no body politic, &c. other than the Company, shall borrow any sums on bills payable at demand; and forging the seal of the Bank, and forging or altering *Bank-notes*, or tendering such forged notes in payment, demanding to have them exchanged for money, &c. and forging the names of cashiers of the Bank, are all capital felonies. See the several statutes 5 & 6 W. & M. c. 20: 8 & 9 W. 3. c. 20: 11 Geo. 1. c. 9: 12 Geo. 1. c. 32: 15 Geo. 2. c. 13. And officers or servants of the Company, that imbezzle any *Bank-note*, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons.

By Stat. 13 Geo. 3. c. 79, Persons not authorized by the Bank, making or using moulds, for the marking of paper, with the words *Bank of England*, visible in the substance, or having such moulds in their possession, are guilty of felony without benefit of clergy: And persons issuing notes and bills engraved to resemble those of the Bank, or having the sum expressed in white characters on a black ground, may be punished by imprisonment, not exceeding six months. But innocent persons possessed of such notes carrying them for payment, not affected.

See Stat. 34 Geo. 2. c. 4, to regulate the holding general courts and courts of directors.

See the several statutes 21 Geo. 3. cc. 14, 60: 22 Geo. 3. c. 8: 23 Geo. 3. c. 35: 24 Geo. 3. *sess.* 2. cc. 10, 39: 25 Geo. 3. c. 32: 29 Geo. 3. c. 37. and a vast variety of previous statutes as to the continuance of the Bank charter.

By Stat. 31 Geo. 3. c. 33, the Bank is to keep in hand only 600,000 *l.* above the sum necessary to pay the current dividends—the remaining surplus to be applied to the use of the Public.

BANKERS, The monied goldsmiths first got the name of *bankers* in the reign of K. Charles the Second; but *bankers* now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it. See the preceding title.

BANKRUPT, A Trader, who secretes himself or does certain other acts, tending to defraud his creditors. 2 *Comm.* 285, 471. The word itself is derived from *bancus* or *banque*, the table or counter of a tradesman; (*Dufresne* 1969;) and *ruptus* broken, denoting thereby one whose shop or place of trade is broken or gone; though others rather choose to adopt the French word *route* a trace or track—a bankrupt, say they, being one who has removed his *banque*, leaving but a trace behind. *Cowel*: 4 *Inst.* 277—It is observable that the title of the first English statute concerning this offence; Stat. 34 H. 8. c. 4, “against such persons as do make bankrupt” is a literal translation of the French idiom, *qui font banque route*. 2 *Comm.* 472. n.

The Bankrupt-law is a system of positive regulations by various statutes, the construction of which have produced the multiplied cases on the subject, from whence the following principles and rules are extracted.—These statutes are,—Stat. 13 *Eliz.* c. 7: (which almost totally altered the old Stat. 34 Hen. 8. c. 4, mentioned above); 1 Jac. 1. c. 15: 21 Jac. 1. c. 19: 10 An. c. 15: 7 Geo. 1. c. 31: 5 Geo. 2. c. 30, continued at present by 28 Geo. 3. c. 24. § 2: 19 Geo. 2. c. 32: 24 Geo. 2. c. 57: 4 Geo. 3. c. 33.

On this subject, recourse has chiefly been had to *Cooke's Bankrupt Laws*; together with the *Commentaries*, and the modern reported determinations.

The matter, to suit the present purpose, has thus been arranged.

I. *Who may be a Bankrupt.*

II. *By what Acts a Person may become so.*

III. *A general View of the Proceedings on, and Effects of a Commission of Bankruptcy.*

1. As they relate to the Bankrupt himself.

2. As they transfer his Estate and Property.

IV. *To this it has seemed necessary to add some more minute Particulars, as to the following Parts of the Subject:*

1. Of the petitioning Creditor's Debt.

2. Of the Proof of Debts.

3. Of Creditors by Marriage Articles.

4. Of Contingent Debts.

5. Of Annuitants and certain other peculiar Creditors.

6. Of removing the Assignees.

7. Of Partners.

V. *Practical Notes and Forms:*

I. THE Statute, 13 *Eliz.* c. 7, enacts “That any merchant or other person, being subject or denizen, using or exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartery, chevifance, or otherwise, in gross or by retail, or seeking his or her trade or living by buying and selling”—may become bankrupts.—Drawing and redrawing bills of exchange, may in certain cases be considered as trading. 1 *Atk.* 128. See *Cowp.* 745.

Every person being a trader, and capable of making binding contracts, is liable to become a bankrupt.—As a nobleman, member of parliament, clergyman, &c. And where it is said, that farmers, innkeepers, &c. cannot be bankrupts, it means, in respect to that particular description; and not as affording protection, if in any other shape they come within the bankrupt-laws.—But *Infants* and *Married women* cannot be bankrupts.—As to the latter however, there are exceptions; for a *feme covert* in London, being a sole trader according to the custom, is liable to a commission of bankruptcy; and, as repeated determinations have settled that a *feme covert* living apart from her husband, as a *feme sole*, is liable to execution for debts contracted by her, there seems no doubt that such a married woman is equally liable to a commission of bankruptcy.—But if a *feme sole* trader, commit an act of bankruptcy, and afterwards marry and live with her husband, she cannot be made a bankrupt. *Ex parte Mear*, See *Cooke B. L. c. 3. § 1: 4 Term Rep.* 362. and this Dictionary tit. *Baron and Feme*.

Buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and thereby attempting to get a livelihood. 2 *Comm.* 476: 2 *Wils.* 171.

There can be no such thing as an equitable bankruptcy; it must be a legal one; and the party must be a trader in his own right, for if a person that is a trader, makes another his executor, who only disposes of the stock of his trade, it will not make the executor a trader, and liable to a commission of bankruptcy. 2 *P. Wms.* 429: 1 *Atk.* 102.

Any

BANKRUPT I.

Any person trading to *England*, whether native, denizen or alien, though never resident as a trader in *England*, may be a bankrupt, if he occasionally come to this country and commit an act of bankruptcy. *Cowp.* 398, 402: *Raym.* 375: *Salk.* 110.

If a merchant gives over his trade, and some years after becomes insolvent for money he owed while a merchant, he may be a bankrupt: but if it be for new debts, or old debts continued on new security, it is otherwise. *1 Vent.* 5, 29.

To enumerate every trade sufficient to make a man a bankrupt would be tedious. The following seem now settled; and some others are enumerated which have afforded cause of dispute, chiefly from the particular facts of the case.—It is to be premised, that a chapman, or one that buys and sells *any thing*, though his dealing does not come under the denomination of any particular trade, may become a bankrupt.

* Bankers, brokers, coal-dealers, factors, scriveners, vintners, brick-makers, butchers, bakers, brewers, clothiers, goldsmiths, dyers, iron-manufacturers who buy iron and work it into wares, lock-smiths, milliners, nailors, plumbers, sales-men, shoe-makers, smiths and farriers. *2 Wils.* 170, 2: *4 Burr.* 2148: *3 Mod.* 330: *Cro. Jac.* 585: *2 Ld. Raym.* 1480: *2 Comm.* 476: *3 Mod.* 330: *1 Ro. Ab.* 60. pl. 11.

For the probable principle why the Legislature has subjected traders to the bankrupt laws, and not suffered other people to be included in them, See *Port v. Turton*, *2 Wils.* 172.

More particularly, who may or may not be Bankrupts.

Alehouse-keepers, *not. Cooke* 53: *Cro. Car.* 395.
Allum manufacturers, *not. Cooke*, 34, 46.
Artificers, Labourers, &c. *not. Cro. Car.* 21: *Cro. Jac.* 585: *3 Mod.* 330: *2 Wils.* 171: *2 Comm.* 476: *4 Burr.* 2148.

Bankers, *may. Stat.* 5 *Geo.* 2. c. 30.

Bakers, *may. See ante* *

Brewers, *may. See ante* *

Brokers, *may. Stat.* 5 *Geo.* 2. c. 30.

Brick-makers, *may. 2 Wils.* 172: *Brown Ch. Ca.* 173.

See the case of *Parker v. Wells*, *1 Brown* 494: *1 Term Rep.* 34: *Cooke's B. L. c.* 3. § 2.

[In this case and that of allum-manufacturers, though they seem to differ, the same principle is recognized, *viz.* "If a man exercises a manufacture upon the produce of his own land, as a necessary or usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients—as in the case of cheese, cyder, allum, and coal-mines; and the like.—But where the produce of land is merely the raw materials of a manufacture, and used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land is an insignificant article, compared with the expence of the whole manufacture, there in truth he is, and ought to be considered as a trader.—As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much upon the light in which a jury sees the whole transaction, the law and the fact are so blended together, that it is hardly possible to distinguish them."]

Butchers, *may. See ante* * *4 Burr.* 2148.

Carpenters; not merely workmen, but buying timber and materials to carry on trade, *may. 3 Mod.* 155: *Ld. Raym.* 741.

Clergymen trading, *may. Cowp.* 745.

Clothiers, *may. See ante* *.

Coal-dealers, *may. See ante* *.—But not owners or lessees of coal-mines. *2 Wils.* 169, 170.

Companies or corporations, proprietors of shares in, generally—*not*—Except perhaps in the Stationers' company. See *2 Ld. Raym.* 851.—And by statute, "no member of the Bank of England; of the East India or English Linen company; no person circulating Exchequer bills; no adventurer in the Royal fishing trade, or Guinea company; no member of the London Assurance, Royal Exchange, or South Sea companies, shall be deemed a bankrupt, on account of their stock in those companies."—*Stat.* 3 *Geo.* 1. c. 3. § 43: *15 & 14 Car.* 2. c. 24: *4 Geo.* 3. c. 37: *6 Geo.* 1. c. 18: *8 Geo.* 1. c. 21.

Contractors, public, and such other public officers, *not. 3 Keb.* 451.—Butlers and stewards of Towns of courts; farmers of customs, receivers general, excise-men, &c. *not. all on the same principle.*

Drovers of cattle, *not. Stat.* 5 *Geo.* 2. c. 30.

Dyers, *may. See ante* *.

* Factors, *may. Stat.* 5 *Geo.* 3. c. 30.

Farmer, *not. Cooke* 21.—But as a potatoe-merchant he *may.* 573.

Funds or stocks, public, dealers in, *not. 2 P. Wms.* 308. and See ante Companies.

Goldsmith, *may. See ante* *.

Graziers, *not. Stat.* 5 *Geo.* 2. c. 30.

Inn-keepers, *not. 3 Mod.* 329: *Cro. Car.* 395.

Iron-manufacturers, *may. See ante* *.

Labourers, *not. See ante* Artificers.

Land-jobber, *not. 2 Wils.* 169.

Members of parliament, *may. See Stat.* 4 *Geo.* 3. c. 33. and post. 2.

Milliners, *may.* } See ante *.

Nailors, *may.*

Pawnbrokers—it seems *may. 1 Aik.* 206, 218.

Plumbers, *may. See ante* *.

Receiver-general of taxes, *not. Stat.* 5 *Geo.* 2. c. 30.

Sales-men, *may. See ante* *.

Scriveners *may. Stat.* 21 *Jac.* 1. c. 19. § 2.

Ship-owner, *not.*—Freighter, *may. 1 Vent.* 29: *Comb.* 182: *1 Sid.* 411.

Shoemaker, *may. 2 Wils.* 171.

Smugglers, *may. 1 Aik.* 200.

Stock-jobbers, *not. See* Funds.

Tanners, *may. See ante* *.

Tailors, working, *not. Cooke* 45.

Victuallers, *not. 4 Burr.* 2067: *2 Wils.* 382.

Vintners, being wine-merchants, *may. Cooke* 37.

The above Alphabetical List, is probably not so perfect or extensive as it might have been made; but the general principles, already laid down, will serve to direct the Student in cases of doubt or difficulty.

BANKRUPT II.

II. To LEARN what the particular *Acts of Bankruptcy* are, which render a man a bankrupt, the several statutes must be consulted, and the resolutions of the courts thereon;—Among these are to be reckoned.

1. To depart the realm, or from his dwelling house, with intent to defraud or hinder his creditors. *St. 13 Eliz. c. 7.*

2. To begin to keep his house privately, to absent himself from and avoid his creditors. *Stat. ib.*

3. To procure or suffer himself willingly to be arrested, without just or lawful cause; to suffer himself to be outlawed; or to yield himself to prison. *Stat. 13 Eliz. c. 7: 1 Jac. 1. c. 15. sect. 2.*

4. Willingly or fraudulently to procure his goods, money or chattels, to be attached or sequestered. *Stat. 1 Jac. 1. c. 15.*

5. To make any fraudulent grant or conveyance of his lands, tenements, goods, or chattels, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts. *Stat. ib.*

6. Being arrested for debt, to be in prison two months after his arrest, upon that or any other arrest, or detention for debt. *Stat. 21 Jac. 1. c. 15.*

7. To obtain privilege, other than that of parliament against arrest. *Stat. ib.*

8. Being arrested for 100*l.* or more, to escape out of prison. *Stat. ib.*

9. To prefer to any court, any petition or bill against any of the creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment, than was given at the time of their original contracts. *Stat. ib.*

10. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt, is an act of bankruptcy which shall supercede that commission, and be sufficient on which to ground another: and such petitioning creditor shall lose his debt, to be divided among the other creditors. See *Cooke's B. L. c. 4. § 1: St. 5 G. 2. c. 30. § 24.*

11. Neglecting to make satisfaction for any just debt, to the amount of 100*l.* within two months after service of legal process, for such debt, upon any trader, *having privilege of parliament*, is an act of bankruptcy. *Stat. 4 G. 3. c. 33.*

The Legislature having thus by positive laws, declared what acts shall be considered as criterions of insolvency or fraud, whereon to ground a commission; none other can be admitted by inference or analogy. Therefore it is not an act of bankruptcy for a trader secretly to convey his goods out of his house, and conceal them, to prevent their being taken in execution, nor to give money for notice, when a writ should come into the Sheriff's office. 1 *Ld. Raym. 725: Bull. N. P. 40.* So if a trader procure his goods fraudulently to be taken in execution, or makes a fraudulent sale of them, is not an act of bankruptcy, though void against creditors. 4 *Burr. 2478: Cowp. 429.*

Many of the acts of bankruptcy above described are in themselves equivocal, and capable of being explained by circumstances; for to bring them within the purview and meaning of the statute, it is absolutely necessary they should be done to defraud and delay creditors from recovering their just debts.

The better to obtain a clear and comprehensive view of the decisions on this part of the subject, each act of bankruptcy on which any question appears to have been raised, shall be considered separately; promising that the statutes of bankrupts are local, and do not extend to

acts done in foreign countries, or other dominions of Great Britain. *Cowp. 398.*

Departing the realm, will not be an act of bankruptcy unless done with a view of defrauding or delaying creditors; but if it appear that they are in fact delayed, by such absence, it will be the same as if the original departure was fraudulent. *Bull. N. P. 39: Com. Dig. tit. Bankrupt (C. 1): 1 Atk. 196, 240: Cooke's B. L. Vernon v. Hankey.*

Beginning to keep house, or otherwise to absent himself. Denial to a creditor is *prima facie* evidence of this act of bankruptcy. But as the statute requires it to be with an intent to delay or defraud creditors; the mere denial is therefore capable of being explained by circumstances, such as sickness, company, business, or even the lateness of the hour at which the creditor calls.—Neither will an order by the debtor to his servant to deny him be sufficient. For where a trader gave orders to his servant to deny him to creditors on the 26th of May, but was not actually denied to a creditor till the 28th, the court held the actual denial and not the order constituted the act of bankruptcy. *Bull. N. P. 39: 1 Atk. 201: Cooke cites Hawkes v. Sanders, T. 24 G. 3.*

Keeping in another man's house or chamber, having no house of his own, or on ship board, is an act of bankruptcy; so a miller keeping his mill. *Com. Dig. tit. Bankrupt.*

Any keeping house for the purpose of delaying a creditor, even for a very short time, will be an act of bankruptcy; notwithstanding the party afterwards goes abroad and appears in publick. 2 *Str. 809: 2 Term Rep. 59.*

A general denial will not be sufficient, but it must be a denial to a creditor who has a debt at that time due; for if he is only a creditor by a note payable at a future day, a denial to him will be no act of bankruptcy. 7 *Vin. 6. pl. 14.*

It frequently happens that traders in declining circumstances call their creditors together to inspect their affairs; and determine whether a commission shall issue against them or not; and if thought advisable, it is usual for the trader to deny himself to a creditor, for the purpose of making an act of bankruptcy. However it seems doubtful how far such concerted denial will be an act of bankruptcy to affect the interest of third persons. See 1 *Black. Rep. 441: Bull. N. P. 39.*

Departing from his dwelling house may become an act of bankruptcy or not, according to the motive by which the party is impelled; if it be done with a view of defrauding his creditors, or even delaying them, and his absence be but for a single day, it will be an act of bankruptcy; and his very absenting himself is sufficient *prima facie* evidence of an intention to defraud or delay his creditors; but it must be a voluntary absenting and not by means of an arrest. 1 *Salk. 110: 1 Burr. 484: 2 Str. 809: Green 53.*

Suffering himself to be outlawed. An outlawry in Ireland does not make one a bankrupt; but in the county palatine of *Durham* it does. However an outlawry does not appear to be an act of bankruptcy, unless it be suffered with intent to defraud creditors. *Com. Dig. tit. Bankrupt: Stone 124: Billing. 94: Good. 23: 1 Lev. 13.*

Yielding himself to prison, is to be intended of a voluntary yielding for debt; and if a person capable of paying, will notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy. *Bill. 95: Good. 25: Vin. tit. Creditor and Bankrupt 62.*

Willingly

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Willingly or fraudulently procuring his goods to be attached or sequestered, which is a plain and direct endeavour to dis-appoint his creditors of their security. 2 *Comm.* 478.—The attachment here meant, and which the legislature had in view, is that sort of attachment only by which suits are commenced; as in *London* and other places where that species of process is used. *Cowp.* 427.

Making any fraudulent conveyance of his lands or goods.—A fraudulent grant, to come within the meaning of the statute, must be by deed; therefore a fraudulent sale of goods not by deed, is no act of bankruptcy in itself; but being a scheme concerted at the eve of bankruptcy, to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void. 4 *Burr.* 2478.

A grant or conveyance fraudulent within *Stat.* 13 *Eliz.* c. 5, or 27 *Eliz.* c. 4, is an act of bankruptcy. *Com. Dig.*: *Cooke.*

A trader before he becomes a bankrupt may prefer one creditor to another; and may pay him his debt; or may make him a mortgage, with possession delivered, or may assign part of his effects; but a preference of one creditor to the rest, by conveying by deed all his effects to him, is a fraud upon the whole bankrupt law, and an act of bankruptcy. 1 *Burr.* 467.

Whether a transaction be fair or fraudulent, is often a question of law; it is the judgement of law upon facts and intents; but transactions valid as between the parties may be fraudulent by reason of covin, collusion, or confederacy to injure third persons. 2 *Burr.* 827: 1 *Burr.* 467.

Nor will the case be different, if the assignment is made to indemnify a surety; for the inconvenience and mischief arising from an undue preference is the same. *Coke's B. L.* 78: *Dougl.* 282.

An equal distribution among creditors who equally give a general personal credit to the bankrupt, is anxiously provided for, ever since the act 21 *Jac.* 1. c. 19; therefore when a bankrupt, by deed, conveys all his effects to trustees to pay all but one creditor, it is fraudulent and an act of bankruptcy. 1 *Burr.* 477.

But though a conveyance by deed of all a bankrupt's effects, or so much of his stock in trade, as to disable him from being a trader, or all his household goods, is itself an act of bankruptcy; a conveyance of part is very different; that may be publick, fair and honest. As a trader may sell, so may he openly transfer many kinds of property by way of security. What assignment of part will or will not be fraudulent, must depend on the particular circumstances of the case; but a colourable exception of a small part of his estate or effects, will not prevent the deed being declared fraudulent; for the law will never suffer an evasion to prevail to take a case out of the general rule, which is so essential to justice. 1 *Black. Rep.* 441: 2 *Black. Rep.* 362, 996: 1 *Burr.* 477.

An assignment by deed of part of a trader's effects, will be good, if made *bonâ fide*, and possession delivered; and indeed the not delivering possession being only evidence of fraud, may be explained by circumstances. 1 *Burr.* 478, 484. But an assignment even of only part of a trader's effects, to a fair creditor, will if done in contemplation of bankruptcy itself become the very act. 3 *Wils.* 47: *Cowp.* 124.

Procuring any protection except privilege of parliament. If any one be protected as the king's servant, it does not

make him bankrupt. *Shim.* 21. By *Stat.* 7 *Ann.* c. 12 § 5, declaring the privilege of ambassadors and their train, it is expressly enacted, That no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit of that act.

Being arrested for debt and lying two months in prison. The statute does not make the mere being arrested an act of bankruptcy. The most substantial trader is liable to be arrested; but the presumption of insolvency arises from his lying in prison two months without being able to get bail; nor will this presumption be obviated by a mere formal bail, put in for the purpose of changing from one custody to another. Where bail is really put in, the bankruptcy only relates to the time of the surrender; but when it is only formal bail, it will have relation to the first arrest. 1 *Burr.* 437: see *Salk.* 109: *Bull.* N. P. 38.

Escape out of prison on arrest for 100l. or more. The act clearly intends such an escape, as shews he means to run away and thereby to defeat his creditors; it must be an escape against the will of the sheriff, for a man shall not be made a criminal, where he has not the least criminal intention to disobey any law. 1 *Burr.* 440.

It is not an act of bankruptcy for a banker to refuse payment, if he appears, and keeps his shop open. 7 *Mod.* 139: *S. C. C.* 42.

An act of bankruptcy if once plainly committed, can never be purged, even though the party continues to carry on a great trade. 2 *Term Rep.* 59. But if the act was doubtful, then circumstances may explain the intent of the first act, and shew it not to have been done with a view to defraud creditors. But if after a plain act of bankruptcy, a man pays off and compounds with all his creditors he becomes a new man. 1 *Burr.* 484: 1 *Salk.* 110.

III. THE PROCEEDINGS ON A COMMISSION OF BANKRUPT, depend entirely on the several statutes of bankruptcy; all which are blended together, and digested into a concise methodical order in 2 *Comm.* 480, and here adopted with additions.

1. There must be a petition to the Lord Chancellor by one creditor to the amount of 100*l.* or by two to the amount of 150*l.* or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit*. (*St.* 5 *Geo.* 2. c. 30.) Upon which he grants a commission to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. *St.* 13 *Eliz.* c. 7. of these commissioners there are several existing lists, which take the commissions of bankruptcy in turn. The petitioners, to prevent malicious applications, must be bound in a bond to the Lord Chancellor for 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompence for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damaged by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued,

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issued, the commissioners are to meet at their own expence, and take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s. per diem*, each, at every sitting. And no commission of bankrupt shall abate, or be void by the death of the bankrupt subsequent to the commission. *St. 1 Jac. 1. c. 15.* nor upon any demise of the crown. *St. 5 Geo. 2. c. 30.* The granting a commission of bankruptcy is not discretionary, but a matter of right. *1 Vern. 153.*

By *Stat. 5 Geo. 2. c. 30. § 25*, the petitioning creditor is directed at his own costs, to prosecute the commission until assignees shall be chosen; which costs are to be ascertained by the commissioners at the meeting for the choice of assignees; and are to be paid by the assignees to the petitioning creditor out of the first money or effects received by them, under the commission — But these costs may be taxed by a Master in Chancery, on petition to the Lord Chancellor. *Cooke's B. L. c. 1. § 3.*

Notwithstanding the statute *5 Geo. 2.* has provided a remedy against maliciously suing out commissions of bankrupt, yet it is held not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain such redress for the injury he has sustained, as a jury may think he is entitled to. *3 Burr. 1418: 1 Atk. 144.*

If more than two of the commissioners should die, by which means there would not be a sufficient number to execute it, or if the commission should be lost, it must be renewed; upon which renewal only half the fees are paid, and the commissioners under the renewed commission proceed from that step which was left incomplete by the former. *Cooke B. L.*

The commissioners are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the *Gazette*, and at the same time to appoint three meetings. At one of these meetings, an election must be made of assignees or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; and assignees are to be chosen by the major part in value of the creditors who shall then have proved their debts; and one creditor, if to a sufficient amount may chuse himself assignee; but assignees may be, if necessary, originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting at farthest, which must be on the forty-second day after the advertisement in the *Gazette*, (unless the time be enlarged by the Lord Chancellor; which it may not be for more than fifty days, unless on special circumstances of involuntary default by the bankrupt, *1 Atk. 222*.) the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, he shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors. *Stat. 5 Geo. II. c. 30.*

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forth-coming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers. *St. 5 Geo. 2. c. 30:* and see *1 Atk. 240.*

When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife; (*St. 21 Jac. 1. c. 19:* see *1 P. Wms. 610, 611*;) and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them should refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler, permitting such person to escape, or go out of prison, shall forfeit 50*l.* to the creditors. *St. 5 Geo. 2. c. 30.*

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and children;) or, in case he conceals or embezzles any effects to the amount of 20*l.* or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors. *St. 5 Geo. 2. c. 30.* And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment for such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off. *St. 21 Jac. 1. c. 19.*

And so careful is the law to avoid any fraud, dishonesty or concealment, on the part of the bankrupt, that an agreement by the friends of the bankrupt, to pay a sum in consideration that the creditors would not examine him as to particular points, is void. *Nerot v. Wallace, 3 Term Rep. 17.*

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors. *St. 5 Geo. 2. c. 30.*

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and, if in consequence thereof, the creditors,

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creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20*l.*) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it upon cause shewn by any of the creditors of the bankrupt. *Stat. 5 Geo. 2. c. 30.*

If no cause be shewn to the contrary, the certificate is allowed of course, and then the bankrupt is entitled to a decent and reasonable allowance out of his effects for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.* but if they pay ten shillings in the pound, he is to be allowed *five per cent.* if twelve shillings and six-pence, then *seven and a half per cent.* and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.* provided, that such allowance do not in the first case exceed 200*l.* in the second 250*l.* and in the third 300*l.* *St. 5 Geo. 2. c. 30.*

Besides this allowance, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts. And for that among other purposes, all proceedings in commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account; though in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. *St. 5 Geo. 2. c. 30.*

The allowing the certificate of a bankrupt, will not discharge his sureties; but if a bankrupt obtains his certificate before his bail are fixed, it will discharge them; but if not till after they are fixed, they will remain liable notwithstanding the certificate, for it has no relation back; and till allowed it is nothing. And if the creditor proves his debt, with intent to obstruct the certificate, it does not preclude him from pursuing his legal remedies; and even if he had received his debt, or part of it, under the commission, still he might proceed to fix the bail who would be entitled to their remedy, so far as they are oppressed, by *audita querela*, or by motion. 1 *Atk.* 84: 1 *Burr.* 244: 2 *Burr.* 716; 2 *Black.* 812.

However, the bankrupt's certificate, obtained after judgment in an action upon a bail bond against the bankrupt himself, will not discharge the bail-bond, although it discharged the original debt, for it is a new and distinct cause of action. 1 *Burr.* 430: 2 *Str.* 1196: 1 *Will.* 41.

The certificate does not discharge a bankrupt from his own express collateral covenant, which does not run with the land 4 *Burr.* 2443.—Nor from a covenant to pay rent. 4 *Term Rep.* 94.

A bankrupt after a commission of bankruptcy sued out, may, in consideration of a debt due before the bank-

ruptcy, and for which the creditor agrees to accept no dividend or benefit, under the commission, make such creditor a satisfaction, in part, or for the whole of his debt, by a new undertaking or agreement, and *assumpsit* will lie upon such new promise or undertaking. 1 *Atk.* 67.

If a bankrupt has his certificate, and an action be brought against him afterwards for a debt precedent to the commission, he may plead his certificate, or otherwise he is without relief. 2 *Vern.* 696, 697.

The common method of pleading is, generally, that he became a bankrupt within the intent and meaning of the statutes made and in force concerning bankrupts, and that the cause of action accrued before he became a bankrupt. This general plea is given by *Stat. 5 Geo. 2. c. 30. s. 7.*

Though a creditor of a bankrupt under 20*l.* is excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and shew any fraud against allowing the certificate. 7 *Vin. Abr.* 134. *pl.* 18

No allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed; and also if any creditor produces a fictitious debt, or is induced by money or notes to sign his certificate, and the bankrupt does not make discovery of it, but suffers the said creditors to be imposed upon, he loses all title to these advantages. *St. 24 Geo. 2. c. 57. see Doug.* 216, 673. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts, or if he has lost at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time has lost to the value of 100*l.* by stock jobbing.

Also to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full 15*s.* in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades. *St. 5 Geo. 2. c. 30.* But money gained by his trade or profession for the necessary maintenance of himself and family, may be recovered by action by an uncertificated bankrupt. *Chippendale v. Tomlinson, Co. B. L.*

2. By the *Stat. 13 Eliz. c. 7.* The commissioners shall have full power to dispose of all the bankrupt's lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; [and all lands and tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with,) or purchased with any other person, upon secret trust, for his own use;] and cause them to be appraised to their full value, and to sell the same, by deed indented and enrolled, or divide them proportionably among his creditors. This statute expressly included

not

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not only freehold, but customary and copyhold lands and the lord of the manor is thereby bound to admit the assignee, (See *Com. Car.* 568: 1 *Atk.* 96.) but did not extend to estates tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 *Jac.* 1. c. 19. enacts, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issue in tail, remainder-men and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And the commissioners may sell a copyhold enailed by custom. *Stone*, 127: *Billing.* 148. And also, by this and a former act, 1 *Jac.* 1. c. 15, all fraudulent conveyances to defeat the intent of these statutes are declared void; but it is provided, that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt-laws, unless the commission be sued forth within five years after the act of bankruptcy committed. See *Cooke's B. L. c.* 8.

If there be two joint-tenants, and the one becomes bankrupt and dies, *Billinghurst* is of opinion the bankrupt's part shall be sold, and that there shall be no survivorship; because the bankrupt's moiety is bound by the statutes, and also the bankrupt had power to sell the same in his life-time, and might depart with it. And by *Stat.* 1 *Jac.* c. 15, (See ante III. 1.) The Commissioners after the bankrupt's death, may proceed in execution, in and upon the commission, for and concerning the offender's lands, tenements, &c. in such sort as if the offender had been living; which they cannot do, if the survivorship is held to take place.

If the bankrupt be a joint-tenant in fee, for life or years, the commissioners may sell a moiety. So if he be seised in right of his wife, they may sell during the coverture. 1 *Com. Dig.* 530.

In case of a patron becoming bankrupt, the commissioners may sell the advowson of the living; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of a church is not valuable. 1 *Burn's Eccl. Law*, 4th ed. p. 125.

The commissioners may sell offices of inheritance and for terms of years; but an office concerning the execution of justice (and therefore within 5 & 6 *Ed.* 6. c. 16,) cannot be sold. 1 *Atk.* 213. But a place that does not concern the execution of justice, but only the police, may be sold. 1 *Atk.* 210, 215.

If a mortgage is made by a bankrupt, tenant in tail, without suffering a recovery, the assignees shall take advantage of this defect, and hold the land clear of the mortgage. 1 *Will.* 276.

The commissioners may assign a possibility of right belonging to the bankrupt. 3 *P. Wms.* 132.

When assignees are chosen under a commission, all the estate and effects of the bankrupt, whether they be goods or

actual possession, or debts, contracts, and legacies, and other choses in action, are vested in them by assignment; (but until the assignment the property is not transferred out of the bankrupt;) and every new acquisition previous to the certificate will vest in the assignees; but as to future real estates, there must be a new assignment of them. 1 *Atk.* 253: *Billing.* 118: 1 *P. Wms.* 385, 6.

The commissioners, by their warrant, may cause any house or tenement of the bankrupt to be broke open, in order to enter and seize the same. See 2 *Shew.* 247.

When the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them: and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it. 12 *Mod.* 324.

The commissioners in *England* may sell the bankrupt's goods in *Ireland*; and, (notwithstanding a *dictum* of Lord *Mansfield* to the contrary, See *Dougl.* 151,) it seems now decided, that, by the assignment of the commissioners, all the bankrupt's property, whether in *England* or abroad, is conveyed to the use of his creditors. See *Hunter v. Potts*, 4 *Term Rep.* 182. and *Cooke's B. L. c.* 8. § 10.

If a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them, has paid the value before, though he did not know of the sending them at that time, the sending of them to the carrier, will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankruptcy. 4 *Burr.* 2239.

But if the goods were sent, in contemplation of bankruptcy, and to give a preference to a former creditor, if the act of bankruptcy is committed before the creditor receives the property, and assents to it, the commissioners may assign it, as part of the bankrupt's effects, and it will vest in the assignees. 4 *Burr.* 2235.

All questions of preference turn upon the action being complete, before an act of bankruptcy committed, for then the property is transferred; otherwise an act of bankruptcy intervening, vests the property in the hands and disposal of the law. If a man were to make a payment, but the evening before he becomes bankrupt, independent of the act of parliament, and in a course of dealing and trade, it would be good. Where an act is done, that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference. *Corup.* 123.

If a merchant consigns goods to a trader, and before their arrival, the consignee becomes bankrupt, if the merchant can prevent the goods getting into the bankrupt's hands, the commissioners' assignment will not affect them. 2 *Mern.* 203: 1 *Atk.* 248: *Corup.* 296.

The future profits arising from a bankrupt's personal labour are not subject to the assignment. *Chippendale v. Tomlinson*, 7. 25 *Geo.* 3. *B. R.*

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for; therefore when the commission is awarded, the commission, and the property of the assignees, shall have a relation, or reference, back to the first and original act of bankruptcy. 4 *Burr.* 33. Inasmuch that all transactions of

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of the bankrupt, are from that time, absolutely null and void; either with regard to the alienation of his property, or the receipt of his debts, from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. Therefore even if a banker pay the draft of a trader keeping cash with him after knowledge of an act of bankruptcy, the assignees may recover the money. 2 Term Rep. 113; 3 Bro. C. R. 313; *Vernon v. Hankey*, and see 2 Term Rep. 287. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts; 1 Atk. 262; *W. Jones* 202; 2 Show. 480; for if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby. *Vin. Abr. tit. Creditor and Bankrupt* 104; *Cooke's B. L. c. 14. § 7*.

As these acts of bankruptcy however may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to it's utmost length, it is provided by Stat. 19 Geo. II. c. 32, that no money paid by a bankrupt to a *bond fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor (by Stat. 1 Jac. 1. c. 15,) shall any debtor of a bankrupt that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

Sale of goods by a bankrupt after an act of bankruptcy is not merely void, the contract is good between the parties; but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring *in re* for the goods, as supposing the contract may be void, or may bring debt or *assumpsit* for the value, which affirms the contract. 3 Salk. 59. pl. 2; 2 Term Rep. 143; 4 Term Rep. 216, 7.

And so if a bankrupt on the eve of bankruptcy, fraudulently deliver goods to a creditor. 4 Term Rep. 211.

The assignees may pursue any legal method of recovering the property vested in them, by their own authority; but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them, in value, at a meeting to be held in pursuance of notice in the Gazette. St. 5 Geo. II. c. 30 § 38: See 1 Atk. 91, 107, 210, 253; *Cooke's B. L. c. 14*.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after 4, and within 12 months after the commission issued, give 21 days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required: [and under St. 5 Geo. II. c. 30. § 6, by affidavit if living in the country, and if Quakers by affirmation.] And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the quantity of their debts; no regard being had to the quality of them. Mortgages indeed, for

which the creditor has a real security in his own hands, are entirely safe, for the commission of bankrupt reaches only the equity of redemption. *Fincb. Rep. 466; 2 Rep. 25*. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. But, otherwise, judgments, and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*. St. 21 Jac. c. 19. Nay, so far is this matter carried, that, by the express provision of the St. 7 Geo. 1. c. 31, (See St. 5 Geo. 2. c. 30. § 22: *Cowp. 243*.) debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount or drawback, in proportion. *Ld. Raym. 1549; St. 4. 949, 1211; 2 P. Wms. 396; 3 Will. 17*.

And insurances and obligations upon bottomry or *respondentia*, *bond fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy. St. 19 Geo. 2. c. 32; also annuity-bonds though not forfeited at the time of the bankruptcy. *Cowp. 540*. but see 2 Blac. R. 110. b.—And Policies of Insurances for Life. *Dougl. (2d edit.) 166*.

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. St. 5 Geo. 2. c. 30. It is the duty of assignees to make a dividend as early as possible after the time given by statute. And if they neglect to do so, and keep the money in their own hands they will be liable to pay interest for it. 1 Atk. 90; *Coke B. L. c. 7. § 3*.

And if any surplus remains after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt. St. 13 El. c. 7. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence, except that, upon satisfaction made to all the creditors, the commission may be *superfeded*. 2 Ch. Ca. 144. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission, to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt, or his representatives. 1 Atk. 244.

The *Superfedeas* is a writ issuing under the great seal, to supersede the commission, and this writ may be issued at the discretion of the Lord Chancellor, when the creditors of the bankrupt agree to supersede the commission; or because the party appears not to have been a trader; that the party had not committed an act of

bankruptcy; that the commission was not opened till three months after it issued; or that he has paid all his creditors. 1 *Atk.* 154: 2 *Cha. Ca.* 192: *Sil. Ca. Cha.* 46: 1 *Atk.* 135: 1 *Atk.* 244: *Ex parte Nutt*, 1 *Atk.* 102.

Though the usual course is for the Lord Chancellor to order a feigned issue to try the bankruptcy at law, yet if it appears plainly to have been taken out fraudulently and vexatiously, the court will at once supersede the commission, and order the petitioning creditor's bond to be assigned. 1 *Atk.* 128, 144, 218.

IV. 1. The acts of parliament relating to bankrupts, being made for the relief of creditors, none but a creditor could at any time have taken out a commission; and now he must have a legal demand to the amount specified in *St. 5 Geo. 2 c. 30. § 23*. But a debt in equity will in no circumstances be a foundation for a commission; therefore if a legal demand is not in its own nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor, *Forrest*, 248: *Ch. Ca.* 191: *Freem.* 270: 1 *Atk.* 147: 2 *Vez.* 407: 2 *Stra.* 899: 1 *P. Wms.* 783.

It is generally understood, that the commission must issue on the petition of some creditor capable of claiming relief under it; and therefore that if the debt of the petitioning creditor appears to have been contracted subsequent to a secret act of bankruptcy committed by the trader, no commission ought to be granted upon his petition, 2 *Stra.* 744, 6: 1042: 1 *Atk.* 73.

A debt at law, notwithstanding the statute of Limitations has incurred, will support a commission; for the statute does not extinguish the debt, but the remedy, and the least hint will revive it. 2 *Black. Rep.* 703.

It has been determined, that a creditor, by notes bought in at 10s. in the pound, was a creditor for the full sum, and might take out a commission. 1 *P. Wms.* 783.

A creditor, before the party entered into trade, may on account of such debt, sue out a commission, but a creditor for a debt contracted after leaving off trade, cannot. But when a commission is sued out, those creditors who have become such since the quitting trade, may come in and share the dividend with those who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy. 12 *Mod.* 159: *Ld. Raym.* 28: 1 *Sid.* 411: *Dougl.* 282.

If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution, is a satisfaction of the debt, in point of law. Therefore where a commission had issued on the petition of a creditor who had the bankrupt in execution, it was upon that account superseded. 3 *Wils.* 271: 1 *Stra.* 653.

Nor has the petitioning creditor the ordinary election to sue the bankrupt at law, or come under the commission as other creditors have; (*See post.* 2.) for if he was to elect to proceed at law, the commission must be superseded, which would affect those creditors who had proved debts under it. 1 *Atk.* 154.

2. Debts may be proved at any of the public meetings appointed by the commissioners; the usual proof is the oath of the creditor, which if not objected to by the bankrupt himself, or any of those creditors, is generally esteemed sufficient; but if any objection is raised, the demand must be further substantiated by evidence. For

though the creditor should make a positive oath of debt, the commissioners, if they conceive themselves have just grounds to doubt its fairness, ought to admit it only as a claim; and if it is not made out to their satisfaction, it may be rejected. 1 *Atk.* 71, 221.

Upon the principle of equality among the creditors proving under the commission, the privilege of debtors to come in and prove their debts and bankrupts to be discharged therefrom, is co-extensive and commensurate; therefore a man shall not prove a debt and proceed in an action at law, at the same time. However, the court will not absolutely stop him from bringing an action, but put him to his election; and should he elect to proceed at law, he will still be allowed to prove his debt, for the purpose of assenting to, or dissenting from the certificate; which permission is absolutely requisite, to make his remedy at law of any avail, for should the bankrupt procure his certificate, he will be thereby discharged from that action, as well as from all debts contracted before the act of bankruptcy. 1 *Atk.* 83, 119, 220: 1 *P. Wms.* 552.

If the creditor, before he proves his debt, proceeds at law against the bankrupt, he cannot be obliged to make his election till a dividend is declared. And where the creditor has already proceeded at law, he is not at liberty to come in, and prove his debt under the commission, without relinquishing his proceedings at law; unless by order from the great seal, for the purpose of assenting to, or dissenting from the certificate. See 1 *Atk.* 219: 2 *Black. Rep.* 1317.

But the modern determinations, supported by some of earlier date, have mostly put the creditor to his election before a dividend, provided a reasonable time is afforded the creditor to inform himself of the bankrupt's affairs. *Cooke's B. L. c. 6 § 2*.

The being chosen assignee, will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt; for in that case he can only be considered as a creditor at large; and even if he has proved his debt and chosen himself assignee, he may still elect to proceed at law, and be discharged as a creditor under the commission. 1 *Atk.* 153, 221. But a petitioning creditor has not this election; see *ante* 1.

A debt made void by statute, ought not to be permitted to be proved; as a debt on an usurious contract; and though the rule of the court of Chancery is, upon a bill to be relieved against demands of usurious interest, not to make void the whole debt, but to make the party pay what is really due; yet in a commission of bankruptcy, the assignees have a right to insist that the whole is void, as an usurious contract. And unless the assignees and creditors submit to pay what is really due, the Lord Chancellor has not power to order it; and applications of this nature have been frequently refused. 2 *Vez.* 489: 1 *Atk.* 125: see *Dougl.* 716.

If the bankrupt's estate is in arrear for taxes, the collector, when he comes to prove the debt, must produce his authority, that the commissioners may judge of the legality of it. Corporations usually have a clerk or treasurer who is the person to prove debts due to them; he must however produce his appointment under seal to the commissioners. Every security that a creditor has for his debt, must be produced at the time of his proving, when the commissioners will mark them as having been exhibited.

exhibited. In the same manner, any person acting for another, must produce his authority to the commissioners, and they will mark them as exhibits. *Coke's Bankrupt Law*. One inhabitant of a parish may prove for himself and the other inhabitants. 1 *Atk.* 111: and see *Coke's B. L.* c. 4. § 1.

In case of debts uncertain in point of liquidation, as between two merchants in balancing accounts; this matter rests upon a claim to ascertain the sum that was due at the time of the bankruptcy. So where a creditor cannot ascertain his debt with certainty sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it; or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer a claim to be entered; but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not substantiated in a reasonable time, the commissioners may strike it out; and they generally do so before a dividend is declared, unless sufficient reason is offered to them for prolonging the time; but the creditor is notwithstanding afterwards at liberty to prove his debt, and receive his share upon any future dividends. However in such cases where there has not been gross neglect, the *Chancellor* will make an order that such creditor shall be paid his proportion of the first dividend out of the money in the assignees' hands, upon condition that it does not break in upon any former dividend. 3 *Wils.* 271: *Coke's B. L.*

Aliens as well as denizens may come in as creditors; for all statutes concerning bankrupts extend to aliens. *Hob.* 287: see *Stat.* 21 *Jac.* c. 19.

3. The distinction of debts payable *in futuro* on a day certain, and debts depending upon contingency, has given rise to frequent questions, whether the bankrupt's wife or her trustees should be admitted to prove the sum settled on her by marriage-articles, under a commission against her husband.

Lord Hardwicke, on a petition *ex parte Winchester*, (1 *Atk.* 117: *Dav.* 535,) stated the distinctions of the several cases. The first head of cases is where a bond is given by a husband to pay a sum of money in his life-time to trustees, to be laid out in trust for himself and his wife, or children; and in case the husband survives, to the use of himself; if in this case the husband becomes a bankrupt, this being a debt due in his life-time, and before the bankruptcy, the court will let in the trustees to prove such debt, according to the trusts.

The second head is, where a person gives a covenant to pay to trustees a sum of money for the benefit of the wife or children after his death; and also a judgment by way of collateral security to such covenant, and afterwards becomes bankrupt; this being a debt at law, may be proved under the commission.

The third is, where the father gives a bond to his intended son-in-law on the marriage of his daughter, to pay a sum of money after his death and interest in the mean time, on particular days and times, and there is a breach of the condition of the bond, and the father becomes bankrupt; this is a legal debt not depending on a contingency, and therefore may be proved.

The fourth head is, where a man covenants in consideration of a marriage portion paid him, for his heirs, executors and administrators to pay to trustees a sum of money after his decease, in case his wife survives him. This case depending on a contingency, is materially different from the others; because in those there was a remedy at law before the commission issued; and it seems now to be settled, that on a contingent provision for a wife, she cannot be admitted as a creditor. 3 *Wils.* 271: see 2 *P. Wms.* 497: 2 *Ld. Raym.* 1346: 7 *Fin.* 72. pl. 7: *Dav.* 254, 524: 1 *Atk.* 113, 115, 120.—And this though it be particularly conditioned or provided that such debt shall be proveable.—*Ex parte Hill*; *ex parte Matthews*; *Coke's B. L.*

But notwithstanding the general rule seems to be thus established, the case will be different, if the assignees are obliged to come into equity to compel the performance of a trust; for then as they require equity, they shall be obliged to do equity, and secure the settlement to the wife. 1 *Atk.* 114: 2 *Vern.* 662.

4. Contingent debts are said not to be included in *Stat.* 7 *Geo.* 1. c. 31. because it being uncertain whether they will ever become due or not, it is impossible to make such abatement of 5 l. per cent. as that act directs, and therefore they cannot be within it. And this doctrine has been constantly followed and admitted as appears by the cases allowed, in the division (3) immediately preceding; the principle therefore, that contingent creditors cannot be admitted to prove their debts, where the act of bankruptcy is prior to the happening of the contingency, is clear and indisputable. 1 *Atk.* 118. But many questions have arisen as to what debts shall be said to be contingent within the meaning of the rule.

One having only a cause of action cannot come in and prove it as a debt; because the damages that may be given are considered merely as contingent; even in case of a bond of indemnity, where the condition is broken. 3 *Wils.* 270: 2 *Str.* 1160. And this though the surety is called upon and liable to pay the debt, if it is not actually paid. 1 *Term Rep.* 599.

So if a lessee plows up meadow ground, for which he is bound to pay the lessor a certain sum of money as a penalty, that penalty cannot be proved as a debt under the commission: nor if a man be bound in an obligation, in a certain sum to perform covenants, and the obligor before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt. If a bond by a principal and surety has not been forfeited, before the surety became bankrupt, the debt cannot be proved under his commission, but he may be sued upon it notwithstanding his certificate. *Doug.* 155: 3 *Wils.* 270. The bankruptcy of the lessee is no bar to an action on covenant (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 *Term Rep.* 94. But when judgment is obtained in any action, it then becomes such a debt as may be proved, and the judgment, when signed, relates to the verdict. *Id.* 2 *Black.* 1317.

Where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt capable of being proved under a commission; and if an act of bankruptcy intervenes between the undertaking, and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if

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the party engaging to pay the debt of another, is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt sufficient to give him a right of proving under the commission. *Cowp.* 525: 3 *Wils.* 13.

If the party engaging to secure the debt of another himself becomes bankrupt before that debt is payable by the principal, the creditor cannot prove under his commission. *Cowp.* 460.

Where a man becomes bail for another, it is considered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commission. 2 *Str.* 1043: 3 *Wils.* 262.

5. The general rule as to common annuities is, that where one is entitled to an annuity from another, which is not a rent charge on land, or on a specific part of the grantor's estate, but personal, to be paid by him, who afterwards becomes bankrupt, it is only a general demand on him and his estate; and there is nothing a debt on his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the annuity-bond has become forfeited; for otherwise the payments accruing afterwards became a debt after the bankruptcy, and cannot be proved. But where there has been a forfeiture prior to the bankruptcy, in order to prevent the injustice of admitting the creditor only to prove the arrears, and the great inconvenience that would ensue if the annuity should be received from time to time, as an accruing debt on the estate, by which means the division of the estate would be perpetual, and there could be no final dividend during the annuitant's life, the court of Chancery puts it in another shape of setting a value on the annuity, because it was only a general personal demand. And in setting this value, consideration must be had of the time the annuitant has enjoyed it. 2 *Vez.* 490: 1 *Atk.* 251: 2 *Black.* 1107.

In case of an apprentice where the master becomes bankrupt, commissioners recommend it to the creditors to allow him a gross sum out of the estate for the purpose of binding him to another master; as it would be hard to make him come in as a creditor under the commission; but this though it is equitable and just, must be considered as an indulgence, and not a right; for the court can only order him to be admitted as a creditor. 1 *Atk.* 149, 261.

A bond though it be not assignable at law, may be proved under the commission by the assignee; but the assignor must join in the deposition that he hath not received the debt or any part thereof, or any security or satisfaction for the same. *Cooke's B. L.*

In bills of exchange and promissory notes, there is a double contract; the first between the principal debtor and creditor; and also an implied contract, that the principal debtor will indemnify the surety, so that if the creditor, the indorsee, comes upon the surety the indorser, the indorser or his assignees may come in against the original or principal debtor. This is the case between principal and surety, and is likewise the case where an indorser is barely a surety, and no consideration is paid by the original drawer. 1 *Atk.* 123.

The holder of a bill of exchange is entitled to prove the debt under the commission against the drawer, acceptor and indorser, and to receive a dividend from each, upon his whole debt, provided he does not in the whole

receive more than 20s. in the pound. 1 *Atk.* 107. But in this case if the creditor has actually received part of his debt under a commission, he can only prove the remainder under another. See 2 *P. Wms.* 89, 407: 1 *Atk.* 109, 129: 2 *Vez.* 114, 5.

Creditors are not allowed to prove interest on notes or bills, unless it is expressed in the body of them. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 5% per cent. discount. *Cooke's B. L.*: 1 *Atk.* 151.

A bill living with the father and earning money for itself, may, if the father receives that money, be admitted a creditor under the commission against him. 2 *Vez.* 675.

A landlord having a legal right to distrain goods while they remain on the premises, the issuing a commission of bankrupt against the tenant, and the messenger's possession of the tenant's goods, will not hinder him from distraining for rent; for it is not such a *custodia legis* as an execution; and even there the law allows the landlord a year's rent. And the assignment of the commissioners of the bankrupt's estate and effects is only changing the property of the goods, and while upon the premises they remain liable to be distrained. 1 *Atk.* 102, 3, 4.

And as a creditor after proving his debt may elect to abide by such proof, or relinquish it and proceed at law, so a landlord who is considered in a higher degree than a common creditor, may make his election to waive his proof, in his distress for rent. *Cooke's B. L.*—But particular circumstances may deprive the landlord of this right; as if he neglects to distrain, and suffers the goods to be sold by the assignees. 1 *Atk.* 104: See 1 *Bro. C. R.* 427. And a landlord may distrain before the end of the term by custom, as in *Norfolk*. 2 *Term Rep.* 600. A proviso in a lease, that it shall be void in case of the bankruptcy of the lessee is valid. 2 *Term Rep.* 133.

If an executor becomes bankrupt, as he acts in *auspicio*, his bankruptcy does not take away the right of executorship; and the legatees or creditors of the testator cannot prove under the commission, unless the bankrupt has committed a *devastavit*.—But though a bankrupt executor may strictly be the proper hand to receive the assets, yet if his assignees have received any of the property, the Chancellor may appoint a receiver, with whom the assignees shall account: 1 *Atk.* 101: or direct the bankrupt himself to be admitted a creditor for what he may be intitled to as executor, and order the dividend to be paid into the Bank. See *Cooke's B. L.* c. 6. § 3. The effects possessed by a bankrupt as executor, are not liable to the assignment of the commissioners. 3 *Burr.* 1369.

Commissioners after a man becomes a bankrupt compute interest upon debts no lower than the date of the commission.—And a specialty creditor cannot have interest beyond the penalty contained in his security; but a creditor by note carrying interest may receive the full amount. 1 *Atk.* 79, 80.

If a bankrupt is a *factor*, and goods are consigned to him or his order, which come to his possession; though he has the power of immediately selling them, and taking the money, in which case the consignor can only come as a general creditor upon his estate, yet notwithstanding the legal property the factor had in, and power over them, if they remain in *specie* in his hands, they shall be delivered to the principal, who has a lien upon

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upon them as his own property; and the bankrupt only as agent and trustee for him.—And even where the factor had sold the goods, and taken notes for them, it has been determined that the original owner had a specific lien upon, and was entitled to the notes. *2 Vern. 586: 1 Atk. 232.*

6. If the assignees misbehave in the trust reposed in them, they may be removed by petition to the Chancellor. So if an assignee himself becomes bankrupt, that will be a sufficient ground for his removal. *3 Atk. 97: 7 Vin. Abr. 77.*—Or if the commissioners act improperly at the choice of assignees. When an assignee is removed he must join with the old assignee, and the commissioners in making an assignment to the new assignee. The common practice, where only one assignee is removed, is, to make him join with his companion in assigning to the new assignee, and to the one retained, whereby a man is made to convey to himself, which appears absurd. The most feasible plan seems for the old assignees to convey to a third person, in trust, that he should immediately re-convey to the old and new appointed assignee. See *Cooke's B. L.*

Assignees are in the nature of trustees, and where they employ an agent to receive or pay money, and he abuses this confidence, an assignee cannot be distinguished from any other trustee, who if his agent deceive him, must answer over to the *cestui que trusts*. For the chief consideration of the creditors in the choice of assignees is certainly the ability of the persons, that they may be responsible for the sums they receive from the bankrupt's estate. *1 Atk. 88, 90.*

But the negligence of one assignee shall not hurt another joint assignee, where he is not at all privy to any private and personal agreement entered into by his brother assignee. *Id. ib.*

If an assignee becomes a bankrupt, and has applied any of the money received by him in that capacity, to his own use, the commissioners are to be considered as specialty creditors; because the assignees executed a counterpart of the assignment to them, and the agreement being under hand and seal, makes it in the nature of a specialty debt, and therefore they may come upon his real estate. *1 Atk. 89.*

7. If there is a joint commission against two partners, they must be each found bankrupts; and though one of them should die, the commission may still go on; but if one of the joint-traders be dead, at the time of the taking out the commission, it abates, and is absolutely void. *Cooke's B. L.*

It was formerly the practice, where there were several partners, to take out separate commissions against each, as well as a joint-commission; but this has been since discountenanced, it being the common course of the court upon petition, to make an order for the separate creditors to come in and prove their debts under the joint commission; and that the assignees should keep distinct accounts of the several estates; and this may be done, because the assignment in the case of a joint commission is of the whole estate. But on the other hand, where separate commissions are taken out against joint-traders, it seems to have been the opinion that joint-creditors could not prove their debts under the separate commission, except for the purpose of assenting to, or dissenting from, the certificate; but that they must proceed to

take out a joint-commission. *Cooke's B. L. 1 Atk. 138, 38.* But it seems now to be considered that a joint-commission cannot legally be supported while there is a separate one subsisting; because a trader having been declared a bankrupt, the whole of his property is assigned under the first commission, and till he obtains his certificate he is incapable of trading or contracting for his own benefit. However it is certain that in practice joint-commissions are taken out after the parties have been declared bankrupts under separate commissions; by which means great expence is saved, and the joint effects disposed to better advantage; and therefore in a fair case and where it can be made appear that the bankrupt's estate will be benefited by prosecuting a joint commission, the Lord Chancellor, to make it valid, will supersede the prior separate one. *Crop. 824: 1 Atk. 252: Cooke's B. L. c. 1. § 2.*

Joint creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to participate with them; but notwithstanding separate creditors are not entitled to share the dividend of the joint property, until the joint-creditors have received 20s. in the pound, yet they are upon petition, let in to prove their respective separate debts under the joint-commission, paying contribution to the charge of it; and as the joint or partnership estate is in the first place to be applied to pay the joint or partnership debts, so in like manner the separate estate shall be in the first place applied to pay all the separate debts. This is settled as a rule of convenience; and it is resolved, that if there be a surplus of the joint-estate besides what will pay the joint-creditors, the same shall be allotted in due proportions to the separate estate of each partner, and applied to pay the separate creditors. And on the other hand if there be a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint-creditors. *1 Atk. 68: 2 Vern. 706. Dav. 373: 2 P. Wms. 501.*

Where persons in trade [e.g. A. B. and C.] have been connected together in various partnerships, and a joint-commission taken out against them all, an order has been made for keeping distinct accounts of the different partners, as well as of the separate estates of each partner. But when there have been various partnerships [e.g. A. & B. and A. & C.] and a joint-commission is taken out against one firm, in which some of the parties were not engaged, there can be only the common order for keeping the distinct accounts of the joint and separate estate. *Cooke's B. L. c. 6. § 15.*

On a joint-debt, if separate commissions are taken out against the joint-debtors, the creditor may prove his whole debt, under each commission, and receive a dividend so as he does not obtain more than 20s. in the whole. *Cooke's B. L.*

Where there is a joint and several creditor, he must according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon in preference; for which-ever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. And in order to make his election, he must have a reasonable time to enquire into the

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state of the different funds, but he is not intitled to defer such election until a dividend be declared. *Cooke's B. L. c. 6. § 15.*

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoids all the acts of a bankrupt, from the day of the bankruptcy; and from the necessity of the thing, all his property being vested in the assignees who cannot carry on a trade. But after a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien, on any new goods brought in which he had upon the old. One partner has not, after a dissolution, a right to change the possession, or to make an actual division of the specific effects; for one partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account; and no person deriving under the partner can be in a better condition than himself; his executor stands in the very same light. So the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. 4 *Burr.* 2176; *Cowp.* 448, 471; 12 *Mod.* 446.

If a partner is a creditor on the partnership account, he can have no satisfaction but out of the surplus, which shall remain after the joint-creditors are paid; for the joint-creditors rely upon the ostensible state of the fund, and give credit to it accordingly. But Lord Hardwicke said, that where there are joint and separate creditors, if one partner lends a sum of money to the partnership, the creditors of his separate estate have a right to this in the first place. 1 *Atk.* 287; *Wes. jun.* 167.

But this has since been determined contrary, as where there was a joint commission against two partners, and a separate one against one of them. The petitioners, assignees under the separate commission, petitioned to be admitted creditors under the joint-commission, for a sum of money brought by their bankrupt into the partnership, beyond his share, and as being therefore a creditor on the partnership for that sum; but refused, on the principle that he cannot be a creditor on the partnership in competition with the joint creditors. *Cooke's B. L. c. 13.*

So, where one partner has taken more than his share out of the joint-fund, the joint-creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shewn that the partner acted fraudulently, with a view to benefit his separate creditors, at the expense of the joint-creditors. *Cooke's B. L. c. 13.* See tit. *Partners.*

One partner may be a creditor of another, and may, if he continues solvent, prove his debt under a separate commission. 1 *Atk.* 225; 2 *C. R.* 226; *Cooke's B. L. c. 13.*

If there be two partners, and one of them becomes bankrupt, and, on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because by the act of parliament, the bankrupt,

upon making a full discovery, and obtaining his certificate, is to be discharged of all debts. 3 *P. Wms.* 24.

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint-creditors. 3 *P. Wms.* 24.

Before the statute 10 *Ann. cap. 15*, if there were two partners, and only one party became bankrupt, and a separate commission was taken out against him; there was no doubt but the discharge of that bankrupt, discharged him from all debts which he owed in his joint as well as private capacity; but the great question was, whether, by such discharge of the bankrupt, the partner of the bankrupt should likewise be discharged from such debts as he was discharged of; and therefore that statute has enacted, that the partner shall not be discharged.

V. PRACTICAL NOTES, AND FORMS.

The first step to be taken towards procuring a Commission of Bankruptcy, is for the creditor to make an affidavit of his debt before a Master in Chancery; or if he resides altogether in the country, before a Master extraordinary there, to be filed in the Secretary of Bankrupts' Office in London, and exhibited to the commissioners at their first meeting.—The following is the form of an affidavit:

A. B. of, &c. maketh oath that John Wilson of Chelmsford, in the county of Essex, shop-keeper, is justly and truly indebted unto him, this deponent, and to Thomas Abel his partner, in the sum of 100 l. and upwards; for goods sold and delivered by this deponent, and his said partner, to and for the use of the said John Wilson; and this deponent further saith, that the said John Wilson is become a bankrupt, within the true intent and meaning of some or one of the statutes made, and now in force concerning bankrupts, as this deponent hath been informed and believes.

Sworn at the Public Office, the 1st day of September 1754, before me Peter Holford.

When the affidavit is sworn, it is carried to the Secretary of Bankrupts' Office, where the party suing for the commission enters into the bond. See III. 1.

The clerk of the bankrupts fills up a blank petition in the name of the person that makes the affidavit; and annexes the affidavit and bond to the petition, when he prefers the same to the Lord Chancellor.

This petition is answered in a few days, and the petitioning creditor has a commission without any further trouble.

A COMMISSION OF BANKRUPT.

GEORGE the Third, by the grace of God, of Great Britain, France and Ireland, king, defender of the Faith, &c. to our trusty and well-beloved William Bumpstead, Henry Hunter, Henry Cowper, Henry Russel, Esquires, and Richard Hargrave, gentlemen, greeting. Whereas, we are informed that John Wilson, of, &c. using and exercising the trade of a merchant by way of bargaining, exchange, bartering, and chevizance; seeking his trade and living, by buying and selling; about ——— since, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder Thomas Abel, of, &c. and other

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other his creditors of their just debts and duties to them due and owing; We, minding the due execution as well of the statute touching orders for bankrupts, made in the parliament begun and holden at Westminster, the 2d day of April, in the thirteenth year of the reign of Elizabeth, late queen of England, made and provided, as of the Stat. [Sec. mentioning Stats. 1 Jac. 1: 21 Jac. 1: and 5 Geo. 2:] Upon trust of the wisdom, fidelity, diligence, and prudent circumspection, which we have conceived in you, daily these presents, name, assign, appoint, constitute and ordain you our special commissioners; Hereby giving full power, and authority unto you, four or three of you, to proceed according to the said statutes, and all other statutes in force concerning bankrupts; not only concerning the said bankrupt, his body, lands, tenements, freehold and customary, goods, debts, and all other things whatsoever; but also concerning all other persons, who by concealment, claim or otherwise, do, or shall offend, touching the premises, or any part thereof, contrary to the true intent and meaning of the said statutes; And to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors; as towards and for all other intents and purposes, according to the ordinance, and provision of the same statutes. Willing and commanding you, four or three of you, to proceed to the execution and accomplishment of this our commission, according to the true intent and meaning of the same statutes, with all diligence and effect. Witness ourself at Westminster, the — day of — in the — year of our reign.

J. Yorke,

Having got the commission, the petitioning creditor must employ one of the messengers to summon a meeting of the major part of the commissioners to open the same; when the petitioning creditor, must come prepared, to prove his debt, and the party a bankrupt, within the statutes.

OATH to be administered by the Commissioners to Witnesses, upon their Examination.

YOU are here produced, as witnesses, by virtue of a commission out of the high court of Chancery, to us, and others directed, to be by us examined, concerning the bankruptcy of John Wilson, of, &c. Now to all such questions and interrogatories as shall be asked you, by virtue of this commission of bankrupt, concerning the said John Wilson, his trade or profession, his absconding, and other acts which he hath done or suffered, by which he may be discovered to be a bankrupt; and also concerning his lands and tenements, goods and chattels, debts and duties, frauds and concealments, and other matters and things, in obedience to the said commission, and pursuant to the several statutes made concerning bankrupts, you, and every of you shall, true and direct answer make, and shew the truth, the whole truth, and nothing but the truth

So help you God.

All the depositions must be signed by the witnesses. If the party is a Quaker, then instead of swear, say, "You shall solemnly, sincerely, and truly, declare, and affirm."

Immediately upon the commissioners' declaring party a bankrupt, they issue their warrant for seizure his effects and the messenger by virtue thereof seizes the effects, and continues to keep possession 'till the commissioners have executed the assignment.

The application to enlarge the time for the bankrupt's surrender, must be by petition to the great seal, six days at least before the last sitting appointed in the Gazette: this petition may be either in the name of the bankrupt, or of his assignees.

It is usual for the commissioners to recommend, and the creditors to agree, to return the bankrupts their cloths, monies, &c. particularly the jewels, &c. of their wives.

If the bankrupt happens to be a foreigner, and does not understand English, his English examination must be interpreted, and read to him in the language he understands, by a person versed in both languages, who must be first sworn to interpret truly; of which oath and interpretation there must be a memorandum made and annexed to the bankrupt's examination.

If the bankrupt does not surrender himself to the commissioners by 12 o'clock at night of the last day given, the messenger warns him so to do, by a proclamation made by him in the middle of Guildhall; the commissioners continuing sitting till that time.

FORM OF A BANKRUPT'S CERTIFICATE.

To the Right Honourable the Lord High Chancellor of Great Britain.

WE whose names and seals are hereunto subscribed and set, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy, awarded and issued against John Thomas, of, &c. (as described in the commission) bearing date at Westminster, the 21st day of, &c. directed to William Bumpstead, &c. do humbly certify to your Lordship, that the major part of the commissioners by the said commission authorized, having begun to put the said commission into execution, did find that the said John Thomas became a bankrupt, since the 10th day of May, 1784, and before the date, and suing forth of the said commission, within the true intent and meaning of the statutes made, and now in force concerning bankrupts, in some of them; and did thereupon declare and adjudge him a bankrupt accordingly. And we further humbly certify to your Lordship, that the said John Thomas being so declared a bankrupt, the major part of the commissioners by the said commission authorized, pursuant to the directions of the act of parliament made in the 5th year of the reign of his late majesty king George II. intitled 'An act to prevent the committing of frauds by bankrupts, did cause due notice to be given and published in the London Gazette of such commission being issued, and of the times and places of three several meetings of the said commissioners, within 42 days next after such notice (the last of which meetings, was appointed to be on the forty-second day); at which time the said John Thomas was required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said John Thomas, were desired to come prepared, to prove their debts, and to assent to or dissent from the making this certificate. And we further humbly certify to your Lordship, that such three several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice so given and published; and that at one of those meetings the said John Thomas did surrender himself to the major part of the commissioners, by the said commission authorized, and did sign

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sign and subscribe such surrender, and did submit to be examined from time to time upon oath, by and before the major part of the commissioners, by the said commission authorized: and in all things to conform to the several statutes made and now in force concerning bankrupts; and particularly to the said act made in the 5th year of his late majesty's reign. And we further humbly certify to your Lordship, that at the last of the said three meetings, the said John Thomas finished his examination, before the major part of the said commissioners, by the said commission authorized, according to the directions of the said last mentioned act, and upon such his examination, made a full disclosure and discovery of his estate and effects; and in all things conformed himself to the several statutes made and now in force concerning bankrupts, and particularly according to the directions of the said statute made in the 5th year of his late majesty's reign; and there doth not appear to us any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all the estate and effects of the said John Thomas. And we further humbly certify to your Lordship, that the creditors whose names or marks are subscribed to this certificate, are full 4 parts in 5 in number and value of the creditors of the above-named John Thomas, who are creditors for me Legatum 201. respectively, and who have duly proved their debts under the said commission; and that it doth appear to us by due proof by affidavit in writing, that such several subscribing creditors, or some person by them respectively duly authorized thereunto, did, before our signing hereof, sign this certificate, and testify their consent to our signing the same, and to the said John Thomas having such allowance and benefit, as by the said last mentioned act are allowed to bankrupts, and to the said John Thomas being discharged from his debts, in pursuance of the same act. In witness whereof we have hereunto set our hands and seals, this — day of — in the — year of the reign of &c. and in the year of our Lord 1784.

We the creditors of the above-named John Thomas, whose names, or marks are hereunder subscribed, do hereby testify and declare our consent, that the major part of the commissioners, by the above-mentioned commission authorized, may sign and seal the certificate above written; and that the said John Thomas may have such allowance and benefit as are given to bankrupts by the act of parliament made in the 5th year of the reign of his late majesty King George II, intituled, "An act to prevent the committing of frauds by bankrupts," and be discharged from his debts in pursuance of the same act.

William Bumpstead,
Henry Hunter,
Henry Russel.

(The creditors names) A. B.
C. D.

The messengers have printed forms of certificates, therefore the best way is to get a blank from them.

If any person sign the bankrupt's certificate by virtue of a letter of attorney, such letter of attorney must be left at the bankrupt's office.

The certificate, together with the affidavit of seeing the creditors sign it, and also letters of attorney, (if any

such there be) must be lodged with the secretary of bankrupts; who will thereupon give the messenger an authority to the printer of the Gazette, to insert an advertisement therein signifying that the acting commissioners have certified to the great seal, that the bankrupt hath conformed, and that the certificate will be allowed and confirmed, unless cause shown to the contrary, within twenty-one days from the date of the said advertisement.

If no cause is shown within the 21 days, against the allowance of the certificate, the Lord Chancellor will allow the same, by the following subscription on the said certificate:

" — day of — 1784.

WHEREAS the usual notice hath been given in the London Gazette, of — the — day of — last, and none of the creditors of the above-named John Thomas have shown any cause to the contrary: I do allow and confirm this certificate.

THURLOW, C."

CERTIFICATE for a Judge or Justice of Peace, to grant his Warrant for apprehending and committing a Bankrupt.

In the Matter of John Thomas, a Bankrupt.

WE whose names are hereunto subscribed, and seals set, do hereby certify, that a commission of bankrupt, under the great seal of Great Britain, grounded upon the several statutes made and now in force concerning bankrupts, bearing date at Westminster, the — day of June, instant, hath been awarded and issued against John Thomas, of, &c. and directed to William Bumpstead, &c. thereby giving full power and authority to 4 or 3 of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorized, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof upon oath before us had and taken, that the said John Thomas, before the date, and suing forth of the said commission, became bankrupt to all intents and purposes within the compass, true intent, and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date and suing forth of the said commission. Given under our hands and seals at Searl's Coffee-house, Lincoln's Inn, in the county of Middlesex, this — day of June, in the year of our Lord 17—. Witnesses John Knight. William Bumpstead (L.S.) Henry Hunter (L.S.) Henry Russel (L.S.)

The execution of this certificate must be proved by the subscribing witness before the judge or justice, previous to his granting his warrant.

It is usual for the assignees to give notice of the time and place they intend to pay the dividends; if by the assignees, the Solicitor signs an authority for that purpose, to the following effect, viz.

"Gentlemen,

Please to pay Mary Combes the sum of — being her dividend of — shillings in the pound on her debt of — proved under the commission of bankrupt against Francis Gibbons, of, &c.

Your's, &c. John Knight. 14th July 1780.
To Messrs. Partridge and Dennis, said bankrupt's assignees."

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The assignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, viz.

"Received this — day of July, 1780, of Messrs. Partridge and Dennis, assignees of the estate and effects of Francis Gibbons, of, &c. bankrupt, the sum of — being a dividend of — shillings in the pound, on my debt of — proved under the said commission.

Mary Combes."

WRIT OF SUPERSEDEAS.

G E O R G E the Third, by the Grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth: To our trusty and well-beloved William Bumpstead, Henry Hunter, Henry Russell, Henry Cowper, esquires, and Richard Hargrave, gentleman, greeting. Whereas we being informed that John Thomas, of, &c. using and exercising the trade of merchandize, by way of bargaining, exchange, bartering, chewsance, seeking his trade of living by buying and selling, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder Charles Jones, of, &c. and others, his creditors, of their just debts and duties, to them due and owing; and we, minding the due execution of the several statutes made against bankrupts, did, by our commission, under the great seal of Great Britain, bearing date at Westminster, the — day of — in the — year of our reign, name, assign, appoint, constitute, and ordain you our special commissioners, thereby giving, &c. (here recite the original commission to, "diligence and effect," then add) Now foresmuch as the said John Thomas, the bankrupt, by his humble petition, exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, prayed that the said commission might be superseded, whereunto we graciously inclining, do, by these presents, will and command you, and every of you, to stay and surcease all further proceedings upon the said commission, and that you supersede the same accordingly, as our special trust is in you reposed. Witness ourselves at Westminster, the — day of — in the — year of our reign.

J. Yorke.

When this writ is obtained, the commissioners must be served therewith, by delivering to each of them a copy, and at the same time shewing them respectively, the original writ under seal, and then the proceedings are at an end; but it is usual to give notice thereof in the *Gazette*.

BANKS, See tit. *Sea Banks*.

BANLEUGA, Vide *Bannum*.

BANNIMUS, The form of an expulsion of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word *banning* is taken for an exclamation against, or cursing of another.

BANNITUS, or *Bannitatus*.] An outlaw, or banished man. *Pat. Ed. 2.*

BANNUM vel **BANLEUGA**, The utmost bounds of a manor, or town; so used 47 Hen. 3: *Rot. 44. &c.* *Banleuga de Arundel* is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. *Seld. Hist. of Tyber, p. 75.*

BAR, See *Barr*.

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BARATRY, See tit. *Insurance*.

BARBERS, Were incorporated with the *Surgeons of London*; but not to practise surgery, except drawing of teeth, &c. 32 H. 8. c. 42: but separated by 18 Geo. 2. c. 15: See *Surgeon*.

BARBICAN, *barbicanum*.] A watch tower, or bulwark.

BARBICANAGE, *barbicanagium*.] Money given for the maintenance of a *barbican*, or watch-tower; or a tribute towards the repairing or building a bulwark. *Caria 17 Ed. 3: Monasticon, tom. 1. p. 976.*

BARCA, A barque: Gloss. Sax. *Æfrici*; a flat-ship.

BARCARIUM, *barcaria*.] A sheep-cote, and sometimes used for a sheep-walk. *MS. de Placit. Ed. 3: See Barcaria.*

BARGAIN AND SALE, Is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration, for passing of lands, tenements and hereditaments, by deed indented and inrolled. 2 *Inst. 672.*

Since the introduction of uses and trusts, and the Stat. 27 H. 8. c. 10, for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and in consequence of it, the conveyance by feoffment is now very little in use. Before the statute of Uses, equitable estates of freehold might be created through the medium of trusts, without livery; and by the operation of the statute, legal estates of freehold may now be created in the same way. They who framed the statute of Uses, evidently foresaw, that it would render livery unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture inrolled in one of the courts at Westminster, or in the county where the lands lie; such inrollment to be made within 6 months after the date of the indenture. Stat. 27 H. 8. c. 16. See 2 *Inst. 675: Dy. 229: Popb. 48: Dalt. 63.* The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrollment, for the more antient one of livery. But the latter part of this provision, which if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold, in case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years: (See 8 Co. 93: 2 Ro. Ab. 204: 2 *Inst. 671*;) and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniences from this in-

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sufficiency

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sufficiency, of the statute of Inrollments are now in some measure prevented by *Stat. 29 Ch. 2. c. 3.*, which provides against conveying any lands or hereditaments, for more than three years, or declaring trusts of them, otherwise than by writing. *1 Inst. 48 a. n. 3.*

This may serve at present to illustrate the doctrine of *Bargain and Sale*; but to obtain a clear and distinct idea of this part of the Law, see further titles *Conveyance, Deed, Feoffment, Lease and Release, Use, &c.* and *1 Inst. by Hargrave and Butler.*

At present it may be fit to consider;

- I. *What Things may be bargained and sold.*
- II. 1. *By whom, to whom, and*
2. *By what Words, a Bargain and Sale may be made.*
- III. 1. *Of the Consideration, and*
2. *Inrollment of a Bargain and Sale.*
- IV. *Of the Manner of pleading Bargains and Sales.*

I. All things, for the most part, that are grantable by deed in any other way, are grantable by *bargain and sale*; and lands, rents, advowsons, tithes, &c. may be granted by it, in fee-simple, fee-tail, for life, &c. *1 Rep. 176: 11 Rep. 25.*

Any freehold or inheritance in possession, reversion or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be inrolled. *2 Co. 54: Dyer 309: 2 Inst. 671.*

But if tenant for life bargains and sells his land by deed inrolled, it will be a forfeiture of his estate. *4 Leon. 251.*

But a man seised of a freehold may bargain and sell for years, and this shall be executed by the statute of Uses. *27 H. 8. c. 10.*

A man possessed of a term cannot bargain and sell it so as to be executed by the statute. *2 Co. 35, 36: Popb. 76.*

A bargain and sale of the profits of land, is a bargain and sale of the land itself; for the profits and the land are the same thing in substance. *Dyer 71.*

A rent in *esse* may be bargained and sold, because this is a freehold within the statute; and before the statute a rent newly created might be bargained and sold, because when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; but it seems, that since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in *cestui que use*; but here can be no seisin of his rent in the bargainor, because no man can be seised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee, *Kilb. 85: 1 Co. 126: 1 And. 327: 1 Jones 179: Sed qu. de hoc.*

If A. by indenture inrolled bargains and sells lands to B. and his heirs, with a way over other lands of A. this is void as to the way; for nothing but an use passes by the deed, and there can be no use of a thing not in *esse*, as a way, common, &c. before they are created. *Cro. Jac. 183.*

II. 1. The King, and all other persons that cannot be seised to a use, cannot bargain and sell, for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed and becomes a bargain and sale by the statute; but antecedent to any such execution there must be a use

well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. *Bro. Feoffment 10 Uses 33: Hard. 468: Popb. 72.*

If tenant in tail bargains and sells his land in fee, this passes an estate determinable upon the life of the tenant in tail; for at common law the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore when he sells the use in fee, *cestui que use* has a kind of an inheritance, yet determined within the compass of a life, and the statute executes it in the same manner as he has the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fee, this passes only an estate for life, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. *10 Co. 96, 98: 1 Saund. 260, 261: 1 Co. 14, 15: Co. Lit. 151.*

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. *10 Co. 24; 34: 2 Rol. Abr. 788.*

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of bargain and sale; but this shall operate as a covenant to stand seised, if there be none but the consideration of natural love and affection expressed. *7 Co. 40: 2 Co. 24: Cro. Eliz. 394: 1 Vent. 137: 1 Lev. 56.* But if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. *Kilb. 84: Co. Lit. 265.*

If an infant bargains and sells his land by deed indented and inrolled, yet he may plead non-age; for notwithstanding the statute the bargainee claims by the deed as at common law, which was, and therefore is still defeasible by non-age. *2 Inst. 673.*

If a husband seised of lands, in right of his wife, or tenant in tail bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. *Mo. 41. See tit. Baron and Feme. IV.*

If there be two jointenants, and one of them makes a bargain and sale of his own estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for since the freehold is in the bargainor the inheritance continues; but if such jointenant had bargained and sold *totum statum suum* in fee, though he died before inrollment; yet, if the deed were afterwards inrolled, the moiety would not survive, but would pass to the bargainee. *Cro. Jac. 53: Co. Lit. 186: 1 Bulst. 3.*

2. The very words *bargain and sell* are not of absolute necessity in this deed, for other words equivalent will suffice; as if a man seised of lands in fee sell the same to another, by the words *alien* or *grant*, the deed being made in consideration of money, and indented and inrolled, will be an effectual bargain and sale. In short, whatever

whatever words upon valuable consideration would have raised an use of any lands, &c. at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration covenants to stand seised to the use of another, &c. 2 *Inst.* 672: *Cro. Jac.* 210: *Mo.* 34: *Cro. Eliz.* 166.

III. 1. There must be a good consideration given, or at least said to be given, for lands, in these deeds; and for a competent sum of money, is a good consideration; but not the general words for divers considerations, &c. *Mod. Ca.* 777. Where money is mentioned to be paid in a bargain and sale, and in truth no money is paid, some of our books tell us this may be a good bargain and sale; because no averment will lie against that which is expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against fraudulent deeds. *Dyer* 90. If no consideration of money is expressed in a deed of bargain and sale, it may be supplied by an averment, that it was made for money: and after a verdict on a trial, it shall be intended that evidence was given, at the trial, of money paid. 1 *Ventr.* 108. If lands are bargained and sold for money only, the deed is to be inrolled according to the statute; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. 2 *Inst.* 672: 2 *Lew.* 56.

If a man in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day the party has an action for the money, for it is a sale, be the money paid presently or hereafter. *Dyer* 337 a.

2. If the deed of bargain and sale be not inrolled within the six months, (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively,) it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without inrolment, yet in this case if the deed be not inrolled, it will be good neither for the trees nor the land. *Dyer* 90: 7 *Rep.* 40: 2 *Bull.* 8. A bargain and sale of a manor to which an advowson is appendant by indenture not inrolled, will not pass the advowson or the manor, for it was to go as appendant. *Bro. Cas.* 240.

But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. *Dyer* 90.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first inrolled; if afterwards the first deed is also inrolled within six months, the first buyer shall have the land; for when the deed is inrolled, the bargainee is seised of the land from the delivery of the deed, and the inrolment shall relate to it. *H.b.* 165: *Wood's Inst.* 259. Neither the death of the bargainor or bargainee, before the inrolment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee: but the estate of freehold is in the bargainor, until the deed is inrolled; so that the bargainee cannot bring any action of trespass before entry had: though it is said he may surrender, assign, &c. *Cro. Jac.* 52: *Co. Lit.* 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the inrolment. *Sid.* 310. Upon the inrolment of the deed, the estate settles *ab initio*, by the *Stat.* 27 *H. 8. c.* 16; which says, that it shall not

vest, except the deed be inrolled; and when it is inrolled, the estate vests presently by the statute of Uses. 1 *Danv. Abr.* 696.

If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is inrolled; this is a good inrolment within the statute. *Style* 462. None can make a bargain and sale of lands, that hath not the actual possession thereof at the time of the sale; if he hath not the possession, the deed must be sealed upon the land, to make it good. 2 *Inst.* 672: 1 *Lill.* 290.

Houses and lands in London, and any city, &c. are exempted out of the statute of Inrolments. 2 *Inst.* 676. 1 *Nels. Abr.* 342.—See further tit. *Inrolments*.

IV. In pleading a bargain and sale the deed itself must be shewn under seal. 1 *Inst.* 225. For though the inrolment being on record is of undoubted veracity, being the transaction of the court; yet the private deed has not the sanction of a record, though publicly acknowledged and inrolled; for it might have been falsely and fraudulently dated, or ill executed. *Co. Lit.* 225 b. 251 b; 2 *Inst.* 673: 4 *Co.* 71: 5 *Co.* 53: 2 *Rel. Rep.* 119.

It must likewise be set forth that the inrolment was within six months, or *secundum formam statuti*, &c. vide *Allen* 19: *Cartier* 221: *Style* 34. *S. C.*

In pleading a bargain and sale, the party ought regularly to aver payment of the money. 1 *Leon* 170: See *Mon.* 504.

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, inrolled within six months, and the statute of uses, and did not shew that it was in consideration of money; but adjudged, that after a verdict, as this case was, it shall be intended, that evidence was given at the trial, of money paid. 1 *Ventr.* 108.

The party that claims by any bargain and sale, must shew in what court the deed is inrolled, because he must shew all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. *Yelv.* 213: *Cro. Jac.* 291. *S. C.*: *Yelv.* 313.

BARKARY, *barkaria*, *corticulus*.] A tan-house or place to keep bark in for the use of tanners. *New-Book Entr.* tit. *Affise*, *Corp. Polit.* 2.

BARON, *baro*.] Is a French word, and hath divers significations here in England. First, it is taken for a degree of nobility next to a viscount. *Bracton*, lib. 1. cap. 8, says they are called *barones*, quasi *robore belli*. In which signification it agrees with other nations, where *baronia* are as much as *provinciae*: so that barons are such as have the government of provinces as their fee holden of the king; some having greater and others less authority within their territories. It is probable, that formerly, in this kingdom, all those were called barons that had such feignories as we now call *courts-baron*; as they were called *seigneurs* in France, who had any manor, or lordship: and soon after the conquest, all such came to parliament, and sat as peers in the lords' house. But when by experience it appeared that the parliament was too much thronged by these barons, who were very numerous it was in the reign of King John ordained that none but the *barones majores* should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the

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the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called *barons by letters patent*, or by creation, whose posterity are now by inheritance those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless there are still barons by writ, as well as barons by letters patent: and those barons who were first by writ, may now also justly be called *barons by prescription*, for that they and their ancestors have continued barons, beyond the memory of man. 2 *Inst.* 48. See tit. *Peers*. The original of barons by writ, *Camden* refers to king *Hen. 3*; and barons by letters patent, or creation, commenced 11 R. 2. *Cumb. Brit. pag.* 109. To these is added a third kind of barons, called *barons by tenure*, which are some of our ancient barons; and likewise the bishops, who, by virtue of baronies annexed to their bishopricks, always had place in the lords' house of parliament, as barons by succession. *Seager of Honour, lib. 4. cap.* 13.

There are also barons by office; as the barons of the Exchequer, barons of the Cinque Ports, &c. In ancient records, the word *baron* includes all the nobility of England, because regularly all noblemen were barons, though they had a higher dignity; and therefore the charter of King *Ed. 1*, which is an exposition of what relates to barons in *Magna Charta*, concludes *testibus archiepiscopis, episcopis, baronibus, &c.* And the great council of the nobility, when they consisted, besides earls and barons, of dukes, marquesses, &c. were all comprehended under the name *de la counceill de baronage*. *Glanv. cap.* 4. These barons have given them two ensigns to remind them of their duties; first, a long robe of scarlet, in respect whereof they are accounted *de magno concilio regis*; and secondly they are girt with a sword, that they should ever be ready to defend their king and country. 2 *Inst.* 5. A baron is *vir notabilis & principalis*: and the chief burgesses of London were in former times barons, before there was a lord mayor, as appears by the city seal, and their ancient charters.—*Hemicus 3. Rex.* Sciatis nos concessisse & hac presenti charta nostra confirmasse baronibus nostris de civitate nostra London quod eligant sibi mayor de seipfis singulis annis, &c. *Spelm. Gloss.* The earls-palatine and marches of England had anciently their barons under them; but no barons but those who held immediately of the king were peers of the realm. 'Tis certain the king's tenants were called barons; as we may find in *Mist. Favis*, and other writers: and in days of old, all men were stiled barons, whence the present law term of *baron and feme* for husband and wife; which see.

BARONY, *baronia*.] Is that honour and territory which gives title to a baron; comprehending not only the fees and lands of temporal barons, but of bishops also who have two estates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livings and preferments. The baronies belonging to bishops are by some called *regalia*, because *ex sola liberalitate regum eis olim concessa, & a regibus in feudum tenebantur*. *Blount.* Barony, *Bracton* says, (*lib. 2. cap.* 34.) is a right indivisible; and therefore if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet *si capitale messuagium sit caput*

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comitatus et caput baronie, they may not be parcelled. In ancient times thirteen knight fees and a quarter made a tenure *per baroniam*, which amounted to 400 marks *per annum*.

BARONET, *baronetus*.] Is a dignity or degree of honour, which hath precedency before all knights, as knights of the bath, knights batchelors, &c. except *Bannerets*, made *sub vexillis regis in exercitu regali in aperto bello, & ipso rege personaliter presente*. This order of baronets was instituted by King *James I.* in the year 1611, and was then a purchased honour, for the purpose of raising money to pay troops sent out to quell some insurgents in the province of *Ulster* in *Ireland*—The arms of which province, being a red or bloody hand, every baronet has added, on his creation, to his coat of arms. Their number at first was but two hundred; but now they are without limitation: they are created by patent with an *habendum sibi & heredibus masculis, &c.*

BARON AND FEME. The law term for *Husband and Wife*.

Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state, is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous and unscriptural marriages, is the province of the Spiritual Court.—Taking marriage in a civil light, the law treats it as it does all other contracts; on this part of the subject therefore, as well as on what relates to marriage promises, marriage settlements, &c. See this Dict. title *Marriage*.

By marriage, the husband and wife are one person in law. 1 *Inst.* 112.—that is, the very being or legal existence of the woman, is suspended during the marriage; or at least is incorporated and consolidated into that of her husband: under whose wing, protection and cover she performs every thing; and is therefore called in our law-french a *feme covert*, [*sæmina viro coopta*]; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her *coverture*. Therefore if an estate be granted or conveyed to an husband and wife and their heirs, they do not take by moieties, as other jointenants, but the intire estate is in both. 2 *Lev.* 39. And if an estate be granted to an husband and wife, and another person, the husband and wife have but one moiety, and the other person the other moiety. *Litt.* § 291.—A woman may be attorney for her husband; for that implies no separation from, but is rather a representation of her lord. *F. N. B.* 27. Upon this principle of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage.

We may consider the effect of these rights, duties and disabilities, according to the following arrangement.

- I. 1. Of Grants and Contracts between Husband and Wife;
2. Of them being Evidence for or against each other.
- II. What Acts and Agreements of the Wife before Marriage bind the Husband.
- III. 1. Of the Husband's Power over the Person of his Wife, and of her Remedy for any Injury done to her by him.
2. Of Actions by him for criminal Conversation with her.

IV. Of

BARON AND FEME I. 1. 2.

IV. *Of her Interest in her Estate and Property; and her's in his, as to her Paraphernalia.*

V. *Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and therein of a Wife that is Executrix or Administratrix.*

VI. *Of her Contract during Marriage, and how far the Husband is bound by such Contracts; and where a Wife shall be considered as a Feme Sole.*

VII. *Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a civil Action.*

VIII. *What Acts done by the Husband, or Wife alone, or jointly with the Wife, will bind the Wife; and therein of her Agreement or Disagreement to such Acts after the Death of the Husband.*

IX. *Where the Husband and Wife must join in bringing Actions.*

X. *Where they must be jointly sued.*

XI. *Of the Effect of Divorce; and of separate Maintenance, Alimony and Pin-Money.*

I. 1. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by *Stat. 27 H. 8. c. 10*, a man may covenant with other persons to stand seised to the use of his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seised to her use. A man may devise lands by will to his wife, because the devise doth not take effect till after his death. *Co. Litt. 112*

As to devises by femes covert. See tit. *Devise, Will*.

According to some books, by custom of a particular place, as of *Tork*, the wife may take by immediate conveyance from the husband. *Fitz. Prescription 61. Bro. Custom. 56*. And it seems that a *donatio causa mortis* by husband to wife may be good; because that is in the nature of a legacy. *1 P. Wms. 441*.

Where the husband or wife act *en autre droit*, the one may make an estate to the other; as if the wife has an authority by will to sell, she may sell to her husband. *1 Inst. 112 a. 187 b.* and the notes there.

If the feme obligee take the obligor to husband, this is a release in law. The like law is if there be two femes obligees, and the one take the debtor to husband. *1 Inst. 264 b: Cro. Car. 551*.

In the case of *Smith v. Stafford*, (*Hob. 216*), the husband promised the wife before marriage, that he would leave her worth 100*l*. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but *Hobart* were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of *Gage v. Atton*; (*1 Salk. 325: 12 Mod. 290*;) the case there arose upon a bond executed by the husband to the wife before marriage, with a condition, making it void if she survived him, and he left her 1000*l*. Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord C. J. *Holt* differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case she survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt; but that a bond-debt was a present debt, and the condition was not

precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into Chancery; the bond was there taken to be the agreement of the parties and relief accordingly decreed. *2 Vrra. 481*—A like decree was made in the case of *Caunt v. Buckle*, *2 P. Wms. 2431* and see *2 Freem. 205*.—See tit. *Bankrupt IV. 3*.

A. before marriage with M. agrees with M. by deed in writing, that she, or such as she should appoint, should, during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, This agreement being with the feme herself before marriage, was by the marriage extinguished. *Chan. Ca. 21* But where a man before marriage mitted with the feme to make a settlement of certain lands, before the marriage should be solemnized; they intermarried before the settlement, and then the baron died: On a bill by the widow for an execution of the articles, it was decreed against the heir at law of the baron, that the articles should be executed. *2 Vent. 343*.

2. In trials of any sort, Husband and Wife are not allowed to be evidence, for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*;" and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*." But where the offence is directly against the person of the wife, this rule has been usually dispensed with; (*State Trials, vol. 1. Lord Audley's case, Stra. 633*;) and therefore by *Stat. 3 H. 7. c. 2*, in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. Nor in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. *1 Comm. 443, 4*.

The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage on an indictment, on *Stat. 1 Jac. 1. c. 11*, for a second marriage. But the second wife or husband may be a witness; the second marriage being void. *Bull. N. P. 287: 1 Hal. P. C. 693*.

In *Raym. 1*, there is an opinion, that a husband and wife may be witnesses against one another in treason; but the contrary is adjudged, *1 Brownl. 47*: see *2 Keb. 403* and *1 H. P. C. 301*.—The rule in *Lord Audley's case*, is denied to be law. *Raym. 1*; and perhaps was admitted on the particular circumstances of the facts which were detestable in the extreme, the husband having assisted in the rape of his wife.—In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment, that a child was supposititious, the husband of one of the defendant's was admitted to give evidence of the birth, but refused as to the subornation. *Sid. 377: 2 Keb. 403: Mar. 120*.—And the evidence of a wife has been disallowed even against others, where her husband might be indirectly in danger. *Dalt. 540: Leach's Hawk. P. C. ii. 607, 8*.—A husband and wife may demand surety of the peace against each

each other, and their evidence must then of necessity be admitted against each other. 1 *Hawk. P. C.* 253; see *Stra.* 1231; and the other authorities cited by *Hawkins*.

The wife of a bankrupt may be examined by the commissioners—See tit. *Bankrupt*, III 1.

It seems that a wife may be evidence to prove a fraud on the husband, particularly if she were party thereto, as in case of a marriage-brochage agreement. *Sid.* 431: see *post*. II. And in cases of seduction. *L. E.* 55.—And in civil actions, where the husband is not concerned in the action, but the evidence is *collateral* to discharge the defendant, by charging the husband. 1 *Stra.* 504; and see 1 *Stra.* 527.

II. As by marriage the husband and wife become one person in law, therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage. 4 *Co.* 60: 5 *Co.* 10: *Keilw.* 161: *Co. Lit.* 55: *Hill.* 72: *Cro. Car.* 304.

But in cases which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void; and therefore if a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; but she herself cannot without the consent of her husband determine the lease in either case. 5 *Co.* 10.

So where a warrant of attorney was given to confess a judgment to a feme sole, the court gave leave, notwithstanding the marriage, to enter up judgment; for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a feme sole, who marries before attornment, yet the tenant may attorn afterwards: otherwise if a feme sole gives a warrant of attorney, and marries, for that is to charge the husband. 1 *Salk.* 117, 397.

But if a feme sole makes her will, and devises her land to J. S. and afterwards marries him, and then dies, yet J. S. takes nothing by the will, because the marriage was a revocation of it. 4 *Co.* 60.—See tit. *Devise, Will*.

Equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, it was decreed to be delivered up. See 2 *Chan. Rep.* 41, 79, 81: 2 *Vern.* 17: 2 *Ves.* 264: see *tit.* I. 2.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband; though it was intimated that this was with the privy of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her

children before she put herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. 1 *Vern.* 408.

III. 1. By marriage the husband hath power over his wife's person; and by the old law he might give her moderate correction. 1 *Hawk. P. C.* 258; but this power was confined within reasonable bounds. *Moor.* 874: *F. N. B.* 80—In the time of Charles II. this power of correction began to be doubted. 1 *Sid.* 113: 3 *Kebl.* 433. The courts of law however, still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour, *Stra.* 478, 875. But if he threaten to kill her, &c. she may make him find surety of the peace, by suing a writ of *supplicavit* out of Chancery, or by preferring articles of the peace against him in the court of King's Bench, or she may apply to the Spiritual Court for a divorce, *propter sevitiam*. *Crom.* 28. 136: *F. N. B.* 80: *Hell.* 149. *cont.* 1 *Sid.* 113, 116: *Dalh. c.* 68: *Lamb.* 7: *Crom.* 133.

So may the husband have security of the peace against his wife. *Stra.* 1207.

But a wife cannot, either by herself or her *prochein amy*, bring a *hominie replegiando* against her husband; for he has by law a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the Spiritual Court for a divorce *propter sevitiam*; and the nature and proceedings in the writ *de homine replegiando* shew that it cannot be maintained by the wife against her husband. *Proc. in Ch.* 492.

The courts of law will grant a *habeas corpus* to relieve a wife from unjust imprisonment.

2. The ground of the action for adultery, is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue.

In this action the plaintiff must bring proof of the actual solemnization of a marriage; nothing shall supply its place: cohabitation or reputation are not sufficient, nor any collateral proof whatever. 4 *Burr.* 2057: *Bull. N. P.* 27: *Doug.* 162: *Ejff. N. P.* 343.—But it is not necessary to prove a marriage according to the ceremony of the church of England; if the parties are Jews, Quakers, &c. proof of a marriage according to their rites is sufficient. *Bull. N. P.* 28.—The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant's letters to her; but the wife's letters to the defendant will be no evidence for him. *Id.*

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such on the one hand as go in aggravation of damages, and to shew the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of damages. *Bull. N. P.* 27: *Ejff.* 343, 4.—The defendant may prove particular acts of criminality in the wife, previous to her guilt with him, but not her general character, in extenuation. *Id.* *ib.*

If a woman is suffered by her husband to live as a common prostitute, and a man is thereby drawn into *crim. con.*

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no action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. *Id. ib.*

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 *Term Rep.* 657, in the case of *Duberly v. Gunning*.—See 12 *Mod.* 232.

It seems to be in the discretion of the court to grant a new trial in this action, on account of excessive damages; but which they will be very cautious in doing, 4 *Term Rep.* 651.

If adultery be committed with another man's wife without any force, but by her own consent, though the husband may have assault and battery, and lay it *vi & armis*, yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law; and therefore they proceed below, either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above. 7 *Mod.* 81.

IV. *As to the lands of the wife.* The freehold or right of possession of all her lands of inheritance, vests in the husband immediately upon the marriage, the right of property still being preserved to her. 1 *Inst.* 351 a: 273 b: 326 b. in note. This estate he may convey to another.—An incorrect statement in the book called *Cases in Equity, temp. Ld. Talbot*, p. 167, of what was delivered by his lordship in the case of *Robinson v. Cummins*, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See *Cruise on Recoveries*; and post. tit. *Fine and Recov.*—By Stat. 32 H 8 c. 28, leases of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be reserved to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife.—By the same act it is provided that no fine or other act done by the husband only of the inheritance or freehold of his wife shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines whereunto the wife is party and privy [and the above mentioned leases] only excepted. As to alienations of a husband's estate by a woman tenant in dower, &c. see Stat. 11 H. 7. c. 20, which makes them void. See post. Div. VIII. and also tit. *Forfeiture*.

As to chattels real, and things in action of the wife; where the husband survives the wife.

At the common law, no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes which gave it to the next of kin, and if there were persons of equal kindred, whichever took administration first was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether if the husband survived her he was in-

titled to the benefit of it or not. See 1 *Inst.* 351: 4 *Inst.* 87: *Rel. Ab.* 346: *All.* 15: *Co. Eliz.* 466: 3 *C. R.* 37: *Gill. Ca. Eq.* 234.—See tit. *Executor*. I. 1: V. 8.

Upon the construction of the Statute of Distributions, (see tit. *Executor*, V. 8,) it has been held that the husband may administer to his deceased wife; and that he is entitled for his own benefit to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her, and reduced into possession, or contingent, or recoverable only by action or suit.—It was however made a question after the Stat. 29 Car. 2. c. 3. § 25. whether if the husband having survived his wife, afterwards die, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative or his wife's next of kin were entitled thereto. But by a series of cases it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration, follows the right of the estate, and ought in case of the husband's death, after the wife, to be granted to the next of kin of the husband. See Mr. *Hargrave's Law Tracts* 475. And that if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 *P. Wms.* 378, 382.

If the wife survive the husband.—As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal.—All chattels personal, become the property of the husband immediately on the marriage; he may dispose of them, without the consent or concurrence of his wife; and at his death, whether he dies in her life-time, or survives her, they belong to his personal representative. See 10 *Co.* 42: 2 *Inst.* 510.

With respect to her *chattels real*, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (*Dy.* 74.) to have been determined by all the judges in a case in 6 L. 6. The Court of Chancery first broke through this rule, and supported such future dispositions when made by way of trust; their example was followed by the courts of law in *Mat. Manning's case*, 8 *Rep.* 94 b. and *Lampert's case*, 10 *Rep.* 46 b. This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest created by way of remainder. If a person limits a real estate to A. for life, and after the decease of A. and if B. dies in A.'s life-time, to C. for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

Now if a person marries a woman possessed of, or entitled to the trust of a present, actual, and vested interest in

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in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he in this case intitled to dispose of it from her by will. *Prac. Ch.* 418: 2 *Vern.* 270.

If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is such an interest, as upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it; unless perhaps in those cases where the possibility, or contingency, is of such a nature, that it cannot happen during the husband's life-time. 1 *Inst.* 46 b: 10 *Rep.* 51 a: *Hutt.* 17: 1 *Salk.* 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this suppose: the provision to be made before marriage; for if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1 *Cha. Ca.* 225: 1 *Vern.* 7, 18: 1 *Eq. Ab.* 58.

If a wife have a chattel real *en auter droit*, as executor or administrator, the husband cannot dispose of it. 1 *Inst.* 351 a. But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 *Wilf.* 277.—And if a woman be jointenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other jointenant. 1 *Inst.* 185 b.—And the husband hath not power over a chattel real, which the wife hath as guardian. *Plowd.* 294.

Things in action do not vest in the husband till he reduces them into possession. It has been held that the husband may sue alone, for a debt due to the wife upon bond; but that if he join her in the action, and recover judgement and die, the judgment will survive to her. 1 *Vern.* 396: see *All.* 36: 2 *Lev.* 107: 2 *Vex.* 677. The principle of this distinction appears to be, that his bringing the action in his own name alone, is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the *scire facias* on the judgment. In 3 *Atk.* 21, Lord Hardwicke is reported to say, that at law if the husband has recovered a judgment for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled.

These appear to be the general principles of the courts of Law, respecting the interest which the husband takes in, and the power given him over the things in action of his wife; but the courts of Equity have admitted many very nice distinctions respecting them.

1. A settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in his wife's life-time, to the whole of her things in action; but it has been said, that if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which

has not been reduced [into his power] by the husband in his life-time; so if the settlement is in consideration of a particular part of her fortune, such of the things in action as are not comprised in that part, it has been said, survive to the wife. See *Pre. Ch.* 63: 2 *Vern.* 502: *Talb.* 168. In the case of *Blois v. Countess of Hereford*, (2 *Vern.* 501.) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was decreed to belong to the representative of the husband; and it was then said, that in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See *Eq. Ab.* 69.

2. If the husband cannot recover the things in action of his wife but by the assistance of a Court of Equity, the court upon the principle, that he who seeks equity, must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2 *P. Wms.* 641: 3 *P. Wms.* 12: *Talb.* 179: 2 *Vex.* 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 *Vex.* 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 *Vex.* 561, 2; yet where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3 *Atk.* 21.

3. Voluntaries and assignees under a commission of bankruptcy, are in cases of this nature subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2 *Atk.* 420: 1 *P. Wms.* 382. But if the husband actually assigns either a trust term of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a provision for the wife. 1 *Vern.* 7. See 1 *Vern.* 18.—and *Ches's P. Wms.* i. 459, in note, where Lord Thurlow is reported to have said in a case before him “that he did not find it any where decided, that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife; but that a court of equity has much greater consideration, for an assignment actually made by contract, than for an assignment made by mere operation of law; for in this latter case the creditor should be exactly in the case of the husband, and subject precisely to the same equity in favour of the wife.”

4. But notwithstanding the uniform and earnest solicitude of the courts of equity, to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it, without the assistance of those courts, still it does not appear that they have ever interceded to prevent its being paid the husband, or to inhibit him from recovering it at law. 2 *Atk.* 420.—In *Pre. Ch.* 414, it is observed, that if the trustees pay the wife's fortune, it is without remedy.

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5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood that as the husband could not dispose of lands mortgaged in fee, without the wife, the estate remaining in the wife, carried the money along with it, to her and her representatives; but that as to the trust and the absolute power of a term of years, there was nothing to keep a mortgage debt, secured by a term, from going to the husband's representatives: but this distinction no longer prevails; and it is now held that tho' in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See 1 *P. Wms.* 458: 2 *Atk.* 207.

6. If baron and feme have a decree for money in right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by *Hyde, Ch. J.* and his certificate confirmed by *Lord Chancellor.* 1 *Cba. Ca.* 27. If the wife has a judgment, and it is extended upon an *assize*, the husband may assign it without a consideration. So if a judgment be given in trust for a feme sole, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree, to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3 *P. Wms.* 200.

The above summary on this part of the law relative to baron and feme, is principally taken from the ingenious and laborious notes on 1 *Inst.*—To which may be added the following miscellaneous observations.

7. If a lease be conveyed by a *feme sole*, in trust for the use of herself, if she afterwards marries, it cannot be disposed of by the husband: if she dies, he shall not have it, but the executors of the wife. *March* 44: See 2 *Venn.* 270.

If a *feme* having a rent for life takes husband, the baron shall have action of debt for the rent incurred during the coverture, after the death of the *feme.* 1 *Danv.* 719. And arrears due in the life-time of the husband, after his death, shall survive to the wife, if she outlives him, and her administrators after her death. 2 *Lut.* 1151. A *feme* lessee for life, rendering rent, takes husband and dies, the baron shall be charged in action of debt for the rent which was grown due during the coverture, because he took the profits out of which the rent ought to issue. *Kilw.* 125 *Raym.* 6.

If a *feme* covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her, and costs; the husband may release these costs, for the marriage continues, and whatever accrues to the wife during coverture, belongs to the husband; per *Holt Ch. J.* on motion for prohibition. 1 *Salk.* 115.

But if the husband and wife be divorced *a mensâ et thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband. 1 *Roll. Rep.* 426: 3 *Bull.* 204: 1 *Roll. Abr.* 343: 2 *Roll. Abr.* 293. 1 *Salk.* 115.

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A legacy was given to a *feme* covert, who lived separate from her husband, and the executor paid it to the *feme*, and took her receipt for it: yet on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. 1 *Venn.* 261.

If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes intitled to an orphanage share of personal estate, it shall not belong to the husband, but to the wife. 3 *P. Wms.* 37.

Trinkets and jewels given to a wife before marriage, become the husband's again by marriage, and are liable to his debts, if his personal estate is not sufficient. 2 *Atk.* 104.

8. And as the husband may generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods, which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the Civil Law, and is derived from the *Greek*, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a Peeress usually worn by her, have been held to be *paraphernalia.* *Moo.* 213.—Here she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. *Cro. Car.* 343, 7: 1 *Ro. Ab.* 911: 2 *Leon.* 166.—Neither can the husband devise by his will such ornaments or jewels of his wife; though during his life, perhaps he hath the power to sell or give them away. *Noy's Max.* c. 49: 2 *Comm.* 436.—But if she continue in the use of them, till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. 1 *P. Wms.* 730.—And her necessary apparel is protected even against the claim of creditors. *Noy's Max.* c. 47.

That the widow's *paraphernalia* are subject to the debts, but preferred to the legacies of the husband; and that the general rules of marshalling assets are applicable in giving effect to such priority, see not only 1 *P. Wms.* 730 quoted above, but also 2 *P. Wms.* 544: 2 *Atk.* 104, 642: 3 *Atk.* 369, 393: 2 *Vez.* 7. See also *Cha. Ca.* 240: 1 *C. R.* 27.

In one place *Rolle* says, the wife shall have a necessary bed and apparel. 1 *Roll.* 911. l. 20.—See further on the subject of *Paraphernalia.* *Com. Dig.* tit. *Baron and Feme* (F. 3.)

V. If a *Feme sole* indebted takes husband; her debt becomes that of the husband and wife, and both are to be sued for it; but the husband is not liable after the death of the wife, unless there be a judgment against both during the coverture. 1 *Roll. Ab.* 351. *F. N. B.* 120. Where there is judgment against a *feme sole*, who marries and dies, the baron shall not be charged therewith: though if the judgment be had upon *joint assets* against *baron and feme*, and then the *feme* dies, he shall be charged. 3 *Mod.* 186. In action brought against a *feme sole*, if, pending the action, she marries, this shall not abate the action; but the plaintiff may proceed to judgment and execution against her, according as the action was commenced. 1 *Lut.* 217: *Trin.* 12 *W.* 3. And if *allegations* be brought to

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to remove the cause, the plaintiff is to move for a *procedendo* on the return of the *habeas corpus*: also the court of B. R. may refuse it, where brought to abate a just action. 1 *Salk.* 8.

In general the husband is liable to the wife's debts, contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. *F. N. B.* 265: 20 *Hen. 6.* 22 b: *Moor* 468. 1 *Rel. Abr.* 352: 3 *Mol.* 186.

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 *Sid.* 337.

If judgment be against husband and wife, he dies, and she survives, execution may be against her. 1 *Rel. Abr.* 890. l. 10, 50: See post X.

Where a man marries a *widow executrix*, &c. her evidence shall not be allowed to charge her second husband with more than she can prove to have actually come to her hands. Agreed *per cur.* *Abr. Eq. Ca.* 227. *Hil.* 1719.

D. confessed a judgment to F. who made his wife, the plaintiff, executrix, and died; she administered and married a second husband, and then she alone, without her husband, acknowledged satisfaction, though no real satisfaction was made. The court held that this was not good. *S. d.* 31.

A wife *administratrix* under 17 shall join with her husband in an action; *per Tinsden, J.* *Mol.* 297.

If a feme *executrix* takes *baron*, and *relinquish* all actions, this shall be a bar during the coverture without question; by the justices. *Br. Releases*, pl. 29.

If a feme *executrix* take *baron*, and the *baron* puts himself in arbitrament for death of the testator, and award is made, and the *baron* dies, the feme shall be barred; *per tot' cur'*. Brooke says, that from hence it seems to him, that the release of the *baron* without the feme is a good bar against the feme; *quod conceditur*, anno 39 *H.* 15; and therefore there he excepted those debts in his release, otherwise they had been extinct. *Br. Releases*, pl. 79.

If a man marries an *administratrix* to a former husband, who in her widowhood wasted the assets of her intestate, the husband is liable to the debts of the intestate, during the life of the wife; and this shall be deemed a *deceit* in him. *Cro. Car.* 603.

VI. Every gift, grant, or disposition of goods, lands, or other thing whatsoever, and all obligations and feoffments made by a feme *covert*, without her husband's consent, are void. 1 *H.* 5, 125: *Fitz. Covert.* 18.

The husband is obliged to maintain his wife in necessities; yet they must be according to his degree and estate, to charge him; and necessities may be suitable to a husband's degree of quality, but not to his estate; also they may be necessary, but not *ex necessitate* to charge the husband. 1 *Med.* 123: 1 *N. J. Abr.* 354. If a woman buys things for her necessary apparel, though without the

consent of her husband, yet the husband shall be bound to pay it. *Brownl.* 47. And if the wife buys any thing for herself, children, or family, and the *baron* does any act precedent or subsequent whereby he shews his consent, he may be charged thereupon. 1 *Sid.* 120. The expences of a feme *covert's* funeral, paid by her father, while her husband had left her, and was gone abroad, deemed necessities. *H. Black. Rep.* 90. Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessities for her, because he took her for better, for worse: and so he is if he runs away from her, or turns her away: but if she goes away from her husband, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he take her again. 1 *Salk.* 119: see 1 *Str.* 647, 706: and as to actions against fems *covert* having eloped see 2 *Black. Rep.* 1079.

If a man cohabits with a woman, allows her to assume his name, and passes her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessities; and therefore *ne unquus accouple* is a bad plea in an action on the case for the debt of a wife; it is good only in dower or an appeal. *Bull. N. P.* 136: *Esf. N. P.* 124.

Although a husband be bound to pay his wife's debts for her reasonable provision, yet if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. *Pajch.* 3 *Ann. Mod. Caf.* 147, 171. If there be an agreement in writing between husband and wife to live separate, and that the shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. *Mich. Geo.* 1. *Mod. Ca. in L. & E.* 22.

Where there is a separation by consent, and the wife hath a separate allowance, those who trust her, do it upon her own credit. 1 *Salk.* 116. If a husband makes his wife an allowance for clothes, &c. which is constantly paid her, it is said he shall not be charged. 1 *Sid.* 109. And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the news-papers, is no legal notice not to trust her. 1 *Vent.* 42.

It may now safely be assumed as a principle, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts"—This was finally decided and settled in the case of *Englehead v. Lady Langborough*, *M.* 23 *Geo.* 3. and *H.* 23 *Geo.* 3. where in actions against the defendant for goods sold the pleaded coverture; and the plaintiff's replication "that she lived separate and apart from her husband, from whom she had a separate maintenance; and so was liable to her own debts," was on demurrer holden to be good; and plaintiff had judgment.—In the above case the plea also stated that the husband lived in *Ireland*, which being out of the process of the court, some stress was laid on it in the decision; but in the case of *Barwell v. Brock*, *H.*

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24 Geo. 3. it was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this principle was recognized in *Corbett v. Poelnitz* which followed it. 1 Term Rep. 5.

It has been said, that when the husband and wife live apart, the wife must have a separate maintenance from the husband, in order to discharge him. 4 Burr. 2078.—But this opinion seems much shaken by that of Lord Mansfield, in 1 Term Rep. 5—11, where he says, the cases (already mentioned) do not rest on one or two circumstances, but on the great principle which the court has laid down “that where a woman has a separate estate, and acts and receives credit as a feme sole, she shall be liable as such”—A principle which extends further than the facts of any cases yet determined.—And it seems that now a determination in 12 Mod. 603, where coverture and the life of the husband in Ireland was given in evidence in an action against a woman who had traded for 12 years as a widow, is not law.

The *baron* in an account shall not be charged by the receipt of his wife, except it came to his use. 1 Danv. 707. Yet if she usually receives and pays money, it will bind him in equity. *Abi. Caf. Eq.* 61. And why not in law, in an action for money had and received? For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. *Sul.* 425.

If the wife pawn her cloaths for money, and afterwards borrows money to redeem them, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 Show. 283.

If a wife takes up clothes, as silk, &c. and pawns them before made into clothes, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawned; per Holt Ch. J. at Gullthall. 1 Salk. 118.

A wife may use the goods of her husband, but she may not dispose of them: and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 Inst. 308, 310.

If the *baron* is beyond sea in any voyage, and during his absence the wife buys necessaries, this is a good evidence for a jury to find that the *baron* assumes it. *Sid.* 127.

A husband who has abjured the realm, or who is banished, is thereby *civiliter mortuus*; and being disabled to sue or be sued in right of his wife, she must be considered as a *feme sole*; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. *Bra. Baron and Feme*, 66: *Co. Lit.* 133; 1 *Rol. Rep.* 400: *Moon* 851: 3 *Bullst.* 188: 1 *Bullst.* 140: 2 *Vern.* 104.

In *assumpsit* the defendant proved that she was married, and her husband alive in France, the plaintiff had judgment, upon which, as a verdict against evidence, she moved for a new trial, but it was denied; for it shall be intended that she was divorced: besides the husband is an alien enemy, and in that case, why is not his wife chargeable as a *feme sole*? 1 Salk. 116: *Deerly v. Duchs of Mazarine*.

By the custom of London, if a *feme covert* trades by herself, in a trade with which her husband does not intermeddle, she may sue and be sued as a *feme sole*. 10 Mod. 6.

But in such case she cannot give a bond and warrant of attorney to confess a judgment: and when sued as a *feme sole*, she must be sued in the courts of the city of London; for if sued in the courts above, the husband must be joined. So the wife alone cannot bring an action in the courts above, but only in the city courts; and this even though her husband be dead; if the cause of action accrued in his life time. 4 Term Rep. 361, 2.

Where a married man is transported for any felony, &c. the wife may be sued alone, for any debt contracted by her, after the transportation. 1 Term Rep. 9.

VII. In some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit bare theft or burglary by the coercion of her husband, (or even in his company which the law construes a coercion,) she is not guilty of any crime, being considered as acting by compulsion, and not of her own will.

But for crimes *mala in se*, not being merely offences against the laws of society, she is answerable; as for murder and the like; not only because these are of a deeper die; but also since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of) no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 Hale's P. C. 47. And this as well because of the odiousness and dangerous consequence of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 Comm. 28, 29. (But she shall not be considered criminal for receiving her husband, though guilty of treason, nor for the receiving another offender jointly with her husband. *Leach's Hawk. P. C. i. c. 1. § 11. in note.*)—See tit. *Accessary*.

If also a *feme* commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder or robbery, though in company with, or by coercion of her husband, she is punishable. 1 Hawk. P. C. c. 1. § 11.—The distinction between her guilt in *burglary* or *theft* and *robbery*, seems to be, that in the former, if committed through the means of her husband “she cannot know what property her husband may claim in the goods taken; 10 Mod. C3;” but in robbery the wife has an opportunity of judging in what sort of right the goods are taken. *Leach's Hawk. P. C. i. c. 1. § 9. in note.*

If the wife receive stolen goods of her own separate act, without the privity of her husband, or if he knowing thereof, leave the house and forsake her company, the alone shall be guilty as accessary. 22 Aff. 40: *Dalt.* 157: 1 Hale P. C. 516.

In inferior misdemeanors also, another exception may be remarked; that a wife may be indicted and set in the pillory with her husband, for keeping a brothel; for this is an offence touching the domestic economy or

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government of the house, in which the wife has a principal share; and is also such an offence as the law precludes to be generally conducted by the intrigues of the female sex. 1 *Hawk. P. C. c. 1* § 12: 10 *Mod.* 63.

A feme covert generally shall answer, as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 *Co.* 71: 1 *Hawk. P. C. c. 1* § 9. See *Moor* 513: 11 *Mod.* 93: *Nov* 103: *Savil* 25: *Cro. Jac.* 482: 11 *Co.* 61.

A feme may be indicted alone for a riot. *Dalt.* 447.—For selling gin against the *Stat. 9 Geo. 2. c. 3*: *Str.* 1120.—For recalcitancy. *Id.* 16: *Hob* 90: 1 *Sid.* 410: 11 *Co.* 64: *Sav.* 25.—For being a common scold. 6 *Mod.* 213, 239.—For assault and battery. *Salk.* 384.—For foretelling. *Sid.* 410.—For usury. *Skin* 348.—For barratry. 1 *Hawk. P. C. c. 81*. § 6. See *c. 1*. § 13.—For a forcible entry. 1 *Hawk. P. C. c. 4* § 35.—For keeping a gaming house. 10 *Mod.* 335.—Keeping a bawdy house, if the husband does not live with her. 1 *Bac. Abr.* See *ant.*—For trespass or slander. *Kilw* 61: *Ro. Ab.* 251: *Leon* 122: *Cro. Car.* 376.—See 1 *Hawk. P. C. c. 1*. § 13 in note.

A man must answer for the trespasses of his wife: if a *feme covert* slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 *Rep.* 62.—See post. X.

Husband and wife may be found guilty of *nuisance, battery, &c.* 10 *Mod.* 63.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same; as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 *Hawk. P. C. c. 1*.

For the punishment of femes covert, See *tit. Felony, Treason, &c.*

VIII. A wife is *sub potestate viri*, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of the husband; if *baron and feme* levy a fine, this will bar the *feme*: and where the *feme* is examined by writ, she shall be bound; else not. 1 *Danv. Abr.* 708. See ante IV.

If a common recovery be suffered by husband and wife of the wife's lands, this is a bar to the wife; for she ought to be examined upon the recovery. *Pl. Com.* 514 a: 10 *Co.* 43 a. 1 *Roll.* 347. l. 19.

So if husband and wife are vouches in a common recovery, the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. 1 *Sid.* 11: *Str.* 319, 320.

A recovery, as well as a fine by a feme covert, is good to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 *Co.* 43: 2 *Roll. Abr.* 395.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is ex-

amined by the mayor or other officer, binds the wife after the husband's death. 2 *Inst.* 673.—And it seems that by *Stat.* 34 *Hen. 8. c. 22*, all such customary conveyances shall be of force notwithstanding the *Stat.* 32 *Hen. 8. c. 28*. See ante *Div.* IV.

So by custom in *Denbigh in Wales*, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs as a fine does, and this custom is not taken away by *Stat.* 27 *H. 8. c. 25*; for it is reasonable and agreeable to some customs in *England*. *Dy.* 363 b.

So a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. *Com. Dig.* tit. *Baron and Feme* (G. 4) there cites *Litt.* 274; but which is to a different purpose.

A wife is disabled to make contracts, &c. 3 *Inst.* 110. And if a married woman enters into bond as *feme sole*, if she is sued as *feme sole*, she may plead *Non est factum*, and the coverture will avoid her bond. 1 *Lil. Abr.* 217. A feme covert may plead *non assumpsit*, and give coverture in evidence, which makes it no promise, &c. *Ruym.* 395.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it. 19 *Jac.* 1. *B. R.* 2 *Shep. Abr.* 426: *Contra*, if she is used to receive money for him, or if it can be proved the money paid came to his use.

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the curtesy, because no act of a feme covert can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. *Bro. tit. Fines*, 33: 10 *Co.* 43: *Hob.* 225: 7 *Co.* 8: *Co. Lit.* 46.

Lease made by *baron and feme*, shall be said to be the lease of them both, till the feme disagrees, which she cannot do in the life of the baron. *Br. Agreement*, pl. 6.

The examination of a feme covert is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do take an estate by the fine, and part with nothing, the feme need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if *A.* levies a fine *conceit* to baron and feme, and they render to the conuzor, the feme shall be examined; so it is where she takes an estate by the fine rendering rent. 2 *Inst.* 515: 2 *Roll. Abr.* 17.

If baron and feme by fine *sur concessit* grant land to *J. S.* for ninety-nine years, and warrant the said land to *J. S.* during the said term, and the baron dies, and *J. S.* is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 *Saund.* 177: 1 *Sid.* 466. *S. C.*: 1 *Mod.* 290: 2 *Keb.* 684, 703.—See title *Fines*.

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If a husband disseise another to the use of his wife, this does not make her a disseisorese, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the *disseisin*, for the same reason: but her agreement after her husband's death will make her a disseisorese, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee. 1 *Rol. Abr.* 660: *Bro. Disseisin* 67.

But if a feme covert actually enters and commits a disseisin, either sole or together with her husband, then she is a disseisorese, because she thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another. *Co. Lit.* 35; 1 *Rol. Abr.* 660: *Bro. Disseisin* 15, 67: See 8 *Hen.* 6. 14. *cont.*

If the husband, seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions, to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 *Hen.* 8. c. 28: See ante IV: *Bro. Acceptance* 10: *Bro. Leases* 24: *Cro. Jac.* 332: 2 *And.* 42: *Co. Lit.* 45: *Plow.* 137: *Cro. Jac.* 563: *Yelv.* 1: *Cro. Eliz.* 769.

Husband and wife make a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters, the husband before any day of payment dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done either as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. *Dyer* 159: 1 *Rol. Abr.* 475: 1 *Rol. Rep.* 132.

A re-delivery by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed so as to bind her, without its being re-executed or re-attested—and circumstances alone may be equivalent to such re-delivery,

though the deed be a joint deed by baron and feme affecting the wife's land; and no fine levied. *Cocp.* 201.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the custom, which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 *Rol. Rep.* 344, 361, 372: *Cro. Car.* 7: *Cro. Eliz.* 149: 4 *Co.* 27.

A feme covert is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disagree; and that shall avoid the purchase; but if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage; but in this case, though the husband should agree to the purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase, she is not indispensibly bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it. *Co. Lit.* 3 a.

Jointress paying off a mortgage was decreed to hold over till she or her executor be satisfied, and interest to be allowed her. *Chan. Cases* 271.

The husband gave a voluntary bond after marriage to make a jointure of a certain value on his wife; the husband accordingly makes a jointure; the wife gives up the bond; the jointure is voided; the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a feme covert could no ways bind her interest. *Vern.* 427. pl. 402.

A feme covert agrees to sell her inheritance, so as she might have 200 *l.* of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the husband's debts, nor shall any promise by the wife, to that purpose, subsequent to the first original agreement, be binding in that behalf. 2 *Vern.* 64, 65. pl. 58; *Tim.* 1688.

It is a general rule that a feme covert acting with respect to her separate property, is competent to act in all respects as if she were a feme sole. 2 *Vex.* 190: 1 *Bro. C. R.* 20; and see 1 *Vex.* 163.—Where the wife, being authorised by settlement to dispose of her separate estate, contracted to sell it, the court of Chancery will bind her to a specific performance. 1 *Vex.* 517: 1 *Bro. C. R.* 20.—So the bond of a feme covert jointly with her husband shall bind her separate estate. 1 *Bro. C. R.* 16: 2 *Vex.* 190.

BARON AND FEME IX. X.

IX. In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 *Roll. Abr.* 347: 2 *Mol.* 267.

But if a feme sole hath a rent-charge, and rent is in arrear and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. *Cro. El.* 2. 459: *Owen* 82. S. P.: *Moor* 584. S. C.

So if a feme sole hath right to have common for life, and she takes husband, and she is hindered in taking the common, he may have an action alone without his wife. it being only to recover damages. 2 *Bulst.* 14.

But if baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 *Bulst.* 21.

The baron may have an action alone upon the Stat. 5 R. 2. ff. 1. c. 8, for entering into the land of the feme; trespass and taking charters of the inheritance of the feme; *quare impedit*, &c. But for personal torts, they must join, though the baron is to have the damages. 1 *Dan.* 709: 1 *Roll. Rep.* 360. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her without her husband. *Co. Lit.* 132, 326. An action for a battery on the wife, brought by husband and wife, must be laid to the damage of both. 2 *Lord Raym.* 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, *per quod consortium amisit*, &c. *Cro. Jac.* 538: See *Yelv.* 89.

For taking any thing from the wife, the husband only is to bring the action, who has the property; for the wife hath not the property. In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action. 1 *Roll. Rep.* 360, except as above, &c. For a personal duty to the wife, the baron only may bring the action: and the husband is intitled to the fruits of his wife's labour, for which he may bring *quantum meruit*. 1 *Lill. Abr.* 227: 1 *Salk.* 114. In case, before marriage, a feme enters into articles concerning her estate, she is as a separate person; and the husband may be plaintiff in equity against the wife. *Proc. in Chanc.* 24.

Where the feme is administratrix, the suit must be in both their names, for by the intermarriage the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration the granting administration to the feme must be set forth. *Ful.* the *Books of Entries*, and *Gold.* 40 pl. 44.

In action for goods where the feme hath as executrix, they must join, to the end that the damages thereby recovered may accrue to her as executrix in lieu of the goods. *Went. Off. Ex.* 207.

In an action upon a *trover* before marriage, and a conversion after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron alone ought to bring a *replevin*, *detinue*, &c. for the allegations admit and affirm a property in the feme at the

time of the marriage, which by consequence must have vested in the baron. 1 *Sid.* 172: 1 *Keb.* 641. S. C.: 1 *Ent.* 261: 2 *Leo.* 107. S. P.; and that he may join the wife at his election.

If *A.* declares, that the defendant being indebted to him and his wife, as executrix to one *J. S.* in consideration that *A.* would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. *Carth.* 462: 1 *Salk.* 117: *Yelv.* 84: *Cro. Jac.* 110. S. P.

Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action of debt against the obligor. *Owen* 82.

In all actions *real* for the land of the wife, the husband and wife ought to join. R. 1 *Bulst.* 21. So in actions personal for a *chose in action*, due to the wife before coverture. 1 *Roll.* 347. l. 53: *Cro. El.* 537: *Visc. Com. Dig.*

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts and injuries: and therefore in our ecclesiastical courts a woman may sue and be sued without her husband. 2 *Ro. Ab.* 298. See tit. *Action*.

X. The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all torts and trespasses during coverture, in which cases the action must be joint against them both; for if she alone were sued, it might be a means of making the husband's property liable; without giving him an opportunity of defending himself. *Co. Lit.* 133: *Doftr. Plaut.* 3: 2 *Hen.* 6. 4.

If goods come to a feme covert by *trover*, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See *Co. Lit.* 351: 1 *Roll. Abr.* 6. pl. 7: *Yelv.* 106: *Noy* 79: 1 *Leon* 312: *Cro. Car.* 254, 494: 1 *Roll. Abr.* 348. But in debt upon a *decastament* against *lumen* and feme executrix, it shall not be laid *quod devastaverunt*, for a feme covert cannot waste. 2 *Leo.* 145.

An action on the case was brought against baron and feme, for retaining and keeping the servant of the plaintiff, and judgment accordingly. 2 *Leo.* 63.

If a lease for life or years be made to baron and feme, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 *Roll. Abr.* 348.

If an action be brought against an husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *ca. sa.* shall issue to take both the husband and wife in execution. *Moor* 704.—But if the action was originally brought against herself when sole, and pending the suit she marries, the *ca. sa.* shall be awarded against her only, and not against the husband. *Cro. Jac.* 323.—Yet if judgment be recovered against an husband and wife, for the contract, nay even for the personal misbehaviour (*Cro. Car.* 513,) of the wife, during her coverture, the *ca. sa.* shall issue against the husband only: which is (says Mr. J. Blackstone) one of the many great privileges of English wives. 3 *Comm.* 414: See 3 *Wils.*

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124.—See *tit. Arrest, Bail, Execution, Action, &c.*—But in an action against husband and wife, for an assault by the wife, it was held that both may be taken in execution. 1 *Wils.* 149: See *Espinasse's N. P.* 327.

Where a woman before marriage becomes bound for the payment of a sum of money, and on her marriage separate property is settled on her, if the obligee can have no remedy against the husband, the wife's separate property is bound. But the obligee must first endeavour to recover against the husband by suing him. 1 *Bro. C. R.* 17. in note.

XI. If baron and feme are divorced *causâ adulterii*, which is a divorce à *mensâ & thoro*, they continue baron and feme: it is otherwise in a divorce à *vinculo matrimonii*, which dissolves the marriage.

The feme, after divorce, shall re-have the goods which she had before marriage. *Br. Coverture*, pl. 82. *D.* 13. pl. 63. per Fitzherbert: *Keilw.* 122 b. pl. 75.

But if the husband had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver the collusion, and have *detinue* for the whole, whereof the property may be known; and as for the rest, which consists of money, &c. she shall sue in the spiritual court. *Br. Deraignment and Divorce*, pl. 1. cites 26 *H.* 8. 7.

If a man is bound to a feme sole, and after marries her, and after they are divorced, the obligation is revived. *Br. Coverture*, pl. 82. Because the divorce being à *vinculo matrimonii*, by reason of some prior impediment, as precontract, &c. makes them never husband and wife *ab initio*; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, *viz.* that relations will make a nullity between the parties themselves, but not amongst strangers. *Lord Raym.* 521: *Hil.* 11 *W.* 3.

If a man gives lands in tail to baron and feme, and they have issue, and after, divorce is sued, now they have only frank-tenement, and the issue shall not inherit. *Br. Tail et Dones, &c.* pl. 9.

If the baron and feme purchase jointly and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. *Br. Deraignment*, pl. 18. cites 32 *Hen.* 8.

If baron alien the wife's land, and then there is a divorce *causâ præcontractû*, or any other divorce which dissolves the marriage à *vinculo matrimonii*, the wife during the life of the baron may enter by statute 32 *Hen.* 8. c. 28: *Dyer* 13. pl. 61: But vide *Ld. Raym.* 521.

But if after such alienation and divorce the baron dies, she is put to her *cui in vita ante divorcium*; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the *cui in vita*. *Mo.* 58. pl. 164: *Pach.* 8 *Eliz.* *Brayton v. Conway*.

Divorce *causâ adulterii* of the husband; afterwards the wife sues in the spiritual court for a legacy; the executor pleads the release of the baron; the release binds the wife,

for the *vinculum matrimonii* continues. *Cro. Eliz.* 908: Vide 1 *Salk.* 115.

Holt held, that if feme covert after divorce à *mensâ & thoro*, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony: and if he may release the duty, he may release the costs. 1 *Salk.* 115. pl. 4, *S. C. & S. P.* and see 1 *Vern.* 261.

A divorce was à *mensâ & thoro*, and then the husband dies intestate. The wife by bill prayed assistance as to dower and administration (it being granted to another) and distribution. The Master of the Rolls bid her go to law to try if she was entitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the distribution more properly belongs to this court; but since in that court she is such a wife as is not intitled to administration, he dismissed the bill as to distribution too, and said, if they could repeal that sentence, she then would be intitled to distribution. *Ch. Proc.* 111.

In case of a divorce à *mensâ & thoro* the law allows alimony to the wife: which is that allowance which is made to a woman for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.—And the ecclesiastical court is the proper court in which to sue for alimony. *Het.* 69.—This is sometimes called her *essozers*, for which, if the husband refuses payment there is (besides the ordinary process of excommunication in the ecclesiastical court) a writ at common law *de essoveriis habendis*, in order to recover it. 1 *Lev.* 6. It is generally proportioned to the rank and quality of the parties; but in case of an elopement and living with an adulterer, the law allows her no alimony. *Cowel.* 1 *Inst.* 235 a: 12 *Rep.* 30.

A bill may be brought in Chancery for a specific performance of an agreement by the husband with a third person, for a separate maintenance of the wife; notwithstanding that alimony belongs to the spiritual court. *Treat. Eq.* 39.

The court of chancery has decreed the wife a separate maintenance out of a trust fund on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be so applied. 2 *Vern.* 752.—And in another case the husband having quitted the kingdom, Lord Hardwicke decreed the wife the interest of a trust fund till he should return and maintain her as he ought. 2 *Atk.* 96.—Yet in a subsequent case Lord Hardwicke observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, except upon an agreement between them, and even then unwillingly. 3 *Atk.* 547.—And this latter opinion seems most reconcilable with principle; for the case of a divorce *propter sævitiam* (See 2 *Vern.* 493,) may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt, but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. *Wood's Inst.* 62: 2 *Vern.* 386: *Guth v. Guth*, MSS.—The spiritual court however would be the more proper jurisdiction if it acted *in rem*. *Lit. Rep.* 78: 2 *Atk.* 511.—But if after an agreement between husband and wife to live separate, they appear to have cohabited, equity

equity will consider the agreement as waived thereby. *Fletcher v. Fletcher*, Mich. 1788.—See *Fonblanque's Treat.* Bq. 96, 7.

Where, on a separation, lands are conveyed by the baron in trust for the feme, chancery will not bar the feme from suing the baron in the trustee's name, and a surrender or release by the baron shall not be made use of against the feme. 2 Chan. Ca. 102.

A woman living separate from her husband, and having a separate maintenance, *contracts debts*. The creditors, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts: by Lord Keeper North; and the rather, because the executor of the husband, who may have paid the debt, is no party. *Vern.* 326.

Where the husband, during his cohabitation with the wife, makes her an allowance of so much a-year for her expences, if she out of her own good housewifery saves any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality; because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; per Lord Keeper Finch. *Freem. Rep.* 304.

A term was created on the marriage of A. with B. for raising 200 l. a-year for pin-money, and in the settlement A. covenanted for payment of it. There was an arrear of one year at A.'s death, which was decreed, because of the covenant to be charged on a trust-estate settled for payment of debts, it being in arrear for one year only; *ficus* had it been in arrear for several years. *Chan. Prec.* 26.

The plaintiff's relation (to whom he was heir) allowed the wife pin-money; which being in arrear, he gave her a note to this purpose; *I am indebted to my wife 100 l. which became due to her such a day; after by his will he makes provision out of his lands for payment of all his debts, and all monies which be owed to any person in trust for his wife; and the question was, whether the 100 l. was to be paid within this trust; and my Lord Keeper decreed not; for in point of law it was no debt, because a man cannot be indebted to his wife; and it was not money due to any in trust for her. Hil. 1701. between Cornwall and the earl of Montague. But quære; for the testator looked on this as a debt, and seems to intend to provide for it by his will. Abr. Eq. Ca. 66.*

Where the wife hath a separate allowance made before marriage, and buys jewels with the money arising thereout, they will not be assets liable to the husband's debts. *Chan. Prec.* 295.

Where there is a provision for the wife's separate use for clothes, if the husband finds her clothes, this will bar the wife's claim; nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate; for in both cases her not having demanded it for several years together, shall be construed a consent from her that he should receive it; per Lord C. Maulesfield. 2 P. Wms. 82, 83.

So where 50 l. a year was reserved for clothes and private expences, secured by a term for years, and ten years after the husband died, and soon after the wife died; the ex-

ecutors in equity demanded 500 l. for ten years arrear of this pin-money; but it appearing that the husband maintained her, and no proof that she ever demanded it, the claim was disallowed. 2 P. Wms. 341.

BAR, or BARR, Lat. *barra*. Fr. *barre*.] In a legal sense, is a Plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into bar to common intendment, and bar special; bar temporary, and perpetual: bar to a common intendment is an ordinary or general bar, which usually is a bar to the declaration of the plaintiff: bar special is that which is more than ordinary, and falls out upon some special circumstance of the fact, as to the case in hand. *Terms de Ley*.

Bar temporary is such a bar that is good for the present, but may afterwards fail: and bar perpetual is that which overthrows the action of the plaintiff for ever. *Plowd.* 26. But a plea in bar, not giving a full answer to all the matter contained in the plaintiff's declaration is not good. 1 Lill. Abr. 211. If one be barred by plea to the writ, or to the action of the writ, he may have the same writ again, or his right action: but if the plea in bar, be to the action itself, and the plaintiff is barred by judgment, &c. it is a bar for ever in personal actions. 6 Rep. 7. And a recovery in debt is a good bar to action on the case for the same thing: also a recovery on *assumpsit* in case, is a good bar in debt, &c. *Cro. Jac.* 110: 4 Rep. 94.

In all actions personal, as debt, account, &c. a bar is perpetual, and in such case the party hath no remedy, but by writ of error or attain; but if a man is barred in a real action or judgment, yet he may have an action of as high a nature, because it concerns his inheritance; as for instance, if he is barred in a *formedon in descender*, yet he may have a *formedon in the remainder*, &c. 6 Rep. 7. It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever: but, according to *Pemberton* Chief Justice, this is to be understood, when it doth appear that the evidence in one action would maintain the other; for otherwise the court shall intend that the party hath mistaken his action. *Skin.* 57, 58.

Bar to a common intent is good: and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intendment, till it is shewn that there are goods: but if the plaintiff can shew by way of replication, that more goods have fallen into his hands since that time, then, except the defendant alledge a better bar, he shall be condemned in the action. *Plowd.* 26: *Kitch.* 215: *Bro. tit. Barre*.

There is a bar material, and a bar at large: bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, viz. a descent from him that was owner of the land, &c. a scotfment made by the ancestor of the plaintiff, or the like: a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by pleading, nor confess, nor avoid it, but only makes to himself a title in his bar. *Kitch.* 68: 5 H. 7. 29.

See titles *Abatement*, *Action*, *Judgment*; and especially *Pleading*.

This word Bar is likewise used for the place where sergeants and counsellors at law stand to plead the causes in

in court; and where prisoners are brought to answer their indictments, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 H. 8. c. 24.

BARRASTER, BARRISTER, [*barristerius*.] A counsellor learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed *jurisconsulti*; and in other countries, called *licentiatii in jure*; and antiently barristers at law were called *apprentices of the law*, (from the French *apprendre* to learn,) in Lat. *apprenticii juris nobiles*. *Fortesc.* The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five; and the exercises done by them, (if they were not called *ex gratia*), were twelve grand moots performed in the inns of Chancery, in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective inns: and a barrister newly called was to attend the six (or four) next long vacations the exercise of the house, *viz.* in Lent and Summer, and was thereupon for those three (or two) years stiled a vacation barrister. Also they are called *utter barristers*, *i. e.* pleaders *aufter* the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king, queen, or prince's counsel are.

From the degrees of barristers and serjeants at law, (see title *Serjeant*) some are usually selected to be his Majesty's counsel; the two principal of whom are called his Attorney and Solicitor-General.—The first king's counsel under the degree of serjeant, was Sir *Francis Bacon*, who was made *so honoris causâ*, without either patent or fee; so that the first of the modern order, who are now the sworn servants of the crown with a standing salary, seems to have been Sir *Francis North*, afterwards Lord Keeper to *Charles II.* These king's counsel must not be employed in any cause against the crown without special licence. A custom now prevails of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents, sometimes next after the king's Attorney General, but usually next after his Majesty's counsel then being.—These, as well as the queen's Attorney and Solicitor-General, rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately, (except in the court of Common Pleas, where serjeants only are admitted in term time) may take upon them the protection and defence of any suitors whether plaintiff or defendant. 3 *Comm.* 27, 28.

A counsel can maintain no action for his fees; (*Davis Pref.* 22: 1 *C. R.* 38;) which are given not as a salary or hire, but as a mere gratuity, which a barrister cannot demand without doing wrong to his reputation. *Davis* 23.

In order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to unseemly licentiousness, it hath been holden, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove ab-

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solutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. *Cro. Jac.* 90. And could feel guilty of deceit or collusion, are punishable by *Stat. Westm.* 1. 3 *E. 1. c.* 28, with imprisonment for a year and a day, and perpetual silence in the courts; and the latter punishment is still sometimes inflicted for gross misdemeanours in practice. *Raym.* 376: 3 *Comm.* 29.

Barristers, who constantly attend the *King's Bench*, &c. are to have the privilege of being sued in transitory actions in the county of *Middlesex*. But the court will not change the venue because some of the defendants are barristers. *Str.* 610. See title *Privilege*.—Pleas, before they are filed, must be signed by a barrister or serjeant. See title *Abatement, Pleading*.

BARRATOR, or BARRETOR. Lat. *barrator*, Fr. *barrateur*.] A common mover of suits and quarrels, either in courts, or elsewhere in the country, that is himself never quiet, but at variance with one or other. *Lambard* derives the word *barretor* from the Lat. *balatro*, a vile knave: but the proper derivation is from the Fr. *barrateur*, *i. e.* a deceiver, and this agrees with the description of a common *barretor* in Lord *Coke's Reports*, *viz.* that he is a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining the possession of houses and lands, or goods by false inventions, &c. 8 *Rep.* 37.

However it seems clear that no general indictment, charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours is good, without adding the words *common barretor*, which is a term of art appropriated by law to this purpose. 1 *Mod.* 288: 1 *Sid.* 282: *Cro. Jac.* 526: 1 *Hawk. P. C. c.* 81. § 9.

A common *barretor* is said to be the most dangerous oppressor in the law; for he oppresseth the innocent by colour of law, which was made to protect them from oppression. 8 *Rep.* 37. No one can be a *barretor* in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barrator*, and conclude *contra faciem*, &c. And it hath been holden, that a man shall not be adjudged a *barretor* for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false, he shall pay the defendant costs. 1 *Pol. Abi.* 355: 3 *Mod.* 98.

A barrister at law entertaining a person in his house, and bringing several actions in his name, where nothing was due, was found guilty of *barrety*. 3 *Mod.* 97. An attorney is in no danger of being convicted of *barrety*, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. *Ibid.* A common solicitor, who solicits suits, is a common *barretor*, and may be indicted thereof, because it is no profession in law. 1 *Danv. Abi.* 725.

The punishment for this offence in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a *barretor* who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. See the *Stat.* 12 *Geo.* 1, c. 29, under title *Attornies at Law*: 4 *Comm.* 134: and see *Stat.* 34 *E.* 3, c. 1: 1 *Hawk. P. C. c.* 81.

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It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 *Mod* 18: 1 *Ld. Raym.* 490: 12 *Mod.* 516: 2 *Atk.* 340: 1 *Hawk. P. C.* c. 81. § 13.

To this head may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superiour courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by *Stat. 8 Eliz. c. 2*, to be punished by six months' imprisonment, and treble damages to the party injured. 4 *Comm.* 134.

BARREL, *barillum*.] A measure of wine, ale, oil, &c. Of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hoghead; that is, thirty-one gallons and a half. *Stat. 1 R. 3. c. 13*.—Of beer it contains thirty six gallons; and of ale, thirty-two gallons. *Stat. 23 H. 8. c. 4*: 12 *Car. 2. c. 23*.—The assise of herring-barrels is thirty-two gallons wine measure, containing in every barrel usually a thousand full herrings. *Stat. 13 El. c. 11*.—The eel barrel contains thirty gallons. 2 *H. 6. c. 11*.

BARRIERS, *Fr. barrières*; *jeu de barres*, i. e. *palestra*.] A martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators; it is now disused here in England. *Coriol.* There are likewise *barrier towns*, or places of defence on the frontiers of kingdoms.

BARROW, from the Sax. *barrow*, a heap of earth.] A large hillock or mount, raised or cast up in many parts of England, which seem to have been a mark of the Roman *tumuli*, or sepulchres of the dead. The Sax. *beora* was commonly taken for a grove of trees on the top of a hill. *Kennet's Gloss.*

To BARTER, from the *Fr. barater*, or Span. *baratar*, *circumvenire*.] To exchange one commodity for another, or truck wares for wares. *Stat. 1 R. 3. c. 9*. Because probably they that exchange in this manner do endeavour, for the most part, one to over-reach and circumvent the other.—So *Bartery* the substantive in *Stat. 13 Eliz. c. 7*, of *Bankrupts*.

BARTON, or BERTON, A word used in *Devonshire*, for the demesne lands of a manor; sometimes the manor house itself; and in some places for out-houses and fold-yards. In the *Stat. 2 & 3 Ed. 6. c. 12*, *barton* lands, and demesne land, are used as *synonima*. *Blount* says it always signifies a farm distinct from a mansion—and *bertonarii* were farmers, husbandmen that held bartons at the will of the lord.—In the West, they called a great farm a *barton* or *burtun*; and a small farm, a *living*. *Blountin v. Barton and Berton*.

BAS CHEVALIERS, Low or inferior knights by tenure of a base military fee, as distinguished from bannerets, the chief or superior knights: hence we call our simple knights, *viz.* knights batchelors, *bas chevaliers*. *Kennet's Gloss.* to *Parish. Antiq.*

BASE COURT, *Fr. cour basse*.] Is any inferior court, that is not of record, as the court baron, &c. *Kitch. fol.* 95, 96.

BASE ESTATE, *Fr. bas estat*.] Or Base Tenure. That estate which base tenants have in their lands. And base tenants, according to *Lambard*, are those who perform villainous services to their lords; but there is a difference between a base estate and villenage; for to hold in pure villenage is to do all that the lord will command him; and if a copy-holder have but a base estate, he not holding by the performance of every commandment of his lord, cannot be said to hold in villenage. See *Kitch.* 41.—This Dict. title *Tenures*.

BASE FEE, Is a tenure in fee at the will of the lord, distinguished from socage free tenure: but Lord Coke says, that a base fee, or qualified fee, is what may be defeated by limitation, or on entry, &c. *Co. Lit.* 1, 18. *Bassa tenura*, or base tenure, was a holding by villenage, or other customary service, opposed to *alta tenura*, the higher tenure in capite or by military service, &c.—See tit. *Tenure*; *Tail*.

BAS VILLE, The suburbs or inferior town, as used in France.

BASELS, *basilli*, A kind of coin abolished by King Hen. 2. anno 1158: *Hollingshead's Chron.* p. 67.

BASELARD, or BASILLARD, In the *Stat. 12 Rich. 2. c. 6*, Signifies a weapon, which Mr. Speight, in his exposition upon Chaucer, calls *pugionem vel sicam*, a poniard. *Knighton, lib.* 5. p. 2731.

BASILEUS, A word mentioned in several of our historians signifying King, and seems peculiar to the kings of England. *Monasticon*, tom. 1. p. 65. *Edgar totius Angliæ basileus coris navi*.—In many places of the *Monasticon* this word occurs; and also in *Innythbus*, *Malmf-bury*, *Mat. Paris*, *H. vreden*, &c.

BASKET-TENURE of lands. See *Canons*.

BASNETUM, A *basnet*, or helmet.

BASSINET, A skin with which the soldiers covered themselves. *Blount*.

BASTARD, *bastardus*; fancifully derived from the Greek *Cassapis*, *meretrice*; more truly from the Brit. *Bastard*, *notbus*, *spiritus*; or according to *Spelman* from the German, *bastart*—*bas*, low, and *starr* risen, Sax *starr*; as up starr, *homo novus*, suddenly risen up.] One whose father and mother were not lawfully married to each other, previous to his birth; or as it has been seemingly more incorrectly phrased, "one born out of lawful wedlock."

- I. 1. *Who are Bastards, and of their Incapacities.*
2. *Of the Trial of Bastardy.*

- II. 1. *Of the Case of Infant-Bastards, their Maintenance and Protection.*

2. *Of the Murder of Infant-Bastards.*

I. 1. A bastard by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from our law; which though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition to make it legitimate, that it shall be born after lawful wedlock. 1 *Comm.* 454: 2 *Inst.* 96, 7.

BASTARD I. 1.

Blackstone observes, that the reason of our *English* law is surely much superiour to that of the *Roman*, if we consider the principal end and design of the marriage contract taken in a civil light. He then recapitulates several motives, which he concludes we may suppose actuated the Peers at the parliament of *Merton*, when they refused to enact that children born before marriage should be esteemed legitimate. 1 *Comm.* 456.—and see 1 *Inst.* 244 *b*: and 245 *a*. in the notes.

If a man marries a woman grossly big with child by another, and within three days after, she is delivered, the issue is no bastard. 1 *Danv. Abr.* 729. If a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard, but supposed to be the child of the husband. 1 *Rel. Abr.* 358.

As all children born before matrimony are bastards; so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. *Co. Jac.* 451.—See 1 *Inst.* 123 *b*. in note 1 and 2; where the time of gestation as connected with this question is enquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the usual period is forty weeks, or 280 days.—But though the child is born some time after, it only affords *presumption*, not proof of illegitimacy. The information of the late celebrated anatomist Dr. *Hunter*, is also given, from which we learn, 1. That the usual period is nine calendar months; (from 270 to 280 days;) but there is very commonly a difference of one, two, or three weeks.—2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be.—3. The Doctor said he had known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months; and he believed two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

This case of birth of children after the death of the husband, gives occasion to the writ *de ventre inspiciendo*. See title *Ventre inspiciendo*.

But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate, for he may when he arrives to years of discretion, choose which of the fathers he pleases. 1 *Inst.* 8. For this reason by the ancient Saxon laws, in imitation of the civil law, a widow was forbidden to marry for twelve months. *Ll. Ethel. A. D.* 1008: *Ll. Canut. c.* 71: 1 *Comm.* 456, 7.—See 1 *Inst.* 8 *a*. in note 7. where it is said, “*Brook* questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father.” See *Bro. Ab. Bastardy*, p. 18: *Palm.* 10.—See further, 1 *Inst.* 123 *b*. in note 1, where additional authorities are cited, to shew that in this case a jury ought to decide on the question, according to proof of the woman’s condition,

Children born during wedlock, may also in some circumstances be bastards. As if the husband be out of the kingdom of *England*, (or as the law somewhat loosely phrases it, *extra quatuor maria*,) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 *Inst.* 244. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown. *Salk.* 123: 3 *P. Wms.* 276: *Str.* 925; which is such a negative as can only be proved by shewing him to be elsewhere; for the general rule is *presumitur pro legitimatione*. 5 *Rep.* 98.—See also 1 *Inst.* 126 *a*. in note 2; and as to these phrases *infra* (or more classically *intra*) & *extra, quatuor maria*, see some incomplete notes in 1 *Inst.* 108 *a*. note 6; and 261 *a*. note 1.—Although a feme covert may on a question of bastardy give evidence of the fact of criminal conversation, yet she shall not be admitted to prove the non-access of her husband. *Annal.* 79.

There are determinations by which it appears that the child of a married woman may be proved a bastard by other circumstantial evidence than that of the husband’s non-access. 4 *Term Rep.* 251: 356.

In a divorce *à mensâ & thoro*, if the wife has children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access unless the negative be shewn; and the children, *primâ facie* shall not be esteemed bastards. *Salk.* 123.—In case of divorce in the spiritual court *à vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning. 1 *Inst.* 235.

If a man or woman marry a second wife or husband, the first being living, and have issue by such second wife or husband, the issue is a bastard. See *Bott.* (*Ed.* 1793 by *Const.*) 397. pl. 521. Before the statute 2 & 3 *Ed.* 6. c. 21, one was adjudged a bastard, *Quia filius sacerdotis*.

A man hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after the marriage; the first of these is termed in law a *bastard eigné*, and the second a *mulier*, or *mulier puiiné*; by the common law, as hath been said, such *bastard eigné* is as incapable of inheriting, as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the *bastard eigné* enters, and the *mulier* during his whole life never disturbs him, he cannot upon the death of the *bastard eigné* enter upon his issue. *Lit. seit.* 397: *Co. Lit.* 245.

To exclude the *mulier* from the inheritance, there must not only be an uninterrupted possession of the *bastard eigné* during his life, but a descent to his issue. *Co. Lit.* 244: 1 *Rel. Abr.* 624.

No man can bastardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the civil or common law: by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge, he cannot be bastardized; for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that re-

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presents him; and this rule of law was taken from the humanity of the antients, which would not allow the calumny of the dead; as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersions of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed. 7 Co. 44: *Jenk. Rep.* 268: 1 *Brownl.* 42: *Co. Lit.* 33 a. *Lit. fect.* 399: *Co. Lit.* 245.

In the case of *Prich v. The Earls of Bath and Montague*, it was held that the rule that a person shall not be bastardized after his death, is only good in the case of *bastard agnè* and *mulier pusiù*. 1 *Salk.* 120: 3 *Lev.* 410.

If there be an apparent impossibility of procreation on the part of the husband, natural or accidental, as in case of the husband being only eight years old, or disabled by disease, there the issue of the wife shall be a bastard. 1 *Inst.* 244.

The rights of a bastard are very few, being only such as he can acquire; for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. *Forsefc de Ll.* c. 40. Yet he may gain a surname by reputation, though he has none by inheritance. 1 *Inst.* 3, 123: 6 Co. 65.

Where a remainder is limited to the eldest son of *Jane S.* whether legitimate or illegitimate, and she hath issue, a bastard shall take this remainder, because he acquires the denomination of her issue by being born of her body; and so it was never uncertain, who was designed by this remainder. *Noy* 35.

If parents are married, and afterwards divorced, this gives the issue the reputation of children; and so doth a subsequent marriage of the parents. 6 Co. 65: *Hugh's Abr.* 363.

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good; for he is not *de sanguine patris*; but it is said that a woman may give lands in frank-marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. *Dyer* 374: *And.* 79: 6 Co. 77: *Noy* 35.

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. *Preced. Chan* 475.

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for being as was before said *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes; as particularly that a man shall not marry his bastard sister or daughter. 3 *Salk.* 66, 7: *Ld. Raym.* 68: *Comb.* 356. *And see post.* II.

A bastard was, in strictness of law, incapable of holy orders, and though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church. *Fe. tefc.* c. 40: 5 *Rep.* 58. But this doctrine seems now obsolete; and there is a very ancient decision

that a felon should have the benefit of clergy, though he were a bastard. *Bro. Clergy* 20. In all other respects therefore, except those mentioned, there is no distinction between a bastard and another man. 1 *Comm.* 459.

A bastard may be made legitimate, and capable of inheriting by the transcendent power of an act of parliament, and not otherwise. 4 *Inst.* 36; as was done in the case of *John of Gaunt's* bastard children, by a *Stat. of R.* 2. 1 *Comm.* 459.

2 Bastardy, in relation to the several manners of its trial, is distinguished into general and special bastardy.

Till the *Stat. of Merton*, 20 H. 3, the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But after the solemn protest made by the *Barons at Merton*, against the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 *Inst.* 99: *Reeves' Hist. Eng. Law*, 85, 201: and see 1 *Inst.* 126 a. note 2; and 245 a. note 1.

General bastardy, tried by the bishop, in it's notion contains two things. 1st. It should not be a bastard made legitimate by a subsequent marriage. 2dly. That it should be a point collateral to the original cause of action. 1 *Rel. Abr.* 361.

Formerly bastards had a way in such issues to trick themselves into legitimation; for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record, and after that their legitimation could never be contested; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it; but this created great inconveniencies, as is taken notice of in the preamble of *Stat.* 9 Hen. 6. c. 11, in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: to remedy this inconvenience without altering the rules of law, it was enacted, that, before any writ to the bishop, there should be a proclamation made in the court, where the plea depends, and, after that, the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the Chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the Ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 *Rel. Abr.* 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the King, and therefore it must be exercised in the manner the King hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. 1 *Rel. Abr.* 361.

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The certificate must be under the seal of the ordinary, and not under the seal of the commissary only; for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. 1 *Roll. Abr.* 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the public judicatory under which any person lives, is his own act; and were he not thus bound, there might be contradiction in certificates. 1 *Roll. Abr.* 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be non-suit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 *Roll. Abr.* 362.

If a man be certified *mulier*, no man is estopped to bastardize him, for though he may be a *mulier* by the spiritual law, yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate, may plead the issue of special bastardy. 1 *Roll. Abr.* 362.

Special bastardy, is two fold: 1st. Where the bastardy is the gift of the action, and the material part of the issue. 2dly Where those are bastards by the common law that are *muliers* by the spiritual law. 1 *New Abr.* 314: *Co. Lit.* 134: 1 *Roll.* 367: *Hob.* 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 *Brownl.* 1: *Hob.* 179: *Godol.* 479: *Co. Ent.* 29.

If it be found by an assise taken at large that a man is a bastard, the temporal courts are judges of it; for the jury cannot be estopped to speak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and so within their conuzance. *Bro. Bastardy* 97.

II. 1. By *Stat. 18 Eliz. c. 3*, (and see *Stat. 3 Car. 1. c. 4*.) two justices of peace may make an order on the mother or reputed father of a bastard to maintain the infant by weekly payments or otherwise: and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it; or to appear at the sessions.—By *Stat. 7 Jac. 1. c. 4. § 7*, the justices may commit the mother of a bastard, likely to become chargeable, to the house of correction for a year; or for a second offence till she give security for her good behaviour. By *Stat. 13 & 14 Car. 2. c. 12. § 19*, if the putative father or lewd mother run away from the parish, the overseers may by authority of two justices, *seize*, and by order of the sessions, sell the effects of the father or mother to maintain the child.—By *Stat. 6 Geo. 2. c. 31*, the mother of a bastard may, before or after it is born, swear it to any person; and the putative father shall

then, on application by the overseer of the parish be apprehended and committed; unless he give security to indemnify the parish; or to appear at the next sessions; but if the woman die or marry before delivery, or miscarry, or prove not to be with child, the reputed father shall be discharged. Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to shew cause against his being discharged; and if no order be made in pursuance of *Stat. 43 Eliz. c. 2*, (for the maintenance of the child) within six weeks after the woman's delivery, he shall be discharged.—By the said *Stat. 6 Geo. 2. c. 31. § 4*, it is expressly provided that, "It shall not be lawful for the justice to send for any woman before she shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to compel any woman before her delivery to answer any question relating to her pregnancy."—By *Stat. 13 Geo. 3. c. 82. § 5*, bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by *Stat. 20 Geo. 3. c. 36. § 2*, as to bastards born in houses of industry.

The putative father of a bastard, although no legal relationship subsists between them, is so far considered as its natural guardian, as to be intitled to the custody of it, for its maintenance and education. 2 *Str.* 1162; and therefore while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 *Mod.* 43: 1 *Sid.* 444. Bastards are within the meaning of the marriage act. *Stat. 26 Geo. 2. c. 33*, which requires the consent of the father, &c. 1 *Term Rep.* 96. And the rule that a bastard is *filius nullius* applies only to the case of inheritances. *Id.* 101.

As however, without the protection of its natural parents, a bastard is settled in the parish in which it is born; (*Salk.* 427: 3 *Burn. J.*: *Paul's P. O.* 81;) [unless such birth be procured by fraud, *Sel. Ca.* 66; or happen under an order of removal, 1 *Seff. Ca.* 33: *Salk.* 121, 474, 532; or in a state of vagrancy, *Stat. 17 Geo. 2. c. 5*; or in the house of correction, 2 *Bull.* 358; or under a certificate, *Str.* 186;] and the parish of consequence becomes charged with its maintenance, then and not before, the authority of the churchwardens and overseers begins. *Say.* 93; and they may act without an order from the justices. 3 *Term Rep. C. P.* 253.—It seems however, that until a bastard attain the age of seven years, it cannot be separated from its mother, *Cald.* 6; but may be removed to the place of her settlement, while the age of nurture continues. *Carth.* 279; and must under these circumstances be maintained by the parish where it was born. *Doug.* 7.

An order of bastardy must be made by two justices, 2 *Salk.* 478: 1 *Str.* 475; on complaint, 1 *Barn. K. B.* 261; and the examination of the woman must be taken, in the presence of both the justices. 6 *Mod.* 180: 2 *Black. Rep.* 1027; but it is not necessary that the putative father should be present to hear what the deposes. *Cald.* 308; although he must be summoned before an order of filiation can be made, 8 *Mod.* 3: 1 *Seff. Ca.* 179; for he cannot be compelled to give security, or be committed until he has made default. *Id. Raym.* 853, 8: 3 *Salk.* 66; but if an order of filiation is once made, the fact of bastardy is established until the order is reversed. *Cro. Jac.* 535.

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The justice may commit if the putative father neglect to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harriels, or to appear at the sessions. 1 *Sid.* 353. 1 *Vent.* 41: *Ld. Raym.* 658, 1157. The order can only be reversed by an appeal to the sessions, which must be to the next sessions after notice of the order; 2 *Salk.* 480, 7; and if the sessions reverse the order of the two justices, yet they may on summons make another, on the same or on any other person; for in this respect they have an original jurisdiction. 2 *Bulst.* 355. 1 *Str.* 4-5. *Doug.* 632.—The order however may before appeal to the sessions be removed by *certiorari*, into *K. B.* and there quashed for errors on the face of it. *Cald.* 172.—But no order of bastardy made at sessions can be quashed in *K. B.* unless the putative father is present in court. 2 *Salk.* 475; for, on its being quashed, he shall enter into a recognizance to abide the order of the sessions below. 1 *Bl. Rep.* 198.

On this part of the subject see further, *Bott's Poor Laws*, *Confl's Edit.* 1793.

In an ancient *MSS. temp. E. 3*, it is said that he who gets a bastard in the hundred of *Middleton in Kent*, shall forfeit all his goods and chattels to the king.

2. By *Stat. 21 Jac. 1. c. 27*, it is enacted, "That if any woman be delivered of any issue of her body, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

It hath been adjudged, that in order to convict a woman by force of this last statute, there is no need that the indictment be drawn specially, or conclude against the form of the statute; for the statute doth not make a new offence, but only makes such concealment an undeniable evidence of murder. 2 *Hawt. P. C. c. 46. § 43*.

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Hawt. P. C. ubi sup.*

But it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Hawt. P. C. ubi sup.*

Also, it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Hawt. P. C. ubi sup.*

If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it

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works so strongly that it kills the woman, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother, it is murder. 1 *Hal. H. P. C.* 429, 430.

If a woman be quick or great with child, if she take, or any other give her any potion to cause an abortion, or if a man strike her, whereby the child within her is killed; though it be a great crime, yet it is not murder nor manslaughter by the law of England, because the child is not yet *in rerum natura*, nor can it legally be known, whether it were killed or not: so it is, if such child were born alive, and after die of the stroke given to the mother, this is not homicide. 1 *Hal. H. P. C.* 433. The offender however may be indicted for a misdemeanor, at common law.

If a man procure a woman with child to destroy her infant when born, and the child is born, and the woman, in pursuance of that procurement, kill the infant; this is murder in the mother, and the procurer is accessory. 1 *Hal. H. P. C.* 433.

BASTARDY, *bastardia*.] The defect of birth, objected to one born out of wedlock. *Bract. lib. 5. c. 19*. See *Bastard*.

BASTARD EIGNE, See *Bastard*.

BASTON, *B.*] A staff, or club. In the statutes it signifies one of the warden of the Fleet's servants or officers who attend the king's courts with a red staff for taking such into custody who are committed by the court. *Stats. 1 R. 2. c. 12. 5 Eliz. c. 23*. See *Tipstaff*.

BASUS, *per basum solvitur capere*, To take toll by strike; and not by heap; *per basum*, being opposed to *in cumulo vel castello*. See *Consuetud. Domus de Parendon*, *M. s. f. 42*.

BATABIF GROUND. Land that lay between *Englund* and *Seeland*, heretofore in question, when they were distinct kingdoms, to which it belonged; litigious or *debatable ground*, i. e. land about which there is debate; and by that name *Skene* calls ground that is in controversy. *Camb. Britan. title Cumberland*.

BAILLEA, A *Beat*.

BATH, *lat. Bathon*, called by the Britons *Balnea*, has been termed the city of sickmen, *Sax. Decimas* (*cella*), It is a place of resort in *Wessex* famous for its medicinal waters. The charmen are there to be licensed by the mayor and aldermen, by statute 7 *Geo. 1. c. 19*. And a public Hospital or infirmary for poor is established in the city of Bath, the governors whereof have power to hold all charitable gifts, &c. and appoint physicians, surgeons and other officers any persons not able to have the benefit of the Bath waters may be admitted into this hospital, their case being attended by some physician, and the poverty of the patients certified by the minister and churchwardens of the place where they live, &c. Every person so admitted, shall have the use of the old hot bath, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3*l.* each, to defray the expence of removing them back to their parishes, &c. *Stat. 12 Geo. 2. c. 31*.

BATITORIA, A fulling mill. *Morasticon*, tom. 2. p. 32.

BATTLE, *Fr. bataille*.] A trial by combat, anciently allowed of in our laws, (among other cases,) where the

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the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. When an appellee of felony wages *battel*, he pleads that he is *Not guilty*, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join *battel* he replies, That he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove: and then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this thou who callest thyself John by the name of baptism, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name, on the day and year of, &c. at B. as you surmise, nor am any way guilty of the said felony; so help me God.* And then he shall kiss the book and say; *And this I will defend against thee by my body, as this court shall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect: *Hear this thou who callest thyself Thomas by the name of baptism, that thou didst feloniously on the day, and in the year, &c. at B. murder my father W. by name; so help me God.* And then he shall kiss the book, and say; *And this I will prove against thee by my body, as this court shall award.* This being done, the court shall appoint a day and place for the *battle*; and in the mean while the appellee shall be kept in custody of the marshal, and the appellant shall find sureties to be ready to fight at the time and place, unless he be an approver, in which case he shall also be kept by the marshal: and the night before the day of *battle*, both parties shall be arraigned by the marshal, and shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bare-headed and bare-legged from the knee downwards, and bare in the arms to the elbows, armed only with bastons an ell long, and four-cornered targets: and before they engage, they shall both make oath, *That they have neither eat nor drunk, nor done any thing else by which the law of God may be deprest, and the law of the devil exalted*: and then, after proclamation for silence under pain of imprisonment, they shall begin the combat, wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: and if the appellant becomes a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant shall for his perjury lose his *lib. et legem*. If an appellant becomes blind by the act of God after he has waged *battel*, the court will discharge him of the *battel*; and in such case it is said that the appellee shall go free.

This trial by *battel* is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, maimed, &c. he may counterplead the wager of *battel*, and compel the defendant to put himself upon his country, no champions being allowed in criminal appeals; also any plaintiff may counterplead a wager of *battel*, by alledging such matters against the defendant, as induce a violent presumption of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c. for here the

law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of *battel* that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage *battel*. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage *battel*, by reason of the dignity of the appellant.

The citizens of *London* are privileged by charter, that in appeals by any of them, there shall be no wager of *battel*; and by *Stat. 6 R. 2. c. 6*, defendant shall not be received to wage *battel* in an appeal of rape. 2 *Hawk. P. C. c. 45*. This trial by *battel* is before the constable and marshal; but is now disused, See *Glanv. lib. 14: Bracton, lib. 3: Britton, c. 22: Smith de Rep. Angl. lib. 2: Co. Litt. 294, &c.*

For the manner of waging *battel* in an appeal of treason, *Hawkins* cites *Rusw. Col. part 2. vol. 1. 112—128: and 3 Comm. 338. cites vol. 2.*

This species of trial by *wager of battel*, (says *Blackstone*) was introduced into *England*, among other *Norman* customs, by *William the Conqueror*; but was only used in three cases, one military, one criminal, and the third civil.—The first in the court martial or court of chivalry and honour; (*Co. Lit. 261*;) the second in appeals of felony; [of which above;] and the third, upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis* which is frequently a matter of difficulty is in question; but other real actions being merely questions of the *jus possessionis*, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of Providence. Another [and as it seems the juster] pretext for allowing it upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

Although the writ of right itself, and of course this trial thereof is at present much disused, yet it is law at this day; and on that account as matter of curiosity the forms of proceeding therein are collected and preserved in 3 *Comm. 338, &c.* and the appendix thereto; and are similar to those above recited in criminal cases.

The last trial by *battel* that was waged in the court of Common Pleas at *Westminster*; [though there was afterwards one in the court of Chivalry in 1631, 6 *Car. 1*, between *Donald Lord Rey* appellant, and *David Ramsay*, esquire, defendant, which was compromised; See *Orig. Jurid. 65: 19 Raym. 322*; and another in the county palatine of *Durham* in 1638; *Cro. Car. 512*;) was in 13 *Eliz. A. D. 1571*, as reported by *Dyer*, and held in *Totbill-fields, Westminster*. See *Dy. 301. and Spelm. in v. Campsey*; the latter of whom was present at the ceremony.

In this trial by *battel*, on a writ of right, the *battel* is waged by champions, and not by the parties themselves; because in civil actions, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for lands in question, if either of the parties were slain; and also that no person might claim an exemption from this trial, as was allowed in criminal cases *Co. Litt. 294*.

This form of trial by *battel*, the tenant or defendant in a writ of right, has it in his election at this day to demand.

demand. 3 *Comm.* 341. And it was the only decision of such writ of right from the Conquest, till *Hen. II.*, by consent of parliament introduced the *grand assise*; a particular species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other.

—See *Gloss. lib. 2. c. 7.*

BATELLUS, See *Batur*.

BATTERY, See title *Assault*.

BATUS, *Lat.* from the *Sax. bat.*] A boat, and *batellus* a little boat. *Chart. Ed. 1: 20 Julii 18 regni.* Hence we have an old word *batfswain*, for such as we now call *boatswain* of a ship.

BAUBELLA, *baubles*.] A word mentioned in *Hoveden* in *R. 1.* and signifies jewels or precious stones.

BAUDEKIN, *baldecum*, and *baldekinum*.] Cloth of *baudekin*, or gold; it is said to be the richest cloth, now called *brocade*, made with gold and silk, or tissue, upon which figures in silk, &c. were embroidered.

BAWDY-HOUSE, *Lupanor, fornix*.] A house of ill fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a *bawdy-house* comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 *Inst.* 205: 1 *Hawk. P. C. c. 74.* Those who keep *bawdy-houses* are punished with fine and imprisonment; and all such infamous punishment, as pillory, &c. as the court in discretion shall inflict: and a lodger who keeps only a single room for the use of *bawdy*, is indictable for keeping a *bawdy-house*. 1 *Salk.* 382. Persons resorting to a *bawdy-house*, are punishable, and they may be bound to their good behaviour, &c. But if one be indicted for keeping or frequenting a *bawdy-house*, it must be expressly alledged to be such a *house*, and that the party knew it; and not by suspicion only. *Poph.* 208. A man may be indicted for keeping bad women in his own house. 1 *Hawk. P. C. c. 61. § 2.* A constable upon information, that a man and woman are gone to a lewd *house*, or about to commit fornication or adultery, may, if he finds them together, carry them before a justice of peace without any warrant, and the justice may bind them over to the sessions. *Dalt.* 214.

Constables in these cases may call others to their assistance, enter bawdy houses, and arrest the offenders for a breach of the peace. in *London* they may carry them to prison; and by the custom of the city, whores and bawds may be carted. 3 *Inst.* 66.

As to a married woman's being indicted for keeping a house of ill fame. See tit. *Baron and Feme VII.*

But it is said, a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. 1 *Hawk. P. C. c. 74. § 1: 1 Salk.* 382.

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothel houses or stews publickly allowed here in former times, till the reign of *Hen. 8.* by whom they were suppressed about 1 *D.* 1546: and writers assign the number to be eighteen thus allowed on the bank-side in *Southwark*. See *Brothel houses*.

By *Stat. 2. Geo. 2. c. 36.* made perpetual by *Stat. 28 Geo. 2. c. 19* If two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a

bawdy-house, the constable shall go with them before a justice of peace, and shall, (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognizance of 20 *l.* each, to give material evidence of the offence,) enter into a recognizance of 30 *l.* to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expences by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10 *l.* each. On the constable's entering into such recognizance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20 *l.* Any person appearing as master or mistress, or as having the care or management of any bawdy house, shall be deemed the keeper thereof, and liable to be punished as such.—The same act also directs the licensing by magistrates of all public places within 20 miles of the metropolis.

BAY, or *pen*, Is a pond head made up of a great height, to keep in water for the supply of a mill, &c. so that the wheel of the mill may be driven by the water coming thence, through a passage or flood-gate. *Stat. 27 Eliz. c. 19* A harbour where ships ride at sea, near some port, is also called a bay.

BEACON, from the *Sax. biacn, signum*, whence the *Englsh, beckn* to nod or make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 *Inst.* 148. Hence *beaconage* (*beaconagium*) money paid towards the maintenance of beacons: See *Stat. 5 Hen. 4. c. 3.* as to keeping watch on the sea coast.

The erection of beacons, light houses and sea marks, is a branch of the royal prerogative; whereof the first was antiently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal; (3 *Inst.* 204: 4 *Inst.* 148;) to cause them to be erected in fit and convenient places, (4 *Inst.* 136;) as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of Lord High Admiral, (*Stat. 158: 4 Inst.* 149;) or the Admiralty board. And by *Stat. 8 Eliz. c. 13.* the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree or other known sea-mark, he shall forfeit 100 *l.* or in case of inability to pay it, shall be *ipso facto* outlawed. 2 *Comm.* 265.—See the *Stats. 4 Ann. c. 20.* and 8 *Ann. c. 17.* for building the *Eddystone* lighthouse near *Plymouth*, and raising the duties payable by ships for its support; and *Stat. 3 Geo. 2. c. 36.* as to the lighthouse on the rock *Skerries* near *Holyhead* in the county of *Anglesea*.

BEAD, or *bede*, *Sax. bead, oratio*.] A prayer; so that to say over *beads*, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the *Roman-Catholic* religion prevails. They are not allowed to be brought into *England*, or any superstitious things,

BEAM, That part of the head of a ship where the horns grow, from the Sax. *Beam*, i. e. *beam*; because they grow out of the head as branches out of a tree. *Beam* is likewise used for a common balance of weights in cities and towns.

BEAMS and BALANCE, for weighing goods and merchandize in the city of London. See tit. *Weights and Measures*.

BEARERS; Such as bear down or oppress others, and is said to be all who with maintenance. Justices of assize shall inquire of hear, and determine maintainers, bearers, and conspirators, &c. Stat. 4 Ed. 3. c. 11.

BEASTS of chase; ferae committuntur. Are five, viz. the buck, doe, fox, marten, and roe. *Marten*, part 1. page 342. *Beasts of the forest* (*ferae silvestres*) otherwise called *beasts* of venary, are the hare, hind, boar, and wolf. *Ibid.* part 2. c. 4. *Beasts and fowls of the warren*, are the hare, coney, pheasant, and partridge. *Ibid.* Reg. Orig. 95. 96. &c. Co. Lit. 233. — See tit. *Game*.

BEAU-PLEADER, *pulchre placitando*, Fr. *beauplaidier*, i. e. to plead fairly. Is a writ upon the statute of *Mairbridge*, 52 Hen. 3. c. 11, whereby it is enacted, That neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*, i. e. for not pleading fairly or aptly to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it; whereupon an *alias* and *pluries* and *attachment* may be had, &c. *Novo Nat. Br.* 596, 597. And *beau-pleader* is as well in respect of vicious pleadings, as of the *fair pleading*, by way of amendment. 2 Inst. 122.

BEDEL, *bedellus*, Sax. *bydel*, Fr. *bedeau*. A cryer or messenger of a court, that cites men to appear and answer: and is an inferior officer of a parish, or liberty; very well known in London, and the suburbs. There are likewise university *bedels*, and church *bedels*; now called summoners and apparitors: and *Manwood* in his *Forest Laws*, saith there are forest *bedels*, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forest, like unto bailiffs errant of a sheriff in his county. *Convel.*

BEDELARY, *bedelaria*. The same to a *bedel*, as *bailiwick* to a *bailiff*. *Lit. lib. 3. cap. 5. Blount's Convel.*

BEDEREPE, alias *bederepe*. Sax. A service which certain tenants were anciently bound to perform, viz. to reap their landlord's corn at harvest; as some yet are tied to give them one, two, or three days' work, when commanded. This customary service of inferior tenants was called in the Latin *pretaria bederipum*, &c. See *Magna Præcaria*.

BEDEWERI, Those which we now call *banditti*; profligate and excommunicated persons. The word is mentioned in *Mae Paris.* anno 1258.

BLER, As to the exporting, selling, measuring, &c. See tit. *Alabouzes, Brewers, Navigation Acts, Weights and Measures*.

BEGGARS. See *Vagrants*.

BEHAVIOUR of Persons. Vide *Good Behaviour*.

BELGÆ, The inhabitants of *Somersetshire, Wiltshire, and Hampshire*. *Blount.*

BELGÆ. See *Vagrants*.

BEHAVIOUR of Persons. Vide *Good Behaviour*.

BELGÆ, The inhabitants of *Somersetshire, Wiltshire, and Hampshire*. *Blount.*

BELGÆ. See *Vagrants*.

BENEFICE, *beneficium*. It generally taken for any ecclesiastical living or promotion; and benefices are divided into *election* and *advowson*. It is used in the Canon law. 3 Inst. 125.

BENEFICE, *beneficium*, &c. All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. *Deaneries, prebendaries, &c.* are benefices with cure of souls, though not comprehended as such within the Stat. 26 H. 8. c. 13, of residences: but, according to a more strict and proper acceptation, benefices are only rectories, and vicarages. — The word *Benefice* was formerly applied to portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they lost their name of *beneficia* to the livings of the clergy, and retained to themselves the name of *feuds*. — And *beneficium* was an estate in land at first granted for life only, so called, because it was held as mere *benefice* of the donor; and the tenants were bound to swear fealty to the lord, and to serve him in the wars, those estates being commonly given to military men: but at length, by the consent of the donor, or his heirs, they were continued for the lives of the sons of the possessors, and by degrees past into an inheritance: and sometimes such *benefices* were given to bishops, and abbots, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called *regalia* when given by the king; and on the death of a bishop, &c. returned to the king till another was chosen. *Spelm. of Feuds*, c. 21: *Blount, verb.* Beneficium. See tit. *Tenure*.

For matter relating to Ecclesiastical Benefices, and the requisites of the clergy admitted thereto, &c. See titles *Advowson, Parson*.

BENEFICIO PRIMO ECCLESIASTICO HABENDO, A writ directed from the King to the Chancellor, to bestow the *benefice* that shall first fall to the King's gift, above or under such value, upon such a particular person. *Reg. Orig.* 307.

BENEFIT OF CLERGY. See *Clergy*.

BENERGH, An ancient service which the tenant rendered to his lord with his plough and cart. *Lamb. Itin.* p. 222: *Co. Lit.* 86.

BENEVOLENCE, *benefolentia*. Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. *Stow's Annals*, p. 701. And *Stow* saith, that it grew from *Edward the Fourth's* days: you may find it also anno 11 H. 7. c. 10, yielded to that prince in regard of his great expences in wars, and otherwise. 12 Reg. 19. And by act of parliament, 13 Ed. 2. c. 4, it was given to his majesty King *Charles II.*, but with a proviso that it should not be drawn into future example: as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal Stat. 1 W. & M. II. c. 2.

In other nations *benefolences* are sometimes given to lords of the fee by their tenants, &c. *Cassan d. Confess.* *Eng.* p. 134, 136 — see tit. *Taxes*.

BENEVOLENTIA REGIS HABENDA, The form of purchasing the king's pardon and favour, in ancient fine, and submissions, to be restored to estate, title, or place *Parsch. Antiq.* p. 172.

BENT. See tit. See Banks.

BERBIAGE, *berbiagium*.] *Nativi tenentes manerii de Calistoke reddunt per ann. de certo reddito decem. berbiagg. ad le Hokeday xlv. t. MS. Survey of the Datchy of Cornwall.* Blount.

BERBICARIA, A sheep down, or ground to feed sheep. *Leg. Alfredi. c. 9: Monasticon, tom. 1. p. 308.* See the next article.

BERGARIA, *bercbery*, from the Fr. *bergerie*.] A sheep-fold, or other enclosure for the keeping of sheep: in *Domesday* it is written *berquarium*. 2 Inst. 476: Mon. Angl. tom. 2. p. 599. *Bercarius* is taken for a shepherd: and *bercaria* is said to be abbreviated from *berbicaria*, and *berbex*; hence comes *berbicus* a ram, *berbica*, an ewe, *caro berbitina*, mutton. Cowel.

BEREFELLARII: There were seven churchmen so called, anciently belonging to the church of St. John of Beverley. Cowel: Blount.

BEREFREIT, BEREFREID, A large wooden tower. *Simcon Dunelm. Anno 1123: Blount.*

BERGHMASTER, from the Sax. *berg*, a hill, *quasi*, master of the mountains.] Is a *bergh* or chief officer among the *Derbyshire* miners, who also executes the office of a coroner. *Esc. de An. 16 Ed. 1. num. 34, in Turri London.* The Germans call a mountaineer, or miner, a *bergman*. Blount.

BERGMOCH, or BERGHMOTTE, Comes from the Sax. *berg* a hill, and *gemote*, an assembly; and is as much as to say an assembly or court upon a hill, which is held in *Derbyshire*, for deciding pleas and controversies among the miners. And on this court of *berghmote*, Mr. Manlove, in his Treatise of the Customs of the Miners, hath a copy of *verses*, with *references* to statutes, &c. Vide *Squire on the Anglo Saxon Government*.

BERIA, *berie*, *berry*, A large open field.] Those cities and towns in England which end with that word, are built in plain and open places, and do not derive their names from boroughs, as Sir Henry Spelman imagines. Most of our glossographers in the names of places have confounded the word *ber* with that of *bury* and *borough*, as the appellatives of ancient towns; whereas the true sense of the word *berie* is a flat wide campaign, as is proved from sufficient authorities by the learned Du Fresnoy, who observes that *Beria Sancti Edmundi*, mentioned by Mat. Paris. sub ann. 1174, is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads and other open grounds, are called by the name of *beries*, and *berryfields*: the spacious meadow between *Oxford* and *Isley* was in the reign of king *Atelstan* called *Bery*. As is now the largest pasture ground in *Quarendon* in the county of *Buckingham*, known by the name of *Berryfield*. And though these meads have been interpreted demesne or manor meadows, yet they were truly any flat or open meadows, that lay adjoining to any vill or farm. Cowel.

BERRA, A plain open heath. *Berras affarsare*, to grub up such barren heaths, Cowel.

BERNET, *Incendium*, comes from the Sax. *byran*, to burn; it is one of those crimes which by the laws of *Hæn*: 1. cap. 15, *emendari non possunt*. Sometimes it is used to signify any capital offence. *Leges Canonicæ apud Prompt. c. 90: Leg. Hen. 1. c. 12, 47.*

BERQUARIUM, Vide *Bercaria*.

BERSA, Fr. *bars*.] A limit or bound. A park pale. Blount.

BERSARE, Germ. *bars*, to shoot.] *Bersare in foresta mea ad tres arcus.* Chart. Rapph. Comit. Cestr. ann. 1218. *vin.* to hunt or shoot with three arrows in my forest. *Bersarii* were properly those that hunted the wolf. Blount.

BERSELET, *berfellata*.] A hound. Chart. Reg. de Quincy.

BERTON. See *Barton*.

BEREWICHA, or BERWICA, Villages or hamlets belonging to some town or manor. This word often occurs in *Domesday*: *istæ sunt berewiche ejusdem manerii*.

BERWICK, The town of *Berwick upon Tweed* was originally part of the kingdom of Scotland; and as such was for a time reduced by king Edward I. into the possession of the crown of England; and during such a subjection it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new modelled and put upon an English footing by a charter of king James I: and all its liberties, franchises, and customs were confirmed in parliament by Stats. 22 E. 4. c. 8; and 2 Jac. 1. c. 28. Though therefore it hath some local peculiarities, derived from the ancient laws of Scotland; (See *Hale Hist. C. L. 183: 1 Sid. 382, 462: 2 Shew. 365*;) yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was perhaps superfluously declared by Stat. 20 Geo. 2. c. 42, that where England only is mentioned in any act of parliament, the same notwithstanding hath been and shall be deemed to comprehend the dominion of Wales and town of *Berwick upon Tweed*. And though certain of the king's writs or processes of the courts of *Westminster*, do not usually run into *Berwick*, any more than the principality of Wales, yet it hath been solemnly adjudged, that all prerogative writs (as those of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, &c.) may issue to *Berwick* as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of *Berwick*, may be tried by a jury of the county of *Northumberland*. *Cron. Jac. 543: 2 Ro. Ab. 292: Stat. 11 Geo. 1. c. 4: 4 Burr. 834: 1 Comm. 99.*

BERY, or BURY, The vill or seat of habitation of a nobleman, a dwelling or mansion house, being the chief of a manor; from the Sax. *beorg*, which signifies a hill or castle; for heretofore noblemen's seats were castles, situate on hills, of which we have still some remains. As in *Hertfordshire*, there are the *beries* of *Stockton*, *Hope*, &c. It was anciently taken for a sanctuary. See *Beria*.

BESAILLE, or BESAYLE, Fr. *bisayal*, *procurator*.] The father of the grandfather: and in the Common law it signifies a writ that lies where the great grandfather was seized the day that he died, of any lands or tenements in fee-simple; and after his death a stranger entereth the same day upon him, and keeps out the heir. *E. N. B. 222.* See title *Mort d'Ancestor*.

BESCHA,

BECADE, from the *By. Saxon*, *bedan*, to dig. A spade or shovel. Hence perhaps, *the Beccate terra* is *clay*. *Mon. Angl. tom. 7. fol. 63.* may signify a piece of land usually trenched up with a spade, as gardeners fit and prepare their grounds; or may be taken for as much land as one man can dig with a spade in a day.

BESTIALS, *bestiales*.] Beasts or cattle of any sort; *Stat. 4 Ed. 3. c. 5.* it is written *bestiale*; and is generally used for all kinds of cattle, though it has been restrained to those anciently purveyed for the king's provision.

BETACHES, Laymen using glebe lands. *Parl. 14 E. 2.*
BEBERCHES, *Bidawicks*, or customary services done at the bidding of the lord by his inferior tenants. *Godol.*

BEWARED, An old Saxon word signifying expended; for before the *Britons* and *Saxons* had plenty of money, they traded wholly in exchange of wares. *Blount.*

BIDALE, or **BIDALL**, *precaria petaria*, from the Sax. *biddan*, to pray or supplicate.} Is the invitation of friends to drink *ale* at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the West of England; and is mentioned *Stat. 26 Hen. 8. c. 6.* And something like this seems to be what we commonly call *house warming*, when persons are invited and visited in this manner on their first beginning house-keeping.

BIDDING OF THE BEADE, *bidding* from the Sax. *biddan*.] Was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day our ministers, on the *Sunday* preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought; which is required by our canons.

BIDENTES, Two yearlings or three of the second year. *Paroch. Antig. p. 216.*

BIDUANA, A fasting for the space of two days. *Mat. West. p. 135.*

BIGA, *bigata*, A cart or chariot drawn with two horses coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain or waggon. *Mon. Angl. tom. 2. fol. 256.*

BIGAMUS, One guilty of bigamy.

BIGAMY, *bigamia*.] A double marriage; this word properly signifies the being twice married; but is now used by an almost universal corruption, to signify the offence of *polygamy*, or the having a plurality of wives at once. *3 Inst. 88.*

Bigamy according to the Canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the ground of St. Paul's words. *1 Tim. c. 5. v. 2.* "That a bishop should be the husband of one wife," and they were by a canon of the council of *Lyons*, *A. D. 1274*, denied all clerical privileges. This canon was adopted and explained in England by the *Stat. 4 E. 1. c. 3.* (commonly called the *Stat. de bigamis*) c. 5; and bigamy thereupon became an uncommon counterplea to the claim of the benefit of clergy. The cognizance of the plea of bigamy was declared by *Stat. 18 E. 3. c. 2.* to belong to the Court Christian, like that of bastardy. But by *Stat. 1 E. 6. c. 12. § 16*, bigamy was declared to be no

longer an impediment to the claim of clergy. See *Darby v. Darby* 201. and *1 Inst. 20 b; note 1.*

A second marriage, living the former husband or wife is, by the ecclesiastical law of England, simply void, and a mere nullity; but the Legislature has thought proper to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. By *Stat. 1 Jac. 1. c. 11*, it is enacted "that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony;" but within the benefit of clergy.

The act however makes exception to five cases, in which such second marriage, (though in the three first it is void) is yet no felony: (See *3 Inst. 89; Kel. 27; 1 Hal. P. C. 694*).—1. Where either party has been continually abroad for seven years; whether the party in England hath notice of the others being living or no. 2. Where either of the parties hath been absent from the other seven years within this kingdom; and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce; (or separation *à mens et thoro*, *1 Hawk. P. C. 174*;) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence; and the parties loosed *à vinculo matrimonii*, or, 5. Where either of the parties was under the age of consent at the time of the first marriage. *1 Hawk. P. C. 174; 1 Inst. 79.*

In the last case the first marriage was voidable by the disagreement of either party; which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, it seems undoubted that such second marriage would be within the reason and penalties of the act. *4 Comm. 164.*

If the first marriage were beyond sea, and the latter in England, the party may be indicted for it here; because the latter marriage is the offence; but not *vice versa*, though quære why not? *1 Hawk. P. C. 174, 5; 1 Hale's P. C. 692; 1 Sid. 171; Kel. 80.*

A sentence in the ecclesiastical court against a marriage, in a suit for jactitation does not preclude the proof of a marriage on an indictment on the statute.—And admitting such sentence were conclusive as to the fact of marriage, the effect may be avoided by evidence of fraud and collusion in obtaining the sentence. *11 St. Tr. 262. Dutches of Kingston's case.*

As to husband and wife being evidence against each other on trial for this offence. See tit. *Baron and Feme*. I. 2.

BIGOT, A compound of several old English words.] An obstinate person; or one that is wedded to an opinion, in matters of religion, &c. It is recorded that when *Roll* the first duke of Normandy, refused to kiss the King's foot, unless he held it out to him, it being a ceremony required in token of subjection for that dukedom, with which the King invested him; those who were present taking notice of the duke's refusal, advised him to comply with the king's desire, who answered them *ne se bigot*; whereupon he was in derision called *bigot*, and the Normans are so called to this day. *Blount.*

BILAGINES, Lat.] By-laws of corporations, &c. See *By-laws*.

BILANCHUS DEFERENDIS, A writ directed to a corporation, for the carrying of weights to such a haven, there to weigh the wool that persons by our ancient laws were licensed to transport. *Reg. Orig.* 270.

BILINGUIS, Generally a double tongued man; or one that can speak two languages: but it is used in our law for a jury that passeth between an *Englishman* and a *foreigner*, whereof part ought to be *English*, and part strangers: properly a jury *de medietate lingue*, under *Stat.* 28 *Ed.* 3. c. 13. See title *Jury*.

BILL, *billā*] Is diversely used: in law proceedings, it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm: and this *bill* is sometimes addressed to the Lord Chancellor of England, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petition of process against the defendant for redress; and it is made use of as well in criminal as civil matters. In criminal cases, when a grand jury upon a presentment or indictment find the same to be true, they indorse on it *billā vera*; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it: and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, viz. the petty jury, by whom if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. *Term. de Ley* 86: 3 *Inst.* 30. See *Ignoramus* and *Indictment*.

Many of the proceedings in the King's Bench are by *bill*: it is the ancient form of proceeding, and was, and yet should be filed in parchment, in all suits, not by original. The declaration is a transcript of it, or supposed to be. See tit. *Amendment*.

Bill is also a common engagement for money given by one man to another; being sometimes with a penalty, called *penal bill*, and sometimes without a penalty, then called a *single bill*, though the latter is most frequently used. By a *bill* we ordinarily understand a single bond, without a condition; and it was formerly all one with an obligation, save only its being called a *bill* when in *English*, and an obligation when in *Latin*. *West. Symbol.* lib. 2. sect. 146. Where there is a *bill* of 100 *l.* to be paid on demand, it is a duty presently, and there needs no actual demand. *Cro. Eliz.* 548. And a single obligation or *bill*, upon the sealing and delivery, is *debitum in presenti*, though *solvendum in futuro*. On a collateral promise to pay money on demand, there must be a special demand; but between the parties it is a debt, and said to be sufficiently demanded by the action: it is otherwise where the money is to be paid to a third person; or where there is a penalty. 3 *Kebl.* 176. If a person acknowledge himself by *bill* obligatory to be indebted to another in the sum of 50 *l.* and by the same *bill* binds him and his heirs in 100 *l.* and says not to whom he is bound, it shall be intended he is bound to the person to whom the *bill* is made. *Rel. Abr.* 748. A *bill* obligatory written in a book, with the party's hand and seal to it, is good. *Cro. Eliz.* 613.—See 2 *Ro. Ab.* 146.

These kinds of bills are now superseded in use, the single bills by the more modern traffick of *Bills of Exchange*, and the penal bills by *Bonds or Obligations*.—See those titles.

BILL OF EXCEPTIONS, A writ directed to a Common law court, for an error in fact, apparent in the record, or for an error in law, where either party died before judgment, and it lay not for an error in law not appearing in the record, and therefore, where the plaintiff or defendant, or another defendant, alleged any thing *ore tenus*, which was over-ruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law; and so the party grieved was without remedy. 2 *Inst.* 426. And therefore by the *Stat. of H. 4m.* 2, 15 *E.* 1. c. 31, "When one impleaded before any of the justices, alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same, and requires that the justices will put to their seals, the justices shall so do; and if one will not, another shall; and if, upon complaint made of the justice, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff shew the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee; and in all actions whether real, personal, or mixt. 2 *Inst.* 427.

The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, &c. also to challenges of jurors, and any material evidence offered and over-ruled. 2 *Inst.* 427: *Dyer* 231. pl. 3: *Raym.* 486.

The exceptions ought to be put in writing *sedente curiā*, in the presence of the judge who tried the cause, and signed by the counsel on each side; and then the bill must be drawn up and tendered to the judge that tried the cause to be sealed by him; and when signed, there goes out a *fiat facias* to the same judge *ad cognoscendum scriptum*, and that is made part of the record, and the return of the judge with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 *Nels. Abr.* 373. If a bill of exceptions is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. 3 *Comm.* 372: *Reg. Br.* 182: 2 *Inst.* 427.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 *Inst.* 427: *Raym.* 182. S. P.: 2 *Lev.* 327. S. P.

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed. 1 *Vent.* 366, 367: 2 *Lev.* 237: 2 *Jones* 217.

A bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *Nisi Prius*, but in the next immediate superior court, upon a writ of error after judgment given in the court below. 3 *Comm.* 372.

These bills of exceptions, are to be tendered before a verdict given; 2 *Inst.* 427; and extend only to civil

THE BILL OF EXCHANGE

Section 1. Law 5. It was allowed in an indictment for trespass, and in Law 966, in an information in nature of a writ, that

For a precedent of a bill of exchange. See *Bull. N. P.* 317.

Bills of exchange are now seldom used, since the liberality practised by the courts in granting new trials.

BILL OF EXCHANGE, A negotiable security for money, well known among merchants. The laws relating to this subject, and that of **PROMISSORY** (and negotiable) Notes, being implicated together, are here considered under one head, and thus arranged:

- I. Of the Nature of 1. Bills of Exchange; 2. Inland and Foreign; 3. Promissory Notes.—4. The Parties to them.—5. The Distinction and Resemblance between the several Kinds of Bills and Notes.—6. Bank and Bankers' Notes.—7. The essential Qualities, of Bills and Notes.
- II. Of the Acceptance of Bills; how, when, by and to whom made.
- III. Of the Transfer of Bills and Notes by Indorsement, &c.
- IV. Of the Engagements of the several Parties.
- V. Of 1. the Action and Remedy on Bills and Notes; 2. Manner of declaring and pleading; 3. The Evidence; and 4. the Defence.
- VI. Of bills lost, stolen, or forged: and see III.

I. 1. A BILL OF EXCHANGE is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid: or it may be made payable to bearer.

The person who makes the bill is called the *drawer*; he to whom it is address the *drawee*; and when he undertakes to pay the amount, he is then called the *acceptor*. The person to whom it is ordered to be paid is called the *payee*; and if he appoint another to receive the money, that other is called the *indorsee*, as the payee is, with respect to him, the *indorser*; any one who happens for the time to be in possession of the bill is called the *holder* of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties and the distance of their respective residences. Sometimes the amount is made payable at *sight*; sometimes at so many days *after sight*; at other times at a certain distance from the date. *Usance* is the time of one, two or three months after the date of the bill according to the custom of the places between which the exchanges run; and the nature of which must therefore be shewn and averred in a declaration on such a bill.—Double or treble usance is double or treble the usual time; and half usance is half the time.—Where the time of payment is limited by months, it must be computed by calendar, not lunar, months: and where one month is longer than the succeeding one, it is a rule not to go in the computation into a third. Thus on a bill dated the 28, 29, 30 or 31st of *January*, and payable one month after date, the time expires on the 28th of *February* in common years, and in the three latter cases in leap

years. The 28th [to which are to be added the day of grace, see post.]—Where a bill is payable at so many days after sight, or from the date, the day of presentment, or of the date is excluded. Thus where a bill payable 10 days after sight is presented on the 1st day of a month, the 10 days expire on the 11th, where it is dated the 1st, and payable 20 days after date, these expire on the 21st. *Ed. Reym.* 281 *6 Str.* 829.

A custom has obtained among merchants; that a person to whom a bill is address, shall be allowed a few days for payment beyond the terms mentioned in the bill called *days of grace*.—In *Great Britain* and *Ireland* three days are given; in other places more. If the last of these three days happen to be *Sunday*, the bill is to be paid on *Saturday*, but these days of grace are not allowed to bills payable at sight.

3. Bills of exchange are distinguished by the appellation of *Foreign* and *Inland* bills; the first being those which pass from one country to another, and the latter such as pass between parties residing in the same country and the universal consent of merchants has long since established a system of customs relative to *Foreign* bills which was adopted as part of the law in every commercial state.

It does not appear that *inland* bills of exchange were very frequent in *England* before the reign of *Charles II.* (see 6 *Mod.* 29): And when they were introduced, they were not regarded with the same favour as *foreign* bills. At length the Legislature by two different statutes; 9 & 10 *W. 3. c. 17*: and 3 & 4 *An. c. 9*; set both on nearly the same footing: so that what was the law and custom of merchants with respect to the one, is now in most respects the established law of the country with respect to the other.

The following are the most general forms of inland and foreign bills of exchange; but which are varied according to circumstances.

£ 100 London January 1, 1793.
One month after date please to pay to A. B. or order [or to me or my order] the sum of one hundred pounds; and place the same to the account of
To Mr. C. D. T. T.
[Place of abode and business]
Acc. C. D.

London, Jan. 1, 1793. Exchange for £50 sterling
At sight [Or At sight of this my only bill of exchange] pay to Mr. A. B. or order, Fifty pounds sterling value received of him, and place the same to account, as per advice [Or without further advice] from
To Mr. C. D. &c. A. V. S.

London, Jan. 1, 1793. Exchange for 10,000 liv. Tournoises.
At fifteen days after date [Or, at exp. two, &c. usances] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. A. B. and Co. or order, Ten thousand livres Tournoises, value received of them, and place the same to account, as per advice from
To Mr. E. F. C. D.
Banker in Paris.

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The two other bills of the foreign set, are varied thus "first and third," and "first and second not paid."

3. *A Promissory Note*, is a less complicated kind of security, and may be defined to be, an engagement in writing to pay a certain sum of money, mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsible over, within the custom of merchants; and that if in fact such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action within the custom against the drawer of the note; nor could even the person to whom it was in the first instance made payable, bring such action. 1 *Salk.* 129: 2 *Ld. Raym.* 757, 9. But at length they were recognized by the Legislature and put on the same footing with inland bills of exchange; by *Stat. 3 & 4 An. c. 9*; (made perpetual by *Stat. 7 An. c. 25. § 3*); which enacts that promissory notes payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on inland bills of exchange.

FORM OF PROMISSORY NOTES.

£20 London, Jan. 1, 1793.
I promise to pay *A. B.* or bearer on demand Twenty pounds for value received.

T. T.

£20 London, Jan. 1, 1793.
Two months after date, we and each of us promise to pay to Mr. *C. B.* or order, Twenty pounds value received.

A. B.
C. D.

4. By the *Stats. 15 Geo. 3. c. 51*: and *17 Geo. 3. c. 30*, made perpetual by *Stat. 27 Geo. 3. c. 16*, all negotiable notes and bills for less than 20*l.* are declared void; and notes or bills between that sum and 5*l.* must be made payable within 21 days after date; must particularize the name and descriptions of the payees; must bear date at the time and place they are made; must be attested by a subscribing witness, and the indorsement of them must be attended with the same strictness in all respects, and made before the notes or bills become due.

Bills of exchange and promissory notes must now be drawn on stamp paper. The stamp is proportioned, under *Stat. 31 Geo. 3. c. 25*, to the amount of the bill, from 3*d.* to 2*s.*—If foreign bills are drawn here the whole set must be stamped—But bills drawn abroad of necessity are not liable to any stamp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, not at all engaged in trade, to adopt the same mode of remittance and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it, (and, since the *Stat. 3 & 4 An. c. 9*, he a party to a promissory note,) and shall be considered

as a merchant for that purpose. *Clark, 20: 2 Burr. 285; Comb. 152: 1 Show. 125: 2 Show. 501: Lutt. 898, 1585: 10 Mod. 36, 380: Salk. 126.*

But an infant cannot be sued on a bill of exchange. *Carth. 160.*—Nor a feme covert; except in such cases as she is allowed to act as a feme sole. 1 *Ld. Raym.* 147: *Salk. 116.* See title *Baron and Feme.*

Where there are two joint-traders, and a bill is drawn on both of them, the acceptance of one binds the other, if it concern the joint trade; but it is otherwise, if it concern the acceptor only, in a distinct interest and respect. 1 *Salk. 126: 1 Ld. Raym.* 175.

Sometimes exchange is made in the name and for the account of a third person, by virtue of full power and authority given by him, and this is commonly termed *procuration*; and such bills may be drawn, subscribed, indorsed, accepted and negotiated, not in the name or for the account of the manager or transactor of any or all of these branches of remittances, but in the name and for the account of the person who authorized him. *Lex. Merc.*

5. A promissory note in its original form of a promise from one man to pay a sum of money to another bears no resemblance to a bill of exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser to the maker of the note, who by his promise is his debtor, to pay the money to the indorsee. —The indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee—When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the (drawer, or) maker of a note; when with respect to the drawer of a bill, then to the first indorser of a note; the subsequent indorsers and indorsee bear an exact resemblance to one another. 2 *Burr.* 576.

Both bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or simply to bearer.

The first kind have always been held to be negotiable; but where they were made payable to the order of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only an authority to indorse; but the exception was not allowed. 10 *Mod.* 286: 2 *Show.* 8: *Comb.* 401: *Carth.* 403:—And it is now decided law, that bills and notes payable to bearer, are equally transferable as those payable to order; and the transfer in both cases equally confers the right of action on the *bona fide* holder. 1 *Black. Rep.* 485: 3 *Burr.* 1516: *Stat. 3 & 4 An. c. 9. § 5*: 1 *Burr.* 452, 9. The mode of transfer however is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorsement.

6. The bills and notes mentioned above are considered merely as securities for money; but there is a species of each which is considered as money itself. These are, *Bank-notes*, *bankers' cash-notes*, and *drafts on bankers payable on demand.*

Bank-notes are treated as money or cash in the ordinary course or transactions of business by common consent, which gives them the credit and currency of money

BILL OF EXCHANGE I. 7.

ney to every essential purpose; they are as much considered to be money as guineas themselves; 1 *Burr.* 457, and it seems are as lawful a tender. See *Stat. 5 H. & M. c. 20. s. 28*; 3 *Term. Rep.* 554.

Bankers' cash notes and drafts on bankers, are so far considered as money among merchants; that they receive them in payment as ready cash; and if the party receiving them do not within a reasonable time demand the money he must bear the loss in case of the bankers' failure. What shall be construed to be a reasonable time has been subject to much doubt; it was formerly considered as a question of fact depending on the circumstances of the case; to be determined by a jury; but it is now established to be a question of law to be decided by the court, though the precise time is necessarily undetermined. 1 *Black. Rep.* 1. See 1 *Ld. Raym.* 744: 1 *Stra.* 415, 6, 550: 2 *Stra.* 910, 1175, 1248. And on the whole the best rule in these cases seems to be, that drafts on bankers, payable on demand, ought to be carried for payment on the very day on which they are received; if from the distance and situation of the parties that may conveniently be done.

Bills of exchange and promissory notes, though according to the general principles of law, they are to be considered only as evidences of a simple contract, are yet in one respect regarded as specialties; and on the same footing with bonds; for unless the contrary be shewn by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to shew a consideration in his declaration, or to prove it at the trial. 1 *Black. Rep.* 445: *Peckham v. Wood, K. B. East.* 18 *Geo.* 3.—However though foreign bills were always entitled to this privilege it was not without some difficulty that it was extended to inland bills; and notes are indebted for it to the statute 2 *Ld. Raym.* 758: 1 *Black. Rep.* 487.

7. Bills of exchange, contrary to the general nature of *chofes in action*, are by the custom of merchants, assignable or negotiable without any fiction, and every person to whom they are transferred may maintain an action in his own name against any one, who has before him in the course of their negotiation rendered himself responsible for their payment. The same privilege is conferred on notes by the *Statute*. But the instrument or writing which constitutes a good bill of exchange according to the custom, or a good note under the *Statute* must have certain essential qualities. 3 *Wils.* 213.

One of these qualities is, that the bill or note should be for the payment of money only; and not for the payment of money and the doing some other act; (2 *Stra.* 1271;) for these instruments being originally adopted for the convenience of remittance, and now considered only as securities for the future payment of money must undertake only for that; and it must be money in specie, not in good *East India bonds*, or any thing else, which can itself be only considered as a security. *Bull. N. P.* 273.

Another requisite quality is, that the instrument must carry with it a *personal* and certain credit, given to the drawer or maker, not confined to credit on any particular fund. 3 *Wils.* 213. But in the application of this principle there seems to be a material distinction between bills and notes. As to the former, where the fund is supposed to be in the hands of the drawee, the

objection holds in its full force; not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the *person* of the drawer; but where the fund on account of which the money is payable, either is in the hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill.—With respect to a note, if the drawer promise to pay out of a particular fund, then within his power, the note will be good under the statute: the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his *personal* credit; the bare making of the note being an acknowledgement that he has money in his hands. See *Joscelyne v. Lassere, Fort.* 281: 10 *Mod.* 294, 316—*Jenny v. Harle, 1 Stra.* 591: 2 *Ld. Raym.* 1361: 8 *Mod.* 265: *Danvers & ux. v. Delamaine, 3 Wils.* 207: 2 *Black. Rep.* 782.—On the principle which governed these cases an order from an owner of a ship to the freighter to pay money on account of freight, was held to be no bill of exchange. 2 *Stra.* 1211.—But such a bill from the freighters of a ship, to any other person, if good in other respects would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight," only expressing the consideration for which the bill was given. See *Pierfon v. Dunlop, Doug.* 571.—And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, but in reality be only a distinction how the drawer is to reimburse himself, or a recital of the particular species of value received by the maker of a note; in which cases their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 *Ld. Raym.* 1481, 1545: 2 *Stra.* 762: *Barn. K. B.* 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 *Wils.* 213: 1 *Burr.* 325: See 2 *Ld. Raym.* 1362, 1396, 1563: 8 *Mod.* 363: 4 *Vin.* 240, pl. 16: 2 *Stra.* 1151: 4 *Mod.* 242: 1 *Burr.* 323. In the case of notes however it is not necessary, that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing the time must certainly arrive, on which their payment is to depend; (2 *Stra.* 1217: 1 *Burr.* 227;) for here the words of engagement make the debt; and it is no direction to another person; the former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certainly, and at all events payable at that time, whether the maker live till then, or die in the interim.—And it has been decided that a promise to pay "within two months after such a ship shall be paid off" will make a good note; for the paying off the ship is a thing of a publick nature and morally certain. See 1 *Stra.* 24: 1 *Wils.* 262, 3.—But this indulgence seems to have been carried almost too far; and such a latitude seems incompatible with the nature and original intention of a bill of exchange; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.

BILL OF EXCHANGE II.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 *Black. Rep.* 1072.

No precise form of words is necessary to make a bill of exchange or a note under the statute; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it. 10 *Mod.* 287: 2 *Ld. Raym.* 1396: 1 *Str.* 639, 706: 1 *Wils.* 263: 3 *Wils.* 313; 8 *Mod.* 364: *Al.* 1.

The words *value received* being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential; in one case, (*Banbury v. Lister*, 2 *Str.* 1212,) where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems a very doubtful authority.—On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary. *Fort.* 282: *Barr. K. B.* 88: 8 *Mod.* 267: 1 *Show.* 5, 497: 3 *Lord Raym.* 1556, 1481: *Lutw.* 889: 1 *Mod. Ent.* 310.—And the point is now fully settled that these words are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more, cannot be essential. *White v. Ledwick*, *K. B. Hil.* 25 *Geo.* 3.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as *to order* or *to bearer*, seems not hitherto to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception; but as there were other exceptions, the point was not decided. 2 *Str.* 1212: 3 *Wils.* 212.—In another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 *Wils.* 353.—If in a doubtful point however it may be allowed to reason on general principles, it should seem, that it being the original intention and the actual use of bills of exchange that they should be negotiable, such drafts as want these operative words are not entitled to be declared on as specialties, however they may be sufficient as evidence to maintain an action of another kind. *Kyd*, 42.—But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute against the maker. *Moor v. Paine*, *Hardw.* 288.

II. AN ACCEPTANCE is an engagement to pay a bill of exchange according to the tenor of the acceptance.—The circumstances which generally concur in an acceptance are that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due, and according to its tenor; by either subscribing his name or writing the word *accept*, or

accepted, or *accepted A. B.* But a man may be bound as acceptor without any of these circumstances.

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 *Str.* 648.—In foreign bills it has always been understood that a collateral or parol acceptance was sufficient; 1 *Str.* 648: 3 *Burr.* 1674: *Hardw.* 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, *Lunley v. Palmer*, 2 *Str.* 1000; or by letter, 1 *Atk.* 717 (613).

The acceptance is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 *Burr.* 1663: *Doug.* 284: 1 *Atk.* 715, (611).—When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money: and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 1 *Salk.* 179: 1 *Ld. Raym.* 364, 574: 12 *Mod.* 214, 410. *Carth.* 4, 9.

Acceptance is usually made by the drawee, and when before the issuing of the bill, is hardly ever made by any other person; but after the issuing the bill it often happens, either that the drawee cannot be found, or refuses to accept, or that his credit is suspected, or that he cannot by reason of some disability render himself responsible: in any of these cases an acceptance by another person, in order either to prevent the return of the bill, to promote the negotiation of it, or to save the reputation of, and prevent an action against, the drawer, or some of the other parties, is not uncommon: such an acceptance is called an acceptance for the honour of the person on whose account it is made.

That engagement which constitutes an acceptance, is usually made to the holder of the bill, or to some person who has it in contemplation to receive it; and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement: but it is frequently made to the drawer himself; and then it may be binding on the party making the engagement or not, according to the circumstances of the case.

The mere answer of a merchant to the drawer "that he will duly honour his bill" is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. *Cowp.* 572, 4: 1 *Atk.* 715, (611). And an agreement to accept, may be expressed in such terms as to put a third person in a better condition than the drawer. If one, meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may show such promise on the exchange to procure credit, and a third person advancing his money on it has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor. *Dougl.* 285, (299).

BILL OF EXCHANGE III.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance: but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor.—Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period. 1 *Str.* 214: *Marius* 21.—So the drawee may accept a bill which has no time mentioned for payment, and which is held to be payable at sight, to pay, at a distant period; which acceptance will bind him. 11 *Mod.* 190.

A bill was payable the 1st of *January*; the drawee accepted to pay the 1st of *March*: the holder struck out the 1st of *March*, and inserted the 1st of *January*, and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. *Price v. Shute, East.* 33 *Car.* 2.—So the acceptance may direct the payment to be made at a different place from that mentioned in the bill, as at the house of a banker. See 2 *Str.* 1195.—So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills. *Bull. N. P.* 270.—An acceptance may also be conditional, as 'to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold.' 2 *Str.* 1152.

What shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury. 1 *Term Rep.* 182: See 1 *Str.* 648: 1 *Atk.* 717, (612).—If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing, as well as the acceptance; for if the acceptance should, on the face of it appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burthen of proof will be on the acceptor. *Doug.* 286.—A conditional acceptance, when the conditions on which it depends are performed, becomes absolute. *Cowp.* 571.—But if the conditions on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged. *Doug.* 297.

An acceptance by the custom of merchants as effectually binds the acceptor, as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. *Cro. Jac.* 308: *Hard.* 487.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, *accepted*, or *accepted by me A. B.* or, *I accept the bill*, &c. these clearly amount to an acceptance. *Molloy, book 2. cap. 10. sect. 15.*

If the party under-writes the bill, *presented* such a day, or only the day of the month; this is such an acknowledgement of the bill as amounts to an acceptance. 3 *New Abr.* 610: *Comb.* 401. So if he order a direction to another person to pay it. *Bull. N. P.* 270.

If the party says, *Leave your bill with me and I will accept it*, or, *call for it to-morrow and it shall be accepted*;

these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, *Leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord Chief Justice *Hale*, at *Guilthall. Molloy, book 2. cap. 10. sect. 20.*

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that if the bill came back again he would pay it; this was ruled a good acceptance. 3 *New Abr.* 610, cites *Mitch.* 6 *Geo.* 1. *B. R. Gair v. Coleman.*

If a merchant be desired to accept a bill, on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill, will not amount to an acceptance of the other. 1 *Term Rep.* 269.

An agreement to accept or honour a bill, will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal, or in writing, is immaterial: If *A.* having given or intending to give credit to *B.* write to *C.* to know whether he will accept such bills as shall be drawn on him on *B.*'s account; and *C.* return for answer, that he will accept them; this is equivalent to an acceptance; and a subsequent prohibition to draw on him on *B.*'s account, will be of no avail, if in fact, previous to that prohibition the credit has been given. 3 *Burr.* 1663.

If a book-keeper or servant, or other person having authority, or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 *New Abr.* 611.

If a bill be drawn on a servant (as a clerk of a corporation, &c.) with a direction to place the money to the account of his employer, and the servant accept it generally, this renders him liable to answer personally to an indorsee. 2 *Str.* 955: *Hardw.* 1.

If a bill be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c.

Forging the acceptance of any bill of exchange, or the number or principal sum of any accountable receipt, is made felony, by *Stat. 7 Geo. 2. c. 22.*

III. According to the difference in the stile of negotiability of bills and notes, the modes of their transfer also differ. Bills and notes payable to bearer are transferred by delivery: if payable to *A. B.* or bearer they are payable to bearer, as if *A. B.* were not mentioned. 1 *Burr.* 452: 3 *Burr.* 1516: 1 *Black. Rep.* 485. But to the transfer of those payable to order, it is necessary in addition to delivery that there should be something, by which the payee may appear to express his order. This additional circumstance is an *indorsement*; so called from being usually (though not necessarily) written on the back of the note or bill.

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Where no regulation is made by act of parliament (see ante I. 4,) relative to the negotiation of bills or notes, no particular form of words is necessary to make an indorsement; only the name of the indorser must appear upon it, and it must be written or signed by him, or by some person authorized by him for that purpose.

Indorsements are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person, by name: a blank indorsement consists only of the name of the indorser—Blank indorsements are most frequent, indeed almost universal in business.—A blank indorsement renders the bill or note afterwards transferable by delivery only, as if it were payable to bearer; for by only writing his name the indorser shews his intention that the instrument should have a general currency, and be transferred by every possessor. *Doug.* 617, (639), 611, (633).

Except where restrained by statute (See ante I. 4.) The transfer of a bill or note may be made at any time after it has issued, even after the day of payment; and, in case of bills, where the acceptor resides at a distance from the drawer, is frequently made before acceptance. 1 *Ld. Raym.* 575: See 3 *Term Rep.* 80: 3 *Burr.* 1516: 1 *Black. Rep.* 485: *Doug.* 611, (633).

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorser is liable for any sum, at any time of payment that may be afterwards inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. *Doug.* 496, (514).

On a transfer by delivery, it is said that the person making it ceases to be a party to, or security for, the payment of a bill or note; (1 *Ld. Raym.* 442: 12 *Mod.* 241: 1 *Salk.* 128;) yet it seems there can be little doubt that he is liable in another sort of action; as for money had and received, &c. See 3 *Term Rep.* 757: 4 *Term Rep.* 177.

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option, to take it either as indorsee, or as servant or agent to the indorser; and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorser's name, with an order to pay the money to himself, which shews his election to take as indorsee; or to write a receipt which shews he is only the agent of the indorser. 1 *Salk.* 125, 128, 130: 1 *Shoeb.* 163: 2 *Ld. Raym.* 871. And, on this principle one, to whom a bill was delivered with a blank indorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawer, to prove the delivery of it to the latter. 1 *Salk.* 130: 2 *Ld. Raym.* 871.

The original contract on negotiable bills and notes is to pay to such person or persons, as the payee, or his indorsee, or their indorsee shall direct; and there is as much privacy

between the last indorser and the last indorsee, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants, for as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, is incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner and with the same privileges, qualities, and advantages as the original payee, as a transferable negotiable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; for these reasons an indorser for a valuable consideration cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negotiable. 2 *Burr.* 1222, 3, 6, 7—See also *Com.* 311: 1 *Str.* 457: 2 *Burr.* 1216: 1 *Black. Rep.* 295; and as to the effect of Restrictive Indorsements, see *Doug.* 615, (637): 617, (639, 640).

Where the transfer may be by delivery only, that transfer may be made by any person who by any means, whether accident or theft has obtained the possession; and any holder may recover against the drawer, acceptor or indorser in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 *Burr.* 452: 3 *Burr.* 1516: 1 *Black. Rep.* 485. The same principle applies also to the case of a bill negotiated with a blank indorsement. *Parrott v. Roberts & al.* *Doug.* 611, (613); where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee: an assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency, and would render it necessary for every indorsee to enquire into all the circumstances, and the manner in which the bill came to the indorser; but the law is now clearly settled, that a holder coming fairly by a bill or note, is not to be affected with the transaction between the original parties.

But a transfer by indorsement where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsee have transferred it, or some one claiming in the right of some of these parties.—Bills and notes in favour of partners must be indorsed by them all, or at least by one in the firm of the house; and a bill drawn by two persons payable to them or order, must be indorsed by both. *Doug.* 630, (653) in note.

If a bill or note be made or indorsed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property. 1 *Str.* 516: *Ca. L. E.* 246.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only.—If the holder of a bill or note die, it devolves to his executors or administrators, and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been made by the testator or intestate.

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intestate. But on their indorsement they are liable personally to the subsequent parties, for they cannot charge the effects of the testator.—They may also be the indorsee of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate; and in that character they may bring an action on it against the acceptor, or any of the other parties. 3 *Wils.* 1: 2 *Str.* 1260: 2 *Barnes* 137: 2 *Burr.* 1225: 1 *Term Rep.* 487: 10 *Mod.* 315.

When a bill payable to order is expressed to be for the use of another person than the payee, yet the right of transfer is in the payee, and his indorsee may recover against the drawer or acceptor. *Carth.* 5: 2 *Vent.* 309: 2 *Shew.* 509.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. 3 *New Abr.* 610: *Carth.* 466: 1 *Salk.* 65.

IV. By the very act of drawing a bill, the drawer comes under an implied engagement to the payee, and to every subsequent holder, fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place at which he is described to be, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept it in writing on the bill itself, according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose.

In default of any of these particulars, the drawer is liable to an action at the suit of any of the parties before mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also in some cases for damages, interest and costs; and he is equally answerable whether the bill was drawn on his own account, or on that of a third person; for the holder of the bill is not to be affected by the circumstances that may exist between the drawer and another; the personal credit of the drawer being pledged for the due honour of the bill. *Beaves.* See ante I. 7.

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a bill of exchange to any amount, at any distance of time, he renders himself liable to be called on as the drawer of any bill so formed by the person to whom he has given the authority. 1 *H. Black. Rep.* 313.

If acceptance be refused and the bill returned, this is notice to the drawer of the refusal of the drawee; and then the period when the debt of the former is to be considered as contracted, is the moment he draws the bill; and an action may be immediately commenced against him; though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed. *Doug.* 55, *Mitford v. Mayor*; See also 2 *Str.* 949, cited 3 *Wils.* 16, 17.

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorser and indorsee, it is a new bill of exchange; as it is also between every subsequent indorser and indorsee: the indorser therefore, with respect to all the parties subsequent to him, stands in the place of the drawer, being a collateral security for the acceptance and pay-

ment of the bill by the drawee: his indorsement imposes on him the same engagement that the drawing of the bill does on the drawer; and the period when that engagement attaches is the time of the indorsement. 1 *Salk.* 133: 2 *Shew.* 441, 494: 2 *Burr.* 674.

Nothing will discharge the indorser from his engagement but the absolute payment of the money, not even a judgment recovered against the drawer or any previous indorser. 3 *Mod.* 86: 2 *Shew.* 441, 494.—Neither is the engagement of an indorser discharged by an ineffectual execution against the drawer or any prior or subsequent indorser. 2 *Black. Rep.* 1235, and see 4 *Term Rep.* 825.

The engagement of the drawer and indorsors is however still but conditional.—The holder in order to intitle himself to call upon them in consequence of it, undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them.—Where the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come: it does not appear that any precise time, within which this presentment must be made has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, that can conveniently be done; and what has been said on the presentment of bills and notes payable on demand, seems exactly to apply here. See ante I. 6.

Whether the holder of a bill, payable at a certain time after the date be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly determined: in practice however it frequently happens that a bill is negotiated and transferred through many hands, without acceptance; and not presented to the drawee till the time of payment, and no objection is ever made on that account. See 5 *Burr.* 2671: 1 *Term Rep.* 713.

If however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call; and if on account of the holder's delay, any loss accrue by the failure of any of the preceding parties, he must bear the loss. 5 *Burr.* 2670: 1 *Term Rep.* 712.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply, that payment has been made; and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.—For the old cases on this subject, see 1 *Salk.* 127, 132, 3. 1 *Shew.* 155: 1 *Ld. Raym.* 743: 2 *Str.* 829.—This time for demand of payment seems at present to be regulated by the cases as to notice to preceding indorsors immediately following.

A presentment either for payment or acceptance must be made at reasonable hours; which are the common hours of business in the place where the party lives to whom the presentment is to be made.

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If acceptance or payment be refused, or the drawee of the bill or maker of the note has become insolvent, or has absconded, notice from the holder himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added, that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorser should know default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shewn, that the holder looked to him for payment, and gave him notice that he did so. See 1 *Str.* 441, 515; 2 *Black. Rep.* 747; as to bills—and 1 *Str.* 649; 2 *Str.* 1087; 1 *Term Rep.* 170, as to notes.

What should be considered as a reasonable time within which notice should be given, either of non-acceptance or non-payment has been subject to much doubt and uncertainty; it was once held, that a fortnight was a reasonable time, but that is now much narrowed. 1 *Moul.* 27.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next post—Under the same circumstances, the same rule obtains in the case of non-payment. 1 *Term Rep.* 169.—So also in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point as well as on the question of what shall be considered as a reasonable time for making the demand of payment, it has been an object of no little controversy, whether it was the province of the jury, or of the judge to decide; (See ante I. 6;) till lately it seems the jury had been permitted to determine on the particular circumstances of each individual case what time was reasonably to be allowed, either for making demand or giving notice. *Doug.* 515, (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court on several occasions have laid it down as a principle, that what shall be considered as a reasonable time in either case is a question of law: juries have however struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and on a second trial being granted, they in both cases adhered to their opinion, contrary to the direction of the judge. In one of them however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankrupt which had issued against the drawee of the bill between the time of the verdict and the application. See *Doug.* 515; 1 *Term Rep.* 171, and the cases there

cited.—In a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle and granted no less than three trials. 1 *Term Rep.* 167, 9; *Tindal v. Brown*. It seems therefore fully established that what shall be reasonable time is a question of law: and generally that a demand must be made, and notice given as soon as, under all the circumstances, it is possible so to do.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know this fact; and if he had no effects in the drawer's hands, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. 1 *Term Rep.* 410; and see 1 *Term Rep.* 405.

Yet though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the indorser, if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorser, who must be presumed to have paid a valuable consideration for the bill, probably has. 2 *Term Rep.* 714.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by the drawer, to discharge the bill; yet where he had no effects it may; though it appear that in fact he sustained an injury for want of such notice: such a subsequent promise is an acknowledgment that he had no right to draw on the drawee, and if he has in fact sustained damage it is his own fault.—But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived. See 2 *Term Rep.* 713, 714.

In the manner in which notice, either of non-acceptance or non-payment is given, there is a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary, to entitle the holder to recover, against the drawer or indorsers, the amount of the bill on failure of the drawee or acceptor; it is sufficient if it appear that the holder means to give no credit to the latter, but to hold the former to their responsibility. 1 *Term Rep.* 170.—But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends

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intends to recover all damages which he or the deliverer of the money to the drawer, or any other may sustain on account of the non-acceptance: the minute is in common language termed the *noting* of the bill; the solemn declaration, the *protest*, and the person whose office it is to do these acts a *public notary*: and to his protestation all foreign courts give credit. *Mal.* 264: *Mar.* 16.

This *protest* must be made within the regular hours of business, and in sufficient time to have it sent to the holder's correspondent by the *very next post* after acceptance refused; for if it be not sent by that time, with a letter of advice, the holder will be construed to have discharged the drawer and the other parties intitled to notice: and noting alone is not sufficient, there must absolutely be a protest to render the preceding parties liable. *Bull. N. P.* 271: 2 *Term Rep.* 713.

But in this case the holder is not to send the bill itself to his correspondent; he must retain it, in order to demand payment of the drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, the bill must be protested for non-payment, and the bill itself, together with the protest, sent to the holder's correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor. *Braves.*

As this protest on foreign bills must be made on the last day of grace, and immediate notice sent to the parties concerned, it seems established that such a bill is payable, *en demand made*, at any time that day within reasonable hours; and that the acceptor has not the whole day to pay the bill. 4 *Term Rep.* 170.

Besides the protest for non-acceptance, and non-payment, there may also be a protest for better security; this is usual when a merchant who has accepted a bill happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change, before the bill he has accepted has become due; or when the holder has any reason to suppose it will not be paid, in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must also be sent to the parties concerned, by the next post. *Mar.* 27: 1 *Ld. Raym.* 743.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bill, but merely for another cause. 1 *Show.* 164.

The effect of protest for non-acceptance or non-payment, is to charge the drawer or indorsors, not only with the payment of the principal sum, but with interest, damages, and expences; which latter consist usually of the exchange, re-exchange, provision and postage, together with the expences of the protest. See *Stra.* 649.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 *Burr.* 1086, 7: and see 2 *Term Rep.* 52.

The principal difference between foreign and inland bills of exchange at common law, seems to have been this. A protest for non-acceptance or non-payment of a foreign bill was, and still is, essentially necessary to charge

the drawer on the default of the drawee; nothing, not even the principal sum, could or can at this time be recovered against him without a protest: no other form of notice having been admitted by the custom of merchants as sufficient: but on inland bills, simple notice, within a reasonable time, of the default of the drawee, was held sufficient to charge the drawer, without the solemnity of a protest; the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which in many cases might be a very serious disadvantage: to remedy this inconvenience in some degree, the *Stat.* 9 & 10 *W. 3. c.* 17, and afterwards the *Stat.* 3 & 4 *Anne, c.* 9, were passed; the professed intention of which acts was to put inland bills on the same footing as foreign ones; so far as relates to the recovery of damages, interest and costs, (*i. e.* expences) by means of the protest they have done it; but there are several minute particulars, in which, from an attentive perusal of the acts, it will appear they still differ.

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words, *value received*, should be inserted; and the want of these in a foreign bill, cannot deprive the holder of the benefit of a protest; but that benefit in case of non-payment is not given by the statutes to inland bills which want these words, and therefore they cannot be protested for non-payment; and the second act provides, that "where these words are wanting, or the value is less than 20/., no protest is necessary either for non-acceptance or non-payment," the safest construction of which seems to be, that inland bills, without the words *value received*, or under 20/., shall continue as at common law, and shall not be intitled to the privilege of a protest, either for non-acceptance or non-payment.

An inland bill, payable at so many days after sight, cannot be protested at all; and no inland bill can be protested, till after the expiration of the three days of grace; notice of which protest is by the statute to be sent within fourteen days after the protest. 4 *Term Rep.* 170.

There appears also to be another difference subsisting between foreign and inland bills of exchange; for where acceptance and payment both are refused on foreign bills, it seems necessary that there should be a protest for each; but under the *Stat.* 3 & 4 *Ann. c.* 9, it seems that one protest for either, on an inland bill is sufficient.

On inland bills where damages, interest and costs, [expences] are to be recovered, there is more indulgence in the time allowed for notice of non-payment than where only the principal sum is to be recovered; for when there is no protest for non-payment, presentation for payment must be made so early on the last day of grace, that the holder may give notice of non-payment by the next post. See *before*.

That part of the *Stat.* 3 & 4 *Anne, c.* 9, which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded in justice.

As to several niceties relative to qualified acceptances, and protests under peculiar circumstances. See *Braves Lex Merc.* See also 1 *Wils.* 185: *Doug.* 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the
next

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next moment, even if the failure was before the acceptance.—The acceptor may however be discharged by an express declaration of the holder, or by something equivalent to such declaration. *Doug.* 237, (249).—But no circumstances of indulgence shown to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an express declaration of discharge. *Doug.* 235, (247).—Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorser, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor. *Doug.* 238, (250) *in note*; but see *Str.* 733.—See *ante* II.

Though the receipt of part from the drawer or indorser be no discharge to the acceptor, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsors; for it is for their advantage, that as much should be received from others as may be. 1 *Ld. Raym.* 744; 2 *Str.* 745; 1 *Will.* 48; *Bull. N. P.* 271.—So the receipt of part from an indorser, is no discharge of the drawer or preceding indorser.

If the drawer of a note, or the acceptor of a bill, be sued by the indorsee, and the bail pay the debt and costs, this absolutely discharges the indorser as much as if the principal had paid the note or bill; and the bail cannot afterwards recover against the indorser in the name of the indorsee. 1 *Will.* 46.

Though in order to intitle himself to call on any of the preceding parties, in default of the acceptor of a bill, or maker of a note, it be necessary that the holder should give due notice of such default, to the party to whom he means to resort, yet notice to that party alone is sufficient as against him: it is not necessary that any attempt should be made to recover the money of any of the other collateral undertakers; or in case of such attempt being made, to give notice of its being without effect. Thus in order to intitle himself to recover against an indorser, it is not necessary for the indorsee to shew an attempt to recover against the drawer of a bill of exchange, or the payee indorser of a promissory note. See 1 *Salk.* 131, 3; 1 *Str.* 441; 1 *Ld. Raym.* 143; and finally, *Hyson v. Adams*, 2 *Burr.* 69; on the principles of all which cases it is now usually settled, that to intitle the indorsee to recover against the indorser of an *inland* bill of exchange, it is not necessary to demand the money of the first drawer.

By the said Stat. 3 *Ed. 4 Ann.* c. 9. § 7, it is enacted, "that if any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt; if such person accepting of any such bill for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest ac-

cording to the directions of the act, either for non-acceptance or non-payment."

V. I. Before the doctrine of Bills of Exchange was well understood, and the nature and extent of the customs relative to them fully recognized by the courts, the remedy on them was sought in different forms of action, according to the opinions which were entertained of the applicability of the several forms to the respective situations of the parties. See *Hard.* 485, 7: 1 *Mod.* 285; 1 *Fent.* 132; 1 *Freem.* 14; 1 *Lev.* 298; 11 *Mod.* 137; *C. 16.* 204; 1 *Salk.* 125; 12 *Mod.* 37, 345; *Skins.* 346; *Str.* 680; 8 *Mod.* 375; 1 *Mod. Ent.* 312. *pl.* 13; *Mog. Prec.* 548; *K. J. Bowen v. Tims*, B. R. E. 22 *Geo.* 3; *Baily* 47. The conclusion, resulting from all which cases seems to be, that where a privity exists between the parties, there an action of debt, or of *indebitatus assumpsit* may be maintained; but that where it does not exist, neither of these actions will lie.

A privity exists, between the payee and the drawer of a bill of exchange; the payee and drawer of a promissory note; the indorsee and his immediate indorser of either the one or the other; and perhaps between the drawer and acceptor of a bill; provided that in all these cases, a consideration pass respectively between the parties.

But it seems to be considered, that no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorser of either.

The action which is now usually brought on a bill of exchange, is a special action on the case, founded on the custom of merchants.

That custom was not at first recognized by the court, unless it was specially set forth, and therefore it was deemed necessary to set forth by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. See 1 *Will.* 189; 1 *Ld. Raym.* 21, 175; 3 *Mod.* 86; 4 *Mod.* 242.

But when the custom of merchants was recognized by the judges as part of the law of the land, and they declared they would take notice of it, as such, *ex officio*, it became unnecessary to recite the custom at full length; a simple allegation, that "the drawer, mentioning him by his name, according to the custom of merchants, drew his bill of exchange, &c." was sufficient. And if the plaintiff still adhering to former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if by the law of merchants, as recognized by the court, the case as stated, intitled him to his action, he might recover; and the setting forth of the custom was reckoned superfluous, and rejected. See 1 *Shew.* 317; 2 *Ld. Raym.* 1542.

Whether the drawer of a bill, or the indorser of a bill, or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it against the acceptor or maker, in the character of indorsee, seems undecided; but there is a case which clearly shews that a drawer or indorser cannot maintain an action against the acceptor in the character of indorsee, *where the indorsement is after the receipt of payment*; because when a bill is returned unpaid, either on the drawer or indorser, its negotiability is at an end. *Beck v. Robley*, Tr. 14 *Geo.* 3. 1 *H. Black. Rep.* 89, in the notes.

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The action therefore in which the drawer or indorser, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorser, and not as indorsee. *Vis. Simonds v. Parminster*, 1 *Wils.* 185; *Vis. Morg. Prec.* 43, 44, 50; 4 *Term Rep.* 82, 5.

If the drawee, without having effects of the drawer, accept and duly pay the bill without having it protested, he may recover back the money in an action for money paid, laid out and expended to the use of the drawer. *Vis. Sumner v. Nisbet*, 1 *Term Rep.* 269.

Instead of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction. *Tatlock v. Harris*, 3 *Term Rep.* 174.

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be laid in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. *Vis. Golding v. Grace*, 2 *Bl. Rep.* 747.

But though he may have judgment against all, yet he can recover but one satisfaction; yet though he be paid by one, he may sue out execution for the costs in the several actions against the others. 2 *Wils.* 115; and see 1 *Str.* 515; see *ante* IV. and title *Bankrupt* IV. 5. &c.

To this action the defendant may plead the statute of limitations; and by the express provision of the statute of *Queen Anne*, all actions on promissory notes must be brought within the same time as is limited by the statute of *James*, with respect to actions on the case. And it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. *Comb.* 100, 392.

2. As the action on a bill of exchange is founded on the custom of merchants, so that on a promissory note is founded on the statute 3 & 4 *Anne*, c. 9; and usually, though perhaps not necessarily, refers to it. In both cases however it is necessary, that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action, must necessarily concur in order to intitle the plaintiff to recover.

In stating the bill or the note, regard must be had to the legal operation of each respectively. 1 *Burr.* 324, 5. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the *bearer*, and therefore it is proper in the statement of such a bill, to alledge that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. *Vere v. Lewis*, 3 *Term Rep.* 183; *Minot & al. v. Gibson & al.* 11. 485; *Conferred in Don. P. cc.* See *H. Black. Rep.* 569;

Colles v. Emett, *H. Black. Rep.* 313, and more fully as to this subject post. 3. of this division.

Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be intitled to recover. See 1 *H. Black. Rep.* 569.

A bill or note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it will be good; for the legal operation of such a note is, that he who signed, promised to pay. *Semb.* 1 *Burr.* 323.

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good. *Burchell v. Slack*, 2 *Ld. Raym.* 1545. So on a note to pay jointly or severally, *Coop.* 832; contrary to former determinations.

Inland bills and notes may be stated to have been made at any place where the plaintiff chuses to lay his action, because the action on them is transitory, and may be stated to have arisen any where. In an action against the acceptor, it must be alledged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alledged. 2 *Ld. Raym.* 1542: 1 *Ld. Raym.* 364, 5: 374, 5: 1 *Salk.* 127, 9: *Carth.* 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to shew his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsements.

But if the indorsement was in blank, and the action be against the drawer, acceptor, or payee, no other indorsement is necessary to be stated than that of the payee; in an action against a subsequent indorser, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement need be stated, because it is transferable without indorsement. See *ante* III.

In an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to intitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial; and therefore there is no room for presumption that there was actual proof. *Rushton v. Affinall*, *Doug.* 679, (684): but if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. *Doug.* 684, in the notes.

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3. Most part of what might be said as to the *proof* and *defence* in actions on bills or notes, necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is necessary to intitle him to his action, and of what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted; because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 *Ld. Raym.* 444: *Str.* 946: 3 *Burr.* 1354: See 1 *Bl.* 390.—In an action against the acceptor therefore, where the acceptance was on view of the bill, whether in writing on the bill, or by parol, it is not necessary to prove the hand-writing of the drawer.—That of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

On a bill payable to *bearer*, there is no person through whom the holder derives his title; in an action against the acceptor therefore, on such a bill, he has only to prove the hand-writing of the acceptor himself.—But in an action against the acceptor of a bill payable to *order*, the plaintiff must prove the hand-writing of the very payee who must be the first indorser. See 4 *Term Rep.* 28.—If the indorsement of the payee be general, the proof of his hand-writing is sufficient; if special, that of his indorsee must be proved; but otherwise that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration.—Any subsequent holder may declare as the indorsee of the first indorser; but in this case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out, either at or before the trial. See *ante* III.

But the plaintiff in the case of a transfer by delivery (See *ante* III,) may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names of the blank indorsors having been forged. 1 *Burr.* 542; *Dougl.* 633, *Peacock v. Rhodes*.—And though the acceptance be subsequent to the indorsements, yet the necessity of proving the payee's hand-writing is not; by this means, superseded. *Say.* 233: 1 *Term Rep.* 654.

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the indorsors as in an action against the acceptor. See *Collis v. Ematt*, 1 *H. Black. Rep.* 313.—That of the drawer himself must of course be proved.—It must also be proved that the plaintiff has used due diligence. See *ante* IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee, first indorser, and of all those to whom an indorsement has been specially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of *fictional* payees. A bill payable to the order of a *fictional* person, and indorsed in a *fictional* name, is not a novelty among merchants and traders. See *Stane*

v. Finsland, B. R. Sittings after *Easter* 1769; alluded to in 3 *Term Rep.* 176.—But in the years 1786, 7 and 8, two or three houses, connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale.—So long as the acceptors or drawers could either procure money to pay these bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the hand-writing of the first indorser. The question came before the Chancellor by petition.—He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See *Tatlock v. Harris*, 3 *Term Rep.* 174: *Per v. Lewis*, 3 *Term Rep.* 183: *Minet & al. v. Gibson & al.* 3 *Term Rep.* 483: *Collis v. Ematt*, 1 *H. Black. Rep.* 313. From the decisions on these cases, the principal of which was affirmed in the House of Lords, and which have settled that such bills are to be considered as payable to *bearer*, (see *ante* 2, of this division V.) it follows, that proof of the acceptor's hand only, is sufficient to entitle the holder to recover on the bill; and in the case of *Tatlock v. Harris*, where a bill was drawn by the defendant and others on the defendant, it was determined that a *bona fide* holder for a valuable consideration might recover the amount against the acceptor in an action for money paid, or money had and received.

[The principal case above alluded to, as affirmed in the House of Lords, is that of *Minet & al. v. Gibson & al.* already so often mentioned. It is better known by the name of *Gibson and Johnson v. Minet and Pector*; and the opinions of the Judges in the House of Lords, are very fully and accurately reported in 1 *H. Black. Rep.* 569. The effect of the determination, as there stated, is as follows.

If a bill of exchange be drawn in favour of a *fictional* payee, with the knowledge, as well of the acceptor as the drawer; and the name of such payee be indorsed on it by the drawer, with the knowledge of the acceptor, which *fictional* indorsement purports to be to the drawer himself or his order; and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted; but it does not appear that there was an intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor, as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawee; or on a count stating the special circumstances.

Other cases, *Maister & al. v. Gibson & al.* and *Hunter v. Gibson & al.* were afterwards brought before the House of Lords, (June 1793) on demurrers to evidence; on which the Judges gave their opinion, that it was not competent

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competent to the defendants to demand and that on the record, as stated, no judgment could be given.—The whole disclosed a system of bill-negotiation to the amount of a million a year, on fictitious credit, which ended in the bankruptcy of many; but which had at least the good effect of shewing that the obligations of law, are not so easily eluded, as those of honour and conscience.]

In an action by an indorsee against an indorser, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorser, before him against whom the action is brought; every indorser being, with respect to subsequent indorses or holders, a new drawer. 1 *Ld. Raym.* 174: *Str.* 444: 2 *Barr.* 675.—Where an action is by one indorser who has paid the money, proof must be given of the payment. 1 *Ld. Raym.* 743.

In an action by the drawer against the acceptor, where the bill has been paid away and returned, it is necessary to prove the hand-writing of the latter, demand of payment from him, and refusal, the return of the bill and payment by the plaintiff. 10 *Mod.* 36, 7: 1 *Wils.* 185. See ante 1, of this *Div. V.*

In an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself; or something equivalent, as his being in prison on execution. 3 *Wils.* 18.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest. 1 *Salk.* 126: 1 *Ld. Raym.* 175: see *Carvick v. Vickery*, *Doug.* 633.

Where a servant has a general authority to draw, accept, or indorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved, as that it was a general custom for him to do so, &c. See *Comb.* 450: 12 *Mod.* 346.

An action on a bill of exchange, being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's life-time. 12 *Mod.* 447.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of enquiry, it is sufficient for the latter to produce the note or bill without any proof of the defendant's hand. See 2 *Str.* 1149: *Barnes* 233, 4: 2 *Black. Rep.* 748: 3 *Wils.* 155; and finally, 3 *Term Rep.* 301, *Green v. Hednes*; in which the Court said, that by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill, because that was set out on the record; and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether any part of it had been paid.—And now it seems on such judgment, a writ of inquiry is not necessary; for the Court on application by the plaintiff, will, if no good reason be shewn to the contrary, refer it to the proper officer, to ascertain the damages and costs, and calculate the interest.—Ruled *Ann.* B. R. Hil. 26 *Geo.* 3. *Bayly* 67: *Rafleigh v. Salmon*, *H. Black. Rep.* C. P. 252.

4. Besides the different subjects of defence, which may be collected from the whole of the general principles here so fully entered into, the most usual are those which arise either, from the total want of consideration, or from

the illegality of the consideration for which the bill or note was given. See this *Div.* title *Consideration*.

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it.—But there are cases, in which it has been determined, that by the construction of certain statutes, even the innocent indorses shall not recover against the acceptor of the bill or drawer of the note.—As on *Stat.* 9 *Ann.* c. 14. § 1, which absolutely invalidates notes, bills, &c. given for money won at play. 2 *Str.* 1255.—So on *Stat.* 12 *Ann.* § 2. c. 16. § 1, as to securities on usurious contracts, *Long v. Waller*, *Doug.* 736. And reasoning by analogy, on *Stat.* 5 *Geo.* 2. c. 30. § 11, against notes given by a bankrupt to procure his certificate. See this *Dict.* title *Bankrupt*.

It has however been repeatedly ruled at *Nisi prius*, that wherever it appears that a bill or note has been indorsed over, after it is due, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorser, and must stand in the situation of the person to whom it was payable. See 3 *Term Rep.* 80, 83.

VI. See ante III. and the general principles, already exemplified.

If a bank bill payable to A. B. or bearer, be lost, and it is found by a stranger, payment to him would indemnify the Bank; yet A. B. may have trover against the finder, though not against his assignee for valuable consideration, which creates a property. 3 *Salk.* 71.

If the possessor of a bill by any accident loses it, he must cause intimation to be made by a notary public before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privy. And by *Stat.* 9 & 10 *W.* 3. c. 17, if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him, in case the bill so lost be found again.

If a bill lost by the possessor should afterwards come into the possession of any person paying a full and valuable consideration for it, without knowledge of its having been lost, the drawer (and acceptor, if the bill was accepted) must pay it when due to such fair possessor, so that the provision of the statute may in many cases be useless to the loser of the bill.—But against the person who finds the bill, the real owner may maintain an action of trover. 1 *Salk.* 126: 1 *Ld. Raym.* 738.

Stealing of bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony, by *Stat.* 2 *Geo.* 2. c. 25: 9 *Geo.* 2. c. 18. And vide *Stat.* 31 *Geo.* 2. c. 22. § 78.

There are also *BILLS OF CREDIT* between merchants, of which the following is a form.

THIS present writing witnesseth, That I A. B. of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if he the said C. D. do deliver, or cause to be delivered unto

BILL.

E. F. of, &c. or to his use, any sum or sums of money amounting to the sum of, &c. of lawful British money, and shall take a bill under the hand and seal of the said E. F. confessing and shewing the certainty thereof; that then I, my executors or administrators, having the same bill delivered to me or them, shall and will immediately, upon the receipt of the same, pay, or cause to be paid unto the said C. D. his executors or assigns, all such sums of money as shall be contained in the said bill; at, &c. For which payment in manner and form aforesaid, I bind myself, my executors, administrators and assigns, by these presents. In witness, &c.

BILL OF LADING, A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there usually are three parts, one kept by the consignor, one sent to the consignee, and one kept by the captain. See titles *Factor*, *Merchant*.

BILL OF RIGHTS, The statute 1 Wm. and Mary, stat. 2. cap. 2, is so called; as declaring the true rights of British subjects. See title *Liberty*, where this important act is stated at large.

BILL OF SALE, Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession; this doth not alter the property, because it is *nudum pactum, unde non oritur actio*; but if a man sells goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession; because a man is elopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. *Yelv.* 196: *Cro. Jac.* 270: 1 *Brown.* 111: 6 *Co.* 18.

But what is chiefly to be considered under this head, is the statute of 13 *Eliz.* cap. 5; by which it is enacted, "That all fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, shall (as against the party only, whose debt or duty is so endeavoured to be avoided) be utterly void, except grants made *bonâ fide*, and on a good (which is construed a valuable) consideration."

A. being indebted to B. in 400*l.* and to C. in 20*l.* C. brings debt against him, and, pending the writ, A. being possessed of goods and chattels to the value of 300*l.* makes a secret conveyance of them all without exception, to B. in satisfaction of his debt; but, notwithstanding, continues in possession of them, and sells some of them, and others of them, being sheep, he sets his mark on: and resolved that it was a fraudulent gift and sale within the aforesaid statute, and shall not prevent C. of his execution for his just debt; for though such sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration; yet it wants the other; for the owner's continuing in possession, is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indiciu*m of the property of a chattel, and therefore this sale is not made *bonâ fide*. 3 *Co.* 80: *Mo.* 638: 2 *Bull.* 226.

As the owner's continuing in possession of goods, after his bill of sale of them, is an undoubted badge of a fraudulent conveyance, because the possession is the only *indiciu*m of the property of a chattel, which is a thing unixed and transitory; so there are other marks and cha-

BILLUS.

raacters of fraud; as a general conveyance of them all without any exception; for it is hardly to be presumed, that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret correspondence and good understanding settled between him and the vendee, for a private occupancy of all, or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it: as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 *Co.* 81: *Mo.* 638.

If goods continue in the possession of the vendor after a bill of sale of them, though there is a clause in the bill that he shall account annually with the vendee for them, yet it is a fraud: since, if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and cautions of the aforesaid act. *Mo.* 638.

If A. makes a bill of sale of all his goods, in consideration of blood and natural affection, to his son, or one of his relations, it is a void conveyance in respect of creditors; for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales, by 13 *Eliz.* cap. 5.

If A. makes a bill of sale to B. a creditor, and afterwards to C. another creditor, and delivers possession at the time of sale to neither; afterwards C. gets possession of them, and B. takes them out of his possession, C. cannot maintain trespass, because though the first bill of sale is fraudulent against creditors, and so is the second, yet they both bind A. As therefore B.'s is the elder title, the naked possession of C. ought not to prevail against it.

See further on this subject title *Fraud*.—See also title *Bankrupt* II.

BILL OF STORE, A kind of licence granted at the *Custom-house* to merchants to carry such stores and provisions as are necessary for their voyage, custom-free. A bill of *suffervance* is a licence granted to a merchant, to suffer him to trade from one *English* port to another, without paying custom. See title *Navigation Acts*.

BILLET'S OF GOLD, *Fr. billet.*] Are wedges or ingots of gold, mentioned in the statute 27 *E.* 3. c. 27.

BILLET WOOD, Is small wood for fuel, which must be three foot and four inches long, and seven inches and a half in compass, &c. Justices of peace shall inquire by the oaths of six men of the assise of *billet*, and being under size, it is to be forfeited to the poor. *Stat.* 43 *Eliz.* c. 14: vide 9 *An.* c. 15: 10 *An.* c. 6. See *Fuel*.

BILLINGSGATE market to be kept every day, and toll is appointed by statute: all persons buying *fish* in this market may sell the same in any other market by retail; but none but fishmongers shall sell them in shops; if any person shall buy any quantity of fish at *Billingsgate* for others, or any fishmonger shall ingross the market, they incur a penalty of 20*l.* And fish imported by foreigners shall be forfeited, and the vessel, &c. See 10 & 11 *W.* 3. c. 24: 1 *Geo.* 1. *Stat.* 2. c. 18. f. 1. &c. Vide *Fish* and *Fishermen*.

BILLUS, A bill, stick or staff, which in former times was the only weapon for servants.—It was long in use for watchmen, and we are told is still carried by those at *Litchfield*. See *Steevens's Shakespeare*.

BIOTHANETUS,

BIOCHANETUS, One who deserves to come to an untimely end. *Ordericus Vitalis*, writing of the death of *William Rufus*, who was shot by *Walter Tyrrel*, tells us, that the bishops, considering his wicked life and bad exit, adjudged him *ecclesiastica veluti biochanetum absolute indignum*. *Lib. 10. p. 782.*

BIRRETTUM, A thin cap fitted close to the shape of the head: and is also used for the cap or coif of a judge, or serjeant at law. *Spelm.*

BIRTHS, BURIALS, and MARRIAGES, &c. By statute, a duty was granted on *births* and *burials* of persons, from 50*l.* a duke, &c. down to 10*s.* and 2*s.* And the like on *marriages*; also *bachelors*, above twenty-five years of age, were to pay 1*s.* yearly. *Stat. 6 & 7 W. 3. c. 6.* Exp. as to the duties. See tit. *Stamps, Taxes.*

BISACUTUS, An iron weapon double edged, so as to cut on both sides. *Fleta. lib. 1. c. 33.*

BISANTIUM, *besantina*, or *besant*, An antient coin first coined by the Western emperors at *Bizantium* or *Constantinople*. It was of two sorts, gold and silver; both which were current in *England*. *Chaucer* represents the gold *besantine* to have been equivalent to a duckat; and the silver *besantine* was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, *unum bisantium, vel duos solidos.*

BI-SCOT, At a session of *sewers* held at *Wizenbale* in *Norfolk*, 9 *Ed. 3.* it was decreed, That if any should not repair his proportion of the banks, ditches and caufeyes by a day assigned, *xiii.* for every perch unrepaired should be levied upon him, which is called a *bilaw*: and if he should not, by a second day given him, accomplish the same, then he should pay for every perch 2*s.* which is called *bi-scot*. *Hist. of Imbanking and Draining, f. 254.*

BISHOPS and ARCHBISHOPS.—A **BISHOP** (*Episcopus*) is the chief of the Clergy in his *diocese*, and is the archbishop's suffragan or assistant.

AN **ARCHBISHOP** (*Archiepiscopus*) is the chief of the clergy in his *province*, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consecration, by an *archbishop* and two other bishops, &c. is regulated by *Stat. 25 H. 8. c. 20.* (See post, *Bishop*.) An *archbishop* is said to be introned, when a bishop is said to be installed; and there are four things to complete a bishop or *archbishop*, as well as a parson: first, election, which resembles presentation; the next is confirmation, and this resembles admission; next, consecration, which resembles institution; and the last is installation, resembled to induction. 3 *Salk. 72.* In ancient times the *archbishop* was bishop over all *England*, as *Austin* was, who is said to be the first *archbishop* here; but before the *Saxon* conquest the *Britons* had only one bishop, and not any *archbishop*. 1 *Roll. Rep. 328*: 2 *Roll. 440.*

But at this day, the ecclesiastical state of *England* and *Wales* is divided into two provinces or archbishopricks, to wit, *Canterbury* and *York*. Each archbishop hath within his province bishops of several dioceses. The archbishop of *Canterbury* hath under him within his province, of ancient foundations, *Rocheſter*, *London*, *Wincheſter*, *Norwich*, *Lincoln*, *Ely*, *Chicheſter*, *Salisbury*, *Exeter*, *Bath & Wells*, *Worceſter*, *Coventry* and *Litchfield*, *Hereford*, *Llandaff*, *St. David's*, *Bangor*, and *St. Aſaph*; and four founded by King *Henry 8.* erected out of the ruins of dissolved monasteries, viz. *Glouceſter*, *Bristol*,

Peterborough, and *Oxford*. The archbishop of *York* hath under him four, viz. the bishop of the county palatine of *Cheſter*, newly erected by King *Henry 8.* and annexed by him to the archbishoprick of *York*; the county palatine of *Durham*; *Carlisle*; and the *Iſle of Man*, annexed to the province of *York* by King *Hen. 8*; but a greater number this archbishop anciently had, which time hath taken from him. *Co. Lit. 94.*

Westminster was one of the new bishopricks created by *Hen. 8.* out of the revenues of the dissolved monasteries. 2 *Burn. E. L. 78.*—*Thomas Thirlby* was the only bishop that ever filled that see. He surrendered the bishoprick to *Ed. 6. A. D. 1550*, 30th *March*; and on the same day, it was dissolved and added again to the bishoprick of *London*. *Rym. Fœd. 15. p. 228.* Queen *Mary* afterwards filled the church with *Benedictine* monks, and *Eliz.* by authority of parliament, turned it into a collegiate church, subject to a dean.

The *archbishop* of *Canterbury* is now stiled *metropolitanus* & *primus totius Angliæ*; and the *archbishop* of *York* stiled *primus & metropolitanus Angliæ*. They are called *archbishops* in respect of the bishops under them; and *metropolitans*, because they were consecrated at first in the metropolis of the province. 4 *Iaſt. 94.* Both the *archbishops* have distinct provinces, wherein they have suffragan bishops of several dioceses, with jurisdiction under them. The archbishop hath also his own *diocese*, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal; thus having two concurrent jurisdictions, one as Ordinary, or the bishop himself within his diocese; the other as superintendant, throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.

The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (See title *Advowson*.) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *Option*, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself, seems to be derived from the legatine power formerly annexed, by the Popes, to the Metropolitan of *Canterbury*.

The *Archbishop* of *Canterbury* hath the privilege to crown all the Kings of *England*; and to have prelates to be his officers; as for instance; the bishop of *London* is his provincial dean; the bishop of *Wincheſter*, his chancellor; the bishop of *Lincoln*, his vice-chancellor; the bishop of *Salisbury*, his precentor; the bishop of *Worceſter*, his chaplain, &c. It is the right of the *archbishop* to call the bishops and clergy of his province to convocation, upon the king's writ: he hath a jurisdiction in cases of appeal, where there is a supposed default of justice in the ordinary; and hath a standing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and censure and excommuni-

BISHOPS AND ARCHBISHOPS.

cate, suspend or depose, for any just cause, &c. 2 *Roll. Abr.* 223. And he hath power to grant dispensations in any case, formerly granted by the see of *Rome*, not contrary to the law of God: but if the case is new and extraordinary, the king and his council are to be consulted. *Stats.* 25 *H. 8. c.* 21: 28 *H. 8. c.* 16. § 6. This dispensing power is the foundation of the archbishop's granting special licenses, to marry at any place or time; to hold two livings and the like; and in this also is founded the right he exercises of conferring degrees in prejudice of the two Universities. He may retain eight chaplains: and, during the vacancy of any see, he is guardian of the spiritualties. *Stats.* 21 *H. 8. c.* 13: 25 *H. 8. c.* 21: 28 *H. 8. c.* 16.

The archbishop of *Canterbury* hath the precedency of all the clergy; next to him the archbishop of *York*; next to him the bishop of *London*; next to him the bishop of *Durham*; next to him the bishop of *Winchester*; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the bishop of *Durham*. *Co. Lit.* 94: 1 *Ought. Crd. Jud.* 486.

The first archbishop of *York*, that we read of, was *Paulinus*; who, by Pope *Gregory's* appointment, was made archbishop there, about the year of our Lord 622. *Godol.* 14.

The Archbishop of *York* hath the privilege to crown the Queen-consort, and to be her perpetual chaplain.

The Archbishop of *Canterbury* is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. *God.* 13.

The Archbishop of *York* hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the Lord Chancellor. *God.* 14.

A Bishop is elected by the king's *congé d'essire*, or licence to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a *præmunire*, and the king may nominate whom he pleases by letters-patent. *Stat.* 25 *H. 8. c.* 20. This was to avoid the power of the see of *Rome*. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm such election, incur the penalties of a *præmunire*. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalities till consecration. The consecration of bishops, &c. is confirmed by act of parliament.

It is directed in the form of consecrating bishops, that a bishop when consecrated must be full thirty years of age.

It is held a bishop hath three powers; 1st. His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in

any place throughout the world. 2. His power of jurisdiction, which is limited and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his consecration; and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. *Palm.* 473: 4. 5.

The king may not seize into his hands the temporalities of bishops but upon just cause, and not for a contempt, which is only finable; See title *Temporalities*. Bishops are allowed four years for payment of their first fruits, by *stat.* 6 *An. c.* 27. Every bishop may retain four chaplains. *Vide Stat.* 21 *Hen. 8. c.* 13. *f.* 16: 3 *Edm. c.* 1.

A Bishop hath his consistory court, to hear ecclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits, and institutes priests; confirms, suspends, excommunicates, grants licences for marriage, makes probate of wills, &c. *Co. Lit.* 96: 2 *Roll. Abr.* 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him: may grant leases for three lives, or twenty-one years, of land usually letten, reserving the accustomed yearly rents. *Stats.* 32 *H. 8. c.* 28: 1 *El. c.* 19. *f.* 5. See this Dict. title *Leases*.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law so created in some University. *St.* 37 *H. 8. c.* 17.

By *Stat.* 24 *Geo. 3. sess.* 2. *c.* 35, The Bishop of *London*, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience.—But no person shall be thereby enabled to exercise such offices within his majesty's dominions.

By *Stat.* 26 *Geo. 3. c.* 84, The Archbishops of *Canterbury* or *York*, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions to be bishops, without requiring the usual oaths; pursuing the forms prescribed by the act. But no such bishops or their successors, or persons ordained by them, shall exercise their functions within his majesty's dominions.

The right of trial by the Lords of Parliament, as their Peers, it is said, does not extend to bishops; who though they are Lords of Parliament, and sit there by virtue of their baronies, which they hold *jura ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility. 3 *Inft.* 30, 1: see 1 *Comm.* 401: 4 *Comm.* 264: and this Dict. title *Parliament*.

Archbishopricks and Bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan, but the archbishop can resign to none but the king himself. 1 *Comm.* 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the stile and title of *Grace*, and *Most Reverend Father in God by Divine Providence*. The bishops, those of *Lord*, and *Right Reverend Father in God by Divine permission*. Archbishops are *enthroned*; bishops *installed*.

Mr. *Christian* in his notes on 1 *Comm.* 380, says, that the supposed answer of a bishop on his consecration, "*Nolo episcopari*," is a vulgar error.

BISH

BISHOPRICK, The diocese of a bishop.

BISSA, Fr. *biche*, *cerva major*, A hind. *Mss. Angl. vol. 1. fol. 648.*

BISSEXTILE, *bissextilis*.] Leap year, so called because the sixth day before the calends of *March* is twice reckoned, making an additional day in the month of *February*; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first invented by *Julius Cæsar*, to make the year agree with the course of the sun. And, to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute *de anno bissextili*, 21 H. 3, that the day increasing in the leap-year, and the day next before, shall be accounted but one day. *Brit. 209: Dyer 17. See title Year.*

BISUS, *bisus*, *mica bifa*, *panis bifius*, Fr. *pain bis*.] Brown bread, a brown loaf. *Covell.*

BLACK ACT, or **WALTHAM BLACK ACT**. The *Stat. 9 Geo. 1. cap. 22.* is so called, having been occasioned by some devastations committed near *Waltham*, in *Hampshire*, by persons in disguise, or with their faces blacked.—By this act, persons hunting armed and disguised, and killing or stealing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fish-pond, or killing, &c. of cattle, or cutting down trees, or setting fire to house, barn, or wood, or shooting at any person, or sending anonymous letters, or letters signed with fictitious name, demanding money, &c. or rescuing such offenders, are guilty of felony without benefit of clergy. This act is made perpetual by 31 Geo. 2. c. 42. And see further, *Stat. 6 Geo. 2. c. 37: 27 Geo. 2. c. 15.*

See also *Stat. 16 Geo. 3. c. 30.* against deer-stealers; the milder punishment inflicted by which act has been thought a virtual repeal of the punishment inflicted by the Black Act above recited. *Leach's Hawk. P. C. 1. c. 49. § 7.* and this Dict. titles *Foist*, *Game*, *Deer-stealing*.

BLACK-BOOK, Is a book lying in the *Exchequer*. See *State Annals 154.*

BLACK LEAD. By *Stat. 25 Geo. 2. c. 10.* Entering mines of black lead, with intent to steal, is made felony; and by the same act offenders committed or transported for entering mines of black lead with intent to steal, escaping, or breaking prison, or returning from transportation, are excluded from clergy.

BLACK MAIL, Fr. *maille*, a link of mail, or small piece of metal or money.] Signifies in the North of *England*, in the counties of *Cumberland*, *Northumberland*, &c. a certain rent of money, corn, or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties; to be freed and protected from the devastations of those robbers. But by *Stat. 43 Eliz. cap. 13.* to take any such money or contribution, called *black-mail* to secure goods from rapine, is made a capital felony, as well as the offences such contribution was meant to guard against.

It is also used for rents reserved in work, grain, or biffer money; which were called *reditus nigri* in contradistinction to the *blanch farms*, *reditus albi*. See tith. *Alba Firma* and *Blanch Fumes*.

BLACK-ROD, The gentleman usher of the black rod is chief gentleman usher to the king; he belongs to the

BLANK.

garter and hath his name from the black rod, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called in the *Black Book*, fol. 255, *Latus virgatus niger*, & *basiliarius*; and in other places *virga bajulus*. His duty is *ad portandum virgam coram domino rege ad festum sancti Georgii infra castrum de Windfore*: and he hath the keeping of the chapter-house door, when a chapter of the order of the garter is sitting; and in the time of parliament, he attends on the house of peers. His habit is like to that of the register of the order, and garter king at arms; but this he wears only at the solemn times of the festival of *St. George*, and on the holding of chapters. The black rod he bears, is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.

BLACKS OF WALTHAM. See tit. *Black Act*.

BLACKWELL-HALL. The public market of *Blackwell-hall*, *London*, is to be kept every *Tuesday*, *Friday* and *Saturday*, at certain hours; and the hall-keepers not to admit any buying or selling of *woollen cloth* at the said hall upon any other days or hours, on penalty of 100 *l.* Factors selling cloth out of the market, shall forfeit 5 *l.* &c. Registers of all the cloths bought and sold are to be weekly kept: and buyers of cloth otherwise than for ready money, shall give notes to the sellers for the money payable; and factors are to transmit such notes to the owners in twelve days, or be liable to forfeit double value, &c. *Stat. 8 & 9 W. 3. cap. 9.*—See also *Stat. 4 & 5 P. & M. c. 5. § 26: 39 Eliz. c. 20. § 12: 1 Geo. 1. c. 15.*

BLADARIUS, A corn-monger, meal-man, or corn-chandler. It is used in our records for such a retailer of corn. *Pat. 1 Ed. 3. par. 3. m. 13.* See tit. *Clothiers*.

BLADE, *bladum*.] In the *Saxon* signifies generally fruit, corn, hemp, flax, herbs, &c. *Will. de Mohun* released to his brother all the manor of *T.*—*Salvo Infrascripto suo & blado*, &c. excepting his stock and corn on the ground. Hence *bladiar* is taken for an ingrosser of corn or grain.

BLANCH FIRMES, In ancient times the crown-rents were many times reserved in *libris albis*, or *blanch firmes*: In which case the buyer was holden *de-albais firmam*, viz. his hase money or coin, worse than standard, was molten down in the *Exchequer*, and reduced to the fineness of standard silver; or instead thereof, he paid to the King 12 *d.* in the pound by way of addition. *Lewin's Essay upon Coins, p. 5.*

BLANDFORD, An act was passed for rebuilding the town of *Blandford* in the county of *Dorset*, burnt down by fire in the year 1731. *Stat. 5 Geo. 2. c. 16.*

BLANCHORNUM, A little bell. *Leg. Adelfstan. c. 8.*

BLANK-BAR, Is used for the same with what we call a *common bar*, and is the name of a plea in *bar*, which in an action of trespass is put in to oblige the plaintiff to assign the certain place where the trespass was committed: 2 *Cro. 594.*

BLANKS, Were a kind of white money coined by *Hen. 5.* in those parts of *France* which were then subject to *England*, the value whereof was 8 *d.* *Stow's Annals, p. 586.* These were forbidden to be current in this realm. 2 *Lien. 6. c. 9.* See tit. *Alba Firma*.

BLANKS,

BLANKS. In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing some-thing material wanting) in a declaration, abates the same. 4 *Ed.* 4, 14: 20 *H.* 6, 18. And such a blank, is a good cause of demurrer. *Blanks* in the imparlance-roll aided *after verdict* for the plaintiff. *Hob.* 76; *Parker v. Parker.*

BLASARIUS, Is a word used to signify an incendiary. *Blount.*

BLASPHEMY, *blasphemia.*] Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. *Livew.* cap. 1. And *blasphemies* of God, as denying his being, or providence, and contumelious reproaches of *Jesus Christ*, &c. are offences by the Common Law, punished by fine, imprisonment, pillory, &c. 1 *Hawk. P. C.* And by statute 9 & 10 *W.* 3. c. 32, if any one shall by writing, speaking, &c. deny any of the Persons in the Trinity, to be God; assert there are more Gods than one, &c. he shall be incapable of any office; and for the second offence, be disabled to sue any action, to be executor, &c. and suffer three years imprisonment. Likewise by *Stat.* 3 *Jac.* 1. c. 21, persons jestingly or prophanely using the name of God, or of *Jesus Christ*, or of the *Holy Ghost*, or of the Trinity, in any stage play, &c. incurs a penalty of 10*l.*

BLE, Signifies sight, colour, &c. And *blee* is taken for corn: As *Boughton* under the *Blee*, &c.

BLENCH, BLENCH-HOLDING. See tit. *Alba Firma.*

BLLENHEIM. See *Marlborough Duke of.*

BLETA. Fr. *bleche.*] Peat or combustible earth dug up and dried for burning. *Rot. Parl.* 35 *Ed.* 1.

BLINKS, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

BLISSOM, Corruptly called *bloffom*, is when a ram goes to the ewe, from the *Teutonick*, *Blats*, the bowels.

BLOATED FISH OR HERRING, Are those which are half dried. See tit. *Fishery.*

BLODEUS, Sax. *blad.*] Deep red colour; from whence comes bloat and bloated, *viz.* sanguine and high coloured, which in *Kent* is called a *blousing* colour; and a *blouse* is there a red-faced wench. The prior of *Burcester*, *A. D.* 1425, gave his liveries of this colour. *Paroch. Antiq.* 376.

BLOOD, *sanguis.*] Is regarded in descents of lands; for a person is to be the next and most worthy of blood to inherit his ancestor's estate. *Co. Lit.* 13: See *Jenk. Cent.* 203: See tit. *Descent, Heir.*

BLOODWIT, or *bloudwite*, compounded of the Sax. *blad*, i. e. *sanguis*; and *wyte*, old *English*, *miseriordia.*] Is often used in ancient charters of liberties for an amercement for bloodshed. *Skene* writes it *bloudwite*; and says *wite* in *English* is *injuria*; and that *bloudwite* is an amercement or *unlaw* (as the *Scotch* call it) for wrong or injury, as bloodshed is: for he that hath *bloudwite* granted him, hath free liberty to take all amercements of courts for effusion of blood. *Fleta* saith, *Quod significat quietantium misericordiae pro effusione sanguinis.* *Lib.* 1. cap. 47. And according to some writers, *blodwite* was a customary fine paid as a composition and amercement for shedding or drawing of blood; for which the place was answerable, if the party was not discovered; and therefore a privilege or exemption from this fine or

penalty, was granted by the King, or supreme Lord, as a special favour. So king *Henry II.* granted to all tenants within the honour of *Willingford*, *Ut quieti sint de Hildagio*, & *blodewite*, &c. — *Paroch. Antiq.* 114.

BLOODY-HAND, Is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest; and it is where a trespasser is apprehended in the forest, with his hands or other parts bloody, though he be not found chasing or hunting of the deer. *Manwood.* In *Scotland*, in such like crimes, they say taken in the fact, or with the *red hand*. See *Backberind.*

BLUBBER. Whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned *Stat.* 12 *Car.* 2. c. 18.

BOCK-HORD, or *book-board*, *librorum borreum.*] A place where books, evidences, or writings are kept.

BOCKLAND, Sax. *quasi bookland.*] A possession or inheritance held by evidence in writing. See *LL. Al-luredi*, cap. 36. *Bockland* signifies deed land or charterland; and it commonly carried with it the absolute property of the land; wherefore it was preserved in writing, and possessed by the *Thanes* or nobler sort, as *Prædium nobile, liberum & immune à servitiis vulgaribus & servilibus*, and was the same as *allodium*, descendible unto all the sons, according to the common course of Nations and of Nature, and therefore called *gavelkind*; devisable only by will, and thereupon termed *Terræ Testamentales.* *Spelm. of Feuds.* This was one of the titles which the *English Saxons* had to their lands, and was always in writing: there was but one more, and that was *Folkland*, i. e. *Terra Popularis*, which passed from one to another without any writing. See *Squire* on the *Anglo-Saxon Government*, and this *Dist. tit. Tenure.*

BOIA, Chains or fetters, properly what we call *bernicles.* *Hist. Elien. apud Whartoni Angl. Sax. part.* 1. p. 618.

BOIS, Fr.] Wood, and *sub-bois*, underwood. See *Boscus.*

BOLHAGIUM, or *boldagium*, a little house or cottage. *Blount.*

BOLT, A bolt of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of *Burcester.* It is mentioned, *Paroch. Antiq.* p. 574.

BOLTING, A term of art used in our *Inns of Court*, whereby is intended a private arguing of cases. The manner of it at *Gray's Inn* is thus: An ancient and two barristers sit as judges, three students bring each a case, out of which the judges chuse one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to *mooting*, and may be derived from the Sax. *bolt*, a house, because done privately in the house for instruction. In *Lincoln's Inn*, *Mondays* and *Wednesdays* are the *bolting-days*, in vacation time; and *Tuesdays* and *Thursdays* the *moot days.*

BONA FIDE. That we say is done *bonâ fide*, which is done really, with a good faith, without any fraud or deceit.

BONA GESTURA, Good abearing, or good behaviour. See *Good Behaviour.*

BONAIGHT, or *bonaghty*, Was an exaction in *Ireland*, imposed on the people at the will of the lord, for relief of the knights called *bonaghty*, who served in the wars. *Antiq. Hibern.* p. 60.

BONA NOTABILIA. See title *Executor.* V. 3.

BOND I.

BONA PATRIA, An assise of country-men or good neighbours: It is sometimes called *assisa bone patrie*; when twelve or more men are chosen out of any part of the county to pass upon an assise; otherwise called *juratores*, because they are to swear judicially in the presence of the party, &c. according to the practice of Scotland. *Skene. See Assisors.*

BONA PERITURA, Goods that are perishable. The *Stat. Westm. 1, 3 E. 1. cap. 4*, as to wrecks of the sea, ordains, that if the goods within the ship be *bona peritura*, such things as will not endure for a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this Dict. tit. *Wreck.*

BONCHA, A bunch, from the old Lat. *bonna* or *bunna*, a rising bank, for the bounds of fields: and hence *bonum* is used in *Norfolk*, for swelling or rising up in a bunch or tumour, &c.

BOND, A *Bond of Obligation*, is a deed whereby the obligor, or person, bound obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another (the obligee) at a day appointed.

- I. *General Rules as to the Nature, and Form of this Security.*
- II. *Who may be obligors, and Obligees.*
- III. *The Ceremonies necessary to constitute a Bond or Obligation.*
- IV. *Of the Condition; and what shall be a Performance or Breach thereof.*
- V. *Of the Discharge and Satisfaction of Bonds; 1, by the Act of the Party; or 2, by the Act of Law.*
- VI. *Of Actions and Pleadings, on Bonds.*

I. If the bond be without a condition, it is called a single one, *simplex obligatio*; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living, and after his death the obligation descends on his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompence. So that it may be called, though not a *direct*, yet a *collateral* charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation: but it is commonly at the foot of the obligation. *Bro. Obl. 67.* A memorandum on the back of a bond may restrain the same by way of exception. *Moor 67.*

This security is also called a *specialty*; the debt being therein particularly specified in writing, and the party's seal; acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the solemnity of a seal.

As to the assignment of bonds, See tit. *Assignment.*

If the condition of a bond be impossible at the time of

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making it, or be to do a thing contrary to some rule of law that is merely positive; or if it be uncertain or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. *Co Litt 206.* See post, IV; and tit. *Condition.*

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law, but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz. his principal, interest, and expences, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained, upon non-performance of covenants; and the like. And this practice having gained some footing in the courts of law, (See *2 Keb. 553: Salk. 596, 7. 6 Mod. 11, 60, 101:*) the *Stat. 4 & 5 Ann. c. 16*, at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore not intitled to interest; yet, as by the judgment he is intitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him the principal and interest, which incurred as well before as after the entering up of the judgment. *Abr. Eq. 92, 288.*

The Court of Chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest and costs; and notwithstanding they exceeded the penalty, this was affirmed. *1 Vern. 350: 1 Eq. Ab. 92: 16 Vin. tit. Penalty. 3 Comm. 435.*—And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of *K. B.* will not stay the proceedings on payment of the money into court. *2 Term Rep 382.* See *White v. Sealy, Doug. 49, Semb. contra*; but the authority of which is much shaken by the case in *2 Term Rep. 388*, where *Buller, J.* remarked, that there were several cases where the judgment had been carried beyond the penalty. In *Elliot v. Davis (Bunb 23.)* interest on a bond was decreed (*in Scac.*) to be paid, though it exceeded the penalty. See also *Collins v. Collins*, the case of an annuity. *Burr. 820: Holdip v. Orway, 2 Saund. 106: Dewall v. Price, Show. P. C. 15.*

BOND II.

FORM of a BOND or OBLIGATION, with Condition for the Payment of Money.

KNOW all men by these presents, That I David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, in the penal sum of ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September, in the twenty first year of the reign of our sovereign Lord George the Third, by the grace of God, of Great Britain, France and Ireland, king defender of the Faith and so forth, and in the year of our Lord one thousand seven hundred and ———.

The Condition of this obligation is such, that if the above bounden David Edwards, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the above-named Abraham Barker, his executors, administrators or assigns, the full sum of five thousand pounds of lawful money of Great Britain, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered being
first duly stamped in the
presence of
A.B.

David Edwards (L.S.)

For irregular forms of bonds or obligations, See 1 Leon. 25: 3 Leon. 299: Cro. Jac. 208, 607: Bro. tit. Obligation, &c. from whence, and other authorities, which the regularity of modern practice has rendered uninteresting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. 5 Co. 119: 4 Co. 124: 1 Rol. Abr. 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, enters into a bond to the person who causes the restraint, the same may be avoided for duress of imprisonment Co. Lit. 253: 2 Inst. 482. *vid. tit. Duress.*

So in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband. See tit. *Baron and Feme.*

So though an infant shall be liable for his necessities, such as meat, drink, cloaths, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. *Duff. and Stud.* 113: Co. Lit. 172: Cro. Jac. 494, 566: 1 Sid. 112: 1 Salk. 279: Cro. Eliz. 920. See tit. *Infants.*

BOND II.

Also though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, yet may a privy in blood, as the heir, and privies in representation, as the executor and administrator, avoid such bonds; also if a lunatick after office found, enters into a bond, it is merely void. 4 Co. 124, B. v. *Wiley's case*. But see 2 *Stra.* 1104, that lunacy may be given in evidence on the general issue. See tit. *Lunatics.*

But if an infant, feme covert, &c. who are disabled by law to contract, and to bind themselves in bonds, enter, together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. 1 *Rol. Rep.* 41.

If a servant makes a bill in form, "*Memoandum*, that I have received of A. B. to the use of my master C. D. the sum of 40*l.* to be paid at Michaelmas following," and thereto set his seal, this is a good obligation to bind himself; for though, in the beginning of the deed, the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. *Filv* 137, *Talbot v. Gorbolt*.

Infants, idiots, as also feme coverts may be obligees; and here the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligor may plead *non est factum*; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 Co. 119 *b*: Co. Lit. 3 *a*.— See tit. *Baron and Feme.*

An alien may be an obligee, for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us Co. Lit. 129 *b*: *Moor* 431: *Cro. Eliz.* 142, 683: *Cro. Car.* 9. 1 *Salk.* 46: 7 *Mod.* 15: See tit. *Alien.*

Sole Corporations, such as bishops, prebends, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these, shall enure to them in their natural capacities; for no sole body politick can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being. *Cro. Eliz.* 464: *Dyer* 48 *a*: Co. Lit. 9 *a*. 46 *a*: *Mob.* 64. 1 *Rol. Abr.* 515.

If a drunken man gives his bond it binds him; and a bond without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. *Jenk. Cent.* 109. But see *Cole v. Robins, Hil.* 2 *Ann. per Holt*, referred to in *Bull. N. P.* 172, that on the general issue, defendant may give in evidence that they made him sign the bond when he was so drunk he knew not what he did. A person enters voluntarily into a bond, though there was not any consideration for it, if there be no fraud used in obtaining the same, the bond shall not be relieved against in equity: but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 *Chan. Caf.* 157. An heir is not bound, unless he be named expressly in the bond; though the executors and administrators are. *Dy.* 13.

BOND III.

It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case, the obligee may sue them jointly, or he may sue any one of them at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also, in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 *Rol. Abr.* 148: *Dyer* 19, 310: 5 *Co.* 19: *Dul.* 85. *pl.* 42: 1 *Salk.* 393: *Carth.* 61: 1 *Lutw.* 696.

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos & utrumque nostrum per se pro toto & in solido*, these make the obligation joint and several. *Dyer* 19 *b.* *pl.* 114.

III. It is said, that there are only three things essentially necessary to the making a good obligation, *viz.* writing in paper or parchment, *sealing* and *delivery*; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named *Eslen*, and he signs his name *Eslewin*, that this variation is not material; because subscribing is no essential part of the deed, *sealing* being sufficient. 2 *Co.* 5 *a*: *Godard's case*. *Noy* 21, 85: *Moor* 28: *Stile* 97: 2 *Salk.* 462: 5 *Mod.* 281.

And though the *seal* be necessary, and the usual way of declaring on a bond is, that the defendant by his bond or writing obligatory sealed with his seal, acknowledged, &c. yet if the word sealed be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. *Dyer* 19 *a*: *Cro. Eliz.* 571, 737: *Cro. Jac.* 420: 2 *Co.* 5: 1 *Vent.* 70: 3 *Lev.* 348: 1 *Salk.* 141: 6 *Mod.* 306.

Also though sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because as Lord Coke says, these are things which are done afterwards. 2 *Co.* 5 *a*.

The name of the obligor subscribed, 'tis said, is sufficient, though there is a blank for his christian name in the bond. *Cro. Jac.* 261: Vide *Cro. Jac.* 558: 1 *Mod.* 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the bond, and yet he signs and seals it; the court of Chancery may make good such an accident; and in case a person takes away a bond fraudulently, and cancels it, the obligee shall have as much benefit thereby, as if not cancelled. 3 *Chan. Rep.* 99, 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth. 2 *Co.* 5, *Godard's case*: *Noy* 21, 85, 86: *Hob.* 249: *Stile* 97: *Cro. Jac.* 136, 264: *Yelv.* 193: 1 *Salk.* 76.

If a man declare on a bond, bearing date such a day, but does not say when delivered, this is good: for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was first delivered; at another day, for this would be a departure. *Cro. Eliz.*

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BOND IV.

773: 2 *Lev.* 348: 1 *Salk.* 141: Vide 1 *Brownl.* 104: 1 *Lev.* 196.

A plaintiff may suggest a date in a bond, where there is none, or it is impossible, &c. where the parties and sum are sufficiently expressed. 5 *Mod.* 282. A bond dated on the same day on which a release is made of all things up to the day of the date, is not thereby discharged. 2 *Rol. Rep.* 255.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery. 2 *Co.* 4, 6: 3 *Keb.* 332.

A person shall not be charged by a bond, though signed and sealed, without delivery, or words, or other thing, amounting to a delivery. 1 *Leon.* 140: But a bond or deed may be delivered by words, without any act of delivery; as where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. So an actual delivery, without speaking any word, is sufficient: otherwise, a man that is mute could not deliver a deed. *Co. Lit.* 36 *a*: *Cro. Eliz.* 835: *Leon.* 193: *Cro. Eliz.* 122.

Interlineation in a bond in a place not material, will not make the bond void; but if it be altered in a part material, it shall be void. 1 *Nelf. Abr.* 391. And a bond may be void by rasure, &c. As where the date, &c. is rased after delivery; which goes through the whole. 5 *Rep.* 23. If the words in a bond at the end of the condition, *That then this obligation to be void*, are omitted, the condition will be void; but not the obligation.

IV. The condition of a bond was, that *A. L.* should pay such a sum upon the 25th of December, or appear in Hilary term after, in the court of *B. R.* He died after the 25th of December, and before Hilary term, and had not paid any thing: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. 1 *Mod. Rep.* 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as near as can be according to the intention of the parties. *Dyer* 51.

If no time is limited in a bond for payment of the money, it is due presently and payable on demand. 1 *Brownl.* 53. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently; *Jones* 140. See 1 *Leon* 101.

A bond made to enfeoff two persons; if one dies before the time is past, wherein it should be done, the obligor must enfeoff the survivor of them, or the condition will be broken; and if it be that *B.* and others shall enjoy land, and the obligor and *B.* the obligee do disturb the rest; by this the condition is broken. 4 *Hen.* 7. 1: *Co. Lit.* 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a performance of the condition. 2 *Elfst.* 149. But in such case equity would relieve, and probably a judge, on such action coming before him,

A a

would

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would order plaintiff to be non-suited. If the act be to be done at a certain place, where the obligor is to go, to *Rome*, &c. and he is to do the sole act without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite, it may be hastened by the request of the obligee. 6 Rep. 30: 1 *Rel. Abr.* 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in *England*, and tender the money, otherwise the bond will be forfeited: but when a place is appointed, he need seek no further. *Co. Lit.* 210: *Lit.* 340. And if, where no place is limited for payment of money due on a bond, the obligor, at or after the day of payment, meets with the obligee, and tenders him the money, but he goes away to prevent it, the obligor shall be excused. 8 E. 4.

The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. *Co. Lit.* 208.

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded; and therefore a performance in substance is sufficient, though it differ in words or some material circumstance; as if one be bound to deliver the testament of the testator, if he plead that he had delivered letters testamentary, it is sufficient. *Bro. Condition*, 158: 17 E. 4, 3: 1 *Rel. Abr.* 426.

If the condition of an obligation be to procure a lawful discharge, this must be by a *release*, or some *discharge* that is *pleadable*, and not by *acquittance*, which is but evidence. 1 *Keb.* 739.

If the party, who is bound to perform the condition disables himself, this is a breach; as where the condition is, that the feoffee shall re infeoff, or make a gift in tail, &c. to the feoffor, and the feoffee, before he performs it, make a feoffment or gift in tail, or lease for life or years in *presenti* or *future* to another person, or marry or grant a rent-charge, or be bound in a statute, or recognizance, or become professed; in all those cases the condition is broken; for the feoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received it; and being once disabled, he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be de-wigged, &c. before the time of the reconveyance. *Co. Lit.* 221, 222: *Poph.* 110: 1 *Co.* 25 a: 1 *Rel. Abr.* 447: 5 *Co.* 21 a.

Where the condition is in the *conjunctive*, regularly both parts must be performed; yet, to supply the intention of the parties, it is held, that if a condition in the *conjunctive* be not possible to be performed, it shall be taken in the *disjunctive*; as if the condition be, that he and his executors shall do such a thing, this shall be taken in the *disjunctive*, because he cannot have an executor in his life-time; so if the condition be, that he and his assigns shall sell certain goods, this shall be taken in the *disjunctive*, because both cannot do it. 1 *Rel. Abr.* 444: *Overen* 52: 1 *Leon.* 74: *Gouldj.* 71.

See further this Dict. tit. *Condition*, *Consideration*, *Gaining*, *Marriage*; as to *Resignation Bonds*, tit. *Parson*.

A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead

BOND V. 1.

the special matter. 2 *Wilson* 341, &c. Condition of a bond to indemnify a person from any legal prosecution is against law, and void. 1 *Lutw.* 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 *Salk.* 75.

V. 1. Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond conditioned to pay 8*l.* defendant pleaded payment of 5*l.* before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond, and upon demurrer this was adjudged a good plea. *Moor* 677: *Vide* 3 *Bulst.* 301.—Payment after the day, of a less sum, is not good, as the bond is forfeited, at *common law*; and there is not any statute to relieve.

Debt upon bond of 16*l.* conditioned to pay 8*l.* 10*s.* on a certain day; the defendant pleaded, that, before that day, he, at the request of the plaintiff, paid to him 5*l.* which he accepted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the defendant had pleaded the payment of the 5*l.* generally, without alledging, that it was in satisfaction of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be paid in satisfaction. 5 Rep. 117. Debt upon bond, conditioned, that in consideration the plaintiff had paid 12*l.* to the defendant; he became bound to pay the plaintiff 12*l.* if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14*l.* if he lived six months after the date of the bond; the defendant pleaded, that after the six months he paid the plaintiff 8*l.* and then gave him another bond in the penalty of 20*l.* conditioned to pay him 10*l.* on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture, the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 *Lut.* 464.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. *Cio. Car.* 85: *Moore* 872: *Cro. Eliz.* 716, 727: 2 *Cro.* 579. Thus in debt on a bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* on a certain day, the defendant pleaded that at the day, &c. he and his son gave a new bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* at another day then to come, which the plaintiff accepted in satisfaction of the old bond; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. *Hob.* 68. But it is otherwise where the second bond is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate and that W. R. administered, who gave the plaintiff another bond in satisfaction of the former: there was a verdict for the defendant: and it being moved in arrest of judgment, this distinction was made;

BOND V. 2.

made; that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable *de bonis propriis*; and for that reason the second bond was held to be a discharge of the first. 1 *Mod.* 225

V. 2. A bond on which neither principal nor interest has been demanded for 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 *Ch. Rep.* 79: *Pinch. Rep.* 78: See *Mod. Ca.* 22.—But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.—Yet length of time is no *legal* bar, it is only a ground for the jury to presume satisfaction. 1 *Term Rep.* 270.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 *Co.* 136: 1 *Salk.* 300. And vide 1 *Jon.* 345. But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains *assets* in his hands, to pay both debts and legacies. *Cho. Car.* 373: *Yelv.* 160. See tit. *Executor.* IV. 8.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act. 8 *Co.* 136 a: *March* 128.

If one obligor makes the executor of the obligee his executor, and leaves *assets*, the debt is deemed satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c. of the obligee can ever sue the surviving obligor. *Hob.* 10.

But if two are bound jointly and severally to *A.* and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 *Lev.* 73. See tit. *Executor.* IV. 8.

If two are jointly and severally bound in an obligation, and the obligee release to one of them, both are discharged. *Co. Lit.* 232 a.

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon *demurrer* it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 *Lev.* 220: 2 *Show.* 289. *Sed qu.*

If the condition of a bond be, that a clerk shall faithfully serve, and account for all money, &c. to the obligee and his executors; this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business, and retain the clerk in the same employment, with the addition of other business, and an increase of salary. 1 *Term Rep.* 287.—But such a bond is not discharged by the obligees' taking another partner into their house, it is only a security to the house of the obligees. *Ib.* 291. n.

BOND VI.

VI. In a bond where several are bound severally, the obligee is at his election to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once, for if it be of one only, that shall discharge the rest. *Dyer* 19, 310. Where two or more are bound in a joint bond, and only one is sued, he must plead in abatement, that two more sealed the bond, &c. and aver that they are living, and so pray judgment *de billa*, &c. And not demur to the declaration. *Sid.* 420.

If action be brought upon a bond against two joint and several obligors jointly, and both are taken by *capias*, here the death or escape of one, shall not release the other; but the same kind of execution must be taken forth against them: it is otherwise when they are sued severally. *Hob.* 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared shall be charged with the whole debt. 9 *Co.* 119.

If a bond is made to three, to pay money to one of them, they must all join in the action, because they are but as one obligee. *Yelv.* 177.

So if an obligation be made to three, and two bring their action, they ought to shew the third is dead. 1 *Sid.* 238, 420: 1 *Vent.* 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200 *l.* to two, to pay the one 100 *l.* to the one, and the other to the other, is a void condition. *Dyer* 350 a. pl. 20. *Hob.* 172: 2 *Brownl.* 207: *Yelv.* 177.

If *A.* bind himself in a sum to *B.* to pay to *C.* who is a stranger, a payment to *C.* is a payment to *B.* and in an action upon it, the count must be upon a bond payable to *B.* 1 *Sid.* 295: 2 *Keb.* 81.

In debt the declaration was, that the defendant became bound in a bond of —, for the payment of — to him, his attorney or assigns, and on oyer of the bond it appeared, that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance 'twas said that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 *Mod.* 228, *Robert v. Hannage.*

So if *A.* makes a bond to *B.* to pay to such person as he shall appoint; if *B.* does appoint one, payment to him is a payment to *B.* and if *B.* appoint none, it shall be paid to *B.* himself. 6 *Mod.* 228.

If *A.* by his bill obligatory, acknowledges himself to be indebted to *B.* in the sum of 10 *l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20 *l.* but does not mention to whom he is bound, yet the obligation is good, and he shall be intended to be bound to *B.* to whom he acknowledged before the 10 *l.* to be due. 2 *Roll. Abr.* 148. *Franklin v. Turner.*

If an infant seal a bond, and be sued thereon, he is not to plead *non est factum*, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 *Rep.* 119. But if a bond be made by a feme covert, she may plead her coverture, and conclude *non est factum*, &c. her bond being void. 10 *Rep.* 119.

Or plead *non est factum*, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus, In debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for saving the bond, it is necessary for the defendant to shew how he hath performed the condition; and this sort of pleading was never admitted. 2 Vent. 156.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly; but if the condition were for performance of covenants in an indenture, performance were generally a good plea. 1 Lev. 302. This must be understood where the covenants are set forth and appear to be all in the affirmative. For if some are in the affirmative, some in the negative, or any in the disjunctive, the defendant should plead specially.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place, he was ready to pay the money, but that no-body was there to receive it; and held ill on a general demurrer, for want of stating a tender, for the tender only is traversable. 3 Lev. 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs, and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which shewed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment, without assigning a breach. 1 Lev. 55, 84; 3 Lev. 17, 24. This must mean, if the plea was bad in substance.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendants plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not shew that which the defendant hath supposed and admitted. Salk. 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has no cause of action, unless he shew it; and this difference will give the true reason, and reconcile the following cases. 1 Salk. 138; 1 Lev. 55, 84, 226; 1 Saund. 102, 159, 317; 3 Lev. 17, 24; 1 Vent. 114; Cro. Eliz. 320; Telv. 78.

But by Stat. 4 An. c. 16, If an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So of a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar.

By Stat. 8 & 9 Wm. 3. c. 11. § 8, In actions on bonds for performance of covenants, the plaintiff may assign as many breaches as he pleases, and the jury may assess damages. The defendant paying the damages, execution may be staid; but the judgment to remain to answer any future breach, and plaintiff may then have *sci. fa.* against the defendant; and so *toties quoties*.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff, so he may plead payment as to part, and as to the rest an acquittance. 1 Salk. 180.

But a defendant in an action on a bond cannot plead *non est factum*, and a tender as to part. 5 Term Rep. 97.

In debt on an obligation the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. Hard. 332; Hob. 218.

In bonds to save harmless, the defendant being prosecuted, is to plead *non damnificatus*, &c.

The stealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. Stat. 2 Geo. 2. c. 25. See title *Felony*.

BONDAGE, Is slavery; and *bond-men*, in *Domesday*, are called *servi*, but rendered different from *villani*.—*Et de toto tenemento, quod de ipso tenet in bondagio in foca de Nortone cum pertin.* Mon. Augl. 2. par. fol. 609. See *Nativus*.

BOND-TENANTS, copy-holders, and customary-tenants, are sometimes so called. Calthope on Copyholds 51, 54. See title *Copyhold Tenures*.

BONIS NON AMOVENDIS, A writ directed to the sheriffs of London, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. Reg. Orig. 131.

BOOKS, By Stat. 25 Hen. 8. c. 15, No person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king's great officers.

By Stat. 7 An. c. 14. sect. 10, If any book shall be taken, or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

By Stat. 12 Geo. 2. c. 36, No person shall import or sell books first written and printed in this kingdom, and reprinted abroad, under the penalty of 5*l.* and double the value of every book so imported or sold.

The sole right of printing books, bequeathed to the two Universities of England, the four Universities of Scotland, and the Colleges of Eton, Westminster, and Winchester is secured to them, by Stat. 15 Geo. 3. c. 53.

From the seventh to the eleventh century, books were very scarce. To that was chiefly owing the universal ignorance which prevailed, during that period. After the Saracens conquered Egypt in the seventh century, the communication with that country (as to Europe, &c.) was almost entirely broken off, and the papyrus no longer
in

in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide *Robertson's History of Charles the Fifth*, 1 Vol. 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the Sciences greatly facilitated. See further as to Books, title *Literary Property*.

BOOK or RATES, See title *Customs*.

BOOKSELLERS, And authors of books, &c. See title *Literary Property*.

BOOTING, or BOTING-CORN, Rent-corn, anciently so called. The tenants of the manor of *Haadenham in com. Bucks*, formerly paid *booting-corn* to the prior of *Rocheſter*. *Antiq. of Purveyance*, fol. 418. It is thought to be so called, as being paid by the tenants by way of *bote*, or *boot*, viz. as a compensation to the lord for his making them leases, &c.

BORDAGIUM, See *Bordlode*.

BORDARIA, A cottage, from the Sax. *bord*, *domus*.

BORDARII, or BORDIMANNI, These words often occur in *Domesday*, and some think they mean *boors*, husbandmen, or cottagers. In the *Domesday* inquisition they were distinct from the *villani*; and seemed to be those of a less servile condition, who had a *bord* or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions for his *board* or entertainment. Some derive the word *bordarii* from the old Gall. *bords*, the limits or extreme parts of any extent; as the *borderers* of a country, and the *borderers* inhabitants in those parts. *Spelm.*

BORD-HALFPENY, Sax. *bord*, a table and *halpeny*, or half-penny. *Spelm.*] A small toll, by custom paid to the lord of the town for setting up *board*, tables, booths, &c. in fairs and markets.

BORLANDS, The demesnes which lords keep in their hands for the maintenance of their *board* or table. *Brañ. lib. 4. tract. 3. c. 9: Spelm.*

BORDLODE, or BORDAGE. A service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision, which the *bordarii*, or *bordmen*, paid for their *bord lands*. The old *Scots* had the term of *burd*, and *meet-burd* for victuals and provisions; and *burden sack*, for a sack full of provender: from whence it is probable came our word *burden*. *Spelm.*

BORD SERVICE, A tenure of *bord-lands*; by which some lands in the manor of *Fulham in com. Mid.* and elsewhere, are held of the bishop of *London*, and the tenants do now pay six-pence per acre in lieu of finding provision, anciently for their lord's *board* or table. *Blount*.

BORD-BRIGCH, *borg-bryce*, or *burg-brych*, Sax.] A breach or violation of surety-ship, pledge-breach, or breach of mutual fidelity.

BOREL-FOLK, i. e. Country people, from the Fr. *bourre*, *flocus*, because they covered their heads with such stuffs. *Blount*.

BOROUGH, Fr. *burg*. Lat. *burgus*, Sax. *borboe*.] Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament. *Verstegan* saith, that *burg*, or *burgh*, whereof we make our *borough*, metaphorically signifies a town having a wall, or some kind of inclosure about it: and all places that in

old time had among our ancestors the name of *borough*, were, one way or other fenced or fortified. *Lit. sect. 164*. But sometimes it is used for *villa insignior*, or a country town of more than ordinary note, not walled. A *borough* is a place of safety, protection and privilege, according to *Sommer*; and in the reign of King *Hen. 2. burghs* had so great privileges, that if a bond-man or servant remained in a *borough* a year and a day, he was by that residence made a freeman. *Glanville*. And why these were called *free burghs*, and the tradesmen in them *free burgesses*, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter. It is conjectured that *borboe*, or *borough*, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another; and we are told by some writers that it is a street or row of houses close to one another. *Brañ. lib. 3. tract. 2. cap. 10: Lamb. Duty of Const. p. 8.* Vide *Squire's Anglo Saxon Government*, 236, 247, 251, 254, 258, 262, 264. *Trading boroughs* were first formed in the time of *Alfred*. *Squire* 247, 251.

A borough is now understood to be a town, either corporate or not, that sends burgesses to parliament. 1 *Comm.* 114. See title *Burgage-Tenure*, *Parliament*.

BOROUGH COURTS, Vide *Courts*.

BOROUGH-HOLDERS, BORSHOLDERS, or BURSHOLDERS, *quasiborholders*. See title *Headborough*.

BOROUGH-ENGLISH, A custom relative to the descent of lands, in some ancient *boroughs*, and copyhold manors, that estates shall descend to the *youngest son*; or, if the owner hath no issue, to his *younger brother*; *Litt.* § 165. as in *Edmuntou*, &c. *Kitch.* 102.

This is so named in contradistinction as it were to the *Norman* customs, and is noticed by *Glanville*, *lib. 7. c. 3*.

Littleton gives the following reason for this custom. Because the younger son by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in *England*, though it certainly did in *Scotland* (under the name of *Marcheta*, or *Marcheta*) till abolished by *Malcolm III.*—Possibly this custom of *Borough English* may be the remnant of the pastoral state of our *British* and *German* ancestors, in which the youngest child was necessarily most helpless. See 2 *Comm.* 83.

This custom goes with the land, and guides the descent to the *youngest son*, although there be a devise to the contrary. 2 *Lev.* 138. If a man seised in fee of lands in *borough-english*, makes a feoffment to the use of himself and the heirs male of his body, according to the course of the common law; and afterwards die seised, having issue two sons, the *youngest son* shall have the lands by virtue of the custom, notwithstanding the feoffment. *Dyer* 179.

If a copyhold in *borough-english* be surrendered to the use of a person and his heirs, the right will descend to the *youngest son* according to the custom. 1 *Mod.* 102. And a *youngest son* shall inherit an estate in tail in *borough-english*. *Noy* 106. But an heir at common law shall take advantage of a condition annexed to *borough-english*

english land ; though the youngest son shall be intitled to all actions in right of the land, &c. 1 *Nelf. Abr.* 396. And the eldest son shall have tithes arising out of land borough-english ; for tithes of common right are not inheritances descendible to an heir, but come in succession from one clergyman to another. *Ibid.* 347.

Borough-english land being descendible to the youngest son, if a younger son dies without issue male, leaving a daughter, such daughter shall inherit *jure representationis*. 1 *Salk.* 243. It hath been adjudged where a man hath several brothers, the youngest may inherit lands in borough-english : yet it is said where a custom is, that land shall go to the youngest son, it doth not give it to the youngest uncle, for customs shall be taken strictly ; and those which fix and order the descents of inheritance, can be altered only by parliament. *Dyer* 179 : 4 *Leon.* 384 : *Jenk. Cent.* 220.

By the custom of Borough-English, the widow shall have the whole of her husband's lands in dower, which is called her *free-bench* ; and this is given to her the better to provide for the younger children, with the care of whom she is intrusted. *Co. Lit.* 33, 111 : *F. N. B.* 150 : *Mo. pl.* 566.

Borough-English is one of those customs of which the law takes particular notice ; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto. 1 *Comm.* 76.—But the extension of the custom to the collateral line must be specially pleaded. *Robins. on Gavelk.* 38, 43, 93.—And as borough-english may be extended by special custom, so may it be restrained ; and therefore the customary descent may be confined to fee simple. *Mar.* 54. cited *Robins. Appendix.*—See 1 *Inst.* 110 b. in n.

BOROUGH GOODS, as to their being *drufible*. See titles *Will, Executor*.

BORROWING, See title *Bailment*.

BORSHOLDERS, See title *Headborough*.

BORTMAGAD. Sax. *Bord, domus & Magad. ancilla.*] A house-maid. *Spelm.*

BOSPAGE, *boscagium*.] That food which wood and trees yield to cattle ; as mast, &c. from the Ital. *bosco, silva* : but *Marwood* observes, to be quit *de boscagio*, is to be discharged of paying any duty of wind-fall wood in the forest. See *Spelman*, in n.

BOSCARIA, Wood houses, from *boscus* ; or ox houses from *bos*. See *Boftar. Mon. Angl. tom. 2. fol. 302*.

BOSCUS, An ancient word, signifying all manner of wood : *Bosco* Italian, *bois* French. *Boscus* is divided into high-wood or timber, *hautbois*, and coppice or underwoods, *sub boscus, sub-bois* : but the high-wood is properly called *altus*, and in *Fleta* we read it *macremium*. Cum una Caresta de mortuo bosco. *Pat. 10 H. 6*.

BOSINNUS, A certain rustical pipe, mentioned in ancient tenures.

BOSTAR, An ox stall. *Mat. Paris. anno 1234*.

BOTE, Sax.] A recompence, satisfaction or amends. The Saxon *bote* is synonymous to the word *effovers*. See title *Common of Effovers*.—*House-bote* is a sufficient allowance of wood to repair, or burn in the house ; which latter is sometimes called *fire-bote*. *Plough-bote*, and *cart-bote*, are wood to be employed in making and repairing all instruments of husbandry : and *hay-bote* or *bedge-bote*, is wood for repairing of hays, hedges, or fences. 2 *Comm.* 29. Hence also comes *man-bote*, compensation, or amends

for a man slain, &c. In King *Ina's* laws it is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. *Lamb. cap. 99*. From hence likewise we have our common phrase, *to-boot*, i. e. *compensationis gratia*.

BOTELESS, In the charter of *H. 1.* to *Tho. archbishop of York*, it is said, that no judgment or sum of money shall acquit him that commits sacrilege ; but he is in English called *boteless*, viz. without emendation. *Lib. Albus penes Cap. de Subnot. int. Plac. Trin. 12 Ed. 2. Ebor 48*. We retain the word still in common speech ; as it is *boteless* to attempt such a thing ; that is, it is in vain to attempt it.

BOTELLARIA, A buttery or cellar, in which the butts and bottles of wine, and other liquors are deposited.

BOTHA, A booth, stall, or standing in a fair or market. *Mon. Angl. 2 par. fol. 132*.

BOTHAGIUM, *Boothage*, or customary dues paid to the lord of the manor or soil, for the pitching and standing of booths in fairs or markets. *Paroch. Antiq. p. 680*.

BOTHNA, or *buthna*, seems to be a park where cattle are inclosed and fed. *Heftor Boethius, lib. 7. cap. 123*. *Bothena*, also signifies a barony, lordship, &c. *Skens*.

BOTILER OF THE KING, (*pincerna regis*). Is an officer that provides the king's wines, who (according to *Fleta*) may by virtue of his office choose out of every ship laden with sale wines, one cask before the mast, and one behind. *Fleta lib. 2. cap. 21*. This officer shall not take more wine than he is commanded, of which notice shall be given by the steward of the king's house, &c. on pain of forfeiting double damages to the party grieved ; and also to be imprisoned, and ransomed at the pleasure of the king. *Stat. 25 Ed. 3. ft. 5. cap. 21*. See title *Customs*.

BOTTOMRY, or *bottomree, fœnus nauticum*.] Is generally where a person lends money to a merchant, who wants it to traffick, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage ; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under title *Insurance*.

BOVATA TERRÆ, As much land as one ox can plough. *Mon. Angl. par. 3. fol. 91*. See *Oxgang*.

BOUCHE OF COURT, Commonly called *budge of court*, was a certain allowance of provision from the king, to his knights and servants, that attended him in any military expedition. The French *avoir bouche à court*, is to have an allowance at court, of meat and drink : from *bouche*, a mouth. But sometimes it extended only to bread, beer, and wine. And this was anciently in use as well in the houses of noblemen, as in the king's court.

BOVERIUM, or *boveria*, An ox-house. *Mon. Angl. par. 2. fol. 210*.

BOVETTUS, A young steer or castrated bullock. *Paroch. Antiq. p. 287*.

BOVICULA, An heifer, or young cow ; which in the East-riding of *Yorkshire* is called a *wbee*, or *whey*.

BOUGH OF A TREE, Seisin of land given by it, to hold of the donor, *incapite*, *Mad. Exeb. i. 62*. See tit. *Entry*.

BOUND, or *boundary, bunda*.] The utmost limits of land, whereby the same is known and ascertained. See 4 *Inst.* 318, and title *Abutals*.

BOUND-BAILIFFS, See title *Bailiffs*.

BOUNTIES ON EXPORTATION, See title *Navigatio Art.*

B O U N

BOUNTY OF Q. ANNE, for maintaining poor clergymen. See *First Fruits*.

BOW-BEARER, An under officer of the forest, whose office is to oversee, and true inquisition make, as well of sworn men as unsworn in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment in the next court of attachment, &c. *Crompt. Jurisf. fol. 201.*

BOWYERS, One of the ancient companies of the city of London. By Stat. 8 Eliz. c. 10, a bowyer dwelling in London, was to have always ready fifty bows of elm, witch-hazel, or ash, well made and wrought, on pain of 10s. for every bow wanting; and to sell them at certain prices, under the penalty of 40s. And by Stat. 12 E. 4. c. 2, parents and masters were to provide for their sons and servants, a bow and two shafts, and cause them to exercise shooting, on pain of 6s. 8d. &c. See also Stat. 33 H. 8. c. 6; and title *Game*.

BRACELETS, Hounds, or rather beagles of the smaller and slower kind. *Pat. 1 Rich. 2. p. 2. m. 1.*

BRACENARIUS, Fr. *bracconier*.] A huntsman, or master of the hounds. *Anno 26 Ed. 1. Rot. 10. in dorso.*

BRACETUS, A hound: *bracetus* is in Fr. *brachet*, *braco canis sagax, indagator leporum*: so *braco* was properly the large fleet hound; and *brachetus*, the smaller hound; and *brachete* the bitch of that kind. *Monast. Ang. tom. 2. pag. 283.*

BRACINUM, A brewing: the whole quantity of ale brewed at one time, for which *tolseffor* was paid in some manors. *Brecina* a brew house, *MS.*

BRANDING in the hand, or face, with a hot iron, a punishment inflicted by law, for various offences, after the offender hath been allowed clergy. See title *Clergy*, benefit of.

BRANDY, A liquor made chiefly in France, and extracted from the lees of wine. In the Stat. 20 Car. 2. cap. 1, upon an argument in the Exchequer Anno 1668, whether brandy were a strong water or spirit, it was resolved to be a spirit: but in the year 1669, by a grand committee of the whole House of Commons, it was voted to be a strong water perfectly made. See the Stat. 22 Car. 2. cap. 4.

The duty on brandy is regulated by Stat. 27 Geo. 3. c. 13.—By Stat. 4 W. c. 5. § 8, no brandy shall be imported in any cask or vessel, not containing sixty gallons at least, on pain of forfeiture. See further titles *Customs*, *Excise*, and *Burn's Justice* title *Excise XVI.* See also title *Navigation Acts*.

BRASIUM, Malt: in the ancient statutes *brasiator* is taken for a brewer, from the Fr. *brasseur*; and at this day is used for a maltster or malt-maker. *Paroch. Antiq. p. 496.*

BRASS, Is to be sold in open fairs and markets, or in the owners' houses, on pain of 10l. and to be worked according to the goodnels of metal wrought in London, or shall be forfeited: also searchers of brass and pewter are to be appointed in every city and borough by head officers, and in counties by justices of peace, &c. and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective brays, to be forfeited, &c. Stat. 19 H. 7. c. 6. Brass and pewter, bell-metal, &c. shall not be sent out of the kingdom, on pain of forfeiting

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double value, &c. Stat. 33 Hen. 8. c. 7: 2 & 3 Ed. 6. c. 37.

BREACH OF CLOSE, See title *Trespass*.

BREACH OF COVENANT, The not performing of any covenant, expressed or implied in a deed; or the doing an act, which the party covenanted not to do. See title *Covenant*.

BREACH OF DUTY, The not executing any office, employment, or trust, &c. in a due and legal manner.

BREACH OF PEACE, Offences against the public peace, are either such as are an actual breach of the peace or constructively so, by aiding to make others break it. See title *Peace*.

BREACH OF POUND, The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress. See title *Distress*; *Pound-breach*.

BREACH OF PRISON, See title *Escape*; *Prison-breaking*.

BREACH OF PROMISE, *violatio fidei*.] A breaking or violating a man's word, or undertaking; as where a person commits any breach of the condition of a bond, or his covenant, &c. entered into, in an action on the bond, &c. the breach must be assigned. In debt on bond, conditioned to give account of goods, &c. a breach must be alleged, or the plaintiff will have no cause of action. 1 Saund. 102. See titles *Bond*, *Condition*, *Covenant*.

BREAD AND BEER, The assize of bread, beer, and ale, &c. is granted to the Lord Mayor of London and other corporations: Bakers, &c. not observing the assize to be set in the pillory. Stat. 51 H. 3. St. 1. Ord. *Pistor*. & 51 H. 3. St. 6: *Vide 2 & 3 Ed. 6. c. 15.*

By Stat. 31 Geo. 2. c. 29, containing regulations concerning the assize of bread, and to prevent adulteration, so much of Stat. 51 H. 3, intitled, *assisa panis & cervisie*, as relates to the assize of bread, and the Stat. 8 An. c. 18, and all amendments by subsequent acts are repealed.—The weight of the peck loaf, when well baked, is fixed at 17 lb. 6 oz. *Awdps.* and the rest in proportion.—The weight of a sack of flour, at 2 cwt. 2 qrs. or 280 lb. net, which is to produce twenty peck loaves, weighing 347 lb. 8 oz. So that 3 lb. 6 oz. is added to the weight of the flour by the materials of each peck loaf, when baked. And see farther Stat. 32 Geo. 2. c. 18. how penalties not appropriated by Stat. 31 Geo. 2. c. 29, shall be distributed. See also Stat. 3 Geo. 3. c. 6. (for Scotland) &c. wherein there are farther regulations concerning the assize of bread, and for preventing the adulteration thereof.

See also Stat. 13 Geo. 3. c. 62. as to standard wheaten bread. And see title *Corn*.

Under these statutes, bread deficient in weight or quality, may be seized by justices, mayors, &c. and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

BREAD OF TREET, or TRITE, *panis tritici*.] Is bread mentioned in the statute 51 Hen. 3, of assize of bread and ale; wherein are particularised *waistel bread*, *cocket bread*, and *bread of treet*, which answer to the three sorts of bread now in use, called whee, wheaten, and house-hold bread. In religious houses they heretofore distinguished bread by these several names, *panis armigerum*, *panis conventualis*, *panis pauperum*, & *panis famularum*. *Antiq. Not.*

BRECC, from the Fr. *brecche*] A breach or decay. In some ancient deeds there have been covenants for repairing

pairing *maras & breccas, portas & fossata, &c.*—*De brecca aquæ inter Woolwich & Greenwich supervidendi.* Pat. 16. Ric. 2. A duty of 3d. per ton on shipping was granted for amending and stopping of *Dagenham breach*, by Stat. 12 Ann. c. 17.

BRECINA. Vide *Bracium*.

BREDE, A word used by *Bracton* for broad; as too large and too *brede*, is proverbially too long and too broad. *Bract. lib. 3. tract. 2. c. 15.* There is also a Sax. word *brede* signifying deceit. *Leg. Canut. c. 44.*

BREDWITE, Sax. *bread and wite*.] A fine or penalty imposed for defaults in the assise of bread: to be exempt from which, was a special privilege granted to the tenants of the honour of *Wallingford* by king *Hen. II.* *Paroch. Antiq. 114.*

BREHON and BREHON LAW. See tit. *Ireland*.

BREISNA, Weather-sheep, *Mou. Angl. 1. c. 406.*

BRENAGIUM, A payment in bran, which tenants anciently made to seed their lords' hounds. *Blount.*

BRETOYSE, or BRETOISE, The law of the marches of *Wales*, in practice among the ancient *Britons*.

BREVE, A writ; by which a man is summoned or attached to answer in action; or whereby any thing is commanded to be done in the King's courts, in order to justice, &c. It is called *breve* from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers. *Bract. lib. 5. tract. 5. cap. 17:* See *Skene de verb. Breve*, and this Dict. tit. *Writ*.

BREVE PERQUIRERE, To purchase a writ or licence of trial, in the King's courts, by the plaintiff, *qui breve perquisivit*: and hence comes the usage of paying 6s. 8d. fine to the king, where the debt is 40*l.* and of 10*s.* where the debt is 100*l.* &c. in suits & trials for money due upon bond, &c.

BREVE DE RECTO, A writ of right, or licence for a person ejected out of an estate, to sue for the possession of it when detained from him. See tit. *Right*.

BREVI TESTATA. It is mentioned by the feudal writers. Vide *Fend. l. 1. 64.* Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata*. See tit. *Dred*.

BREVBUS & ROTULIS LIBERANDIS, A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, brieis, remembrances, and all other things belonging to that office. *Reg. Orig. fol. 295.*

BREWERS.—As to the dimensions of their casks. See tit. *Coopers*.—By Stat. 24 Geo. 3. ft. 2. c. 41, Brewers of strong and small beer, are to take out annual licences from the officers of excise—Brewers are by this and other acts subject to various regulations under the excise laws.—The duty on beer and ale is settled by Stat. 27 Geo. 3. c. 13.—Notice to the Excise Office must be given, and entry made of places for brewing beer and ale. See *Stats. 12 C. 2. c. 24: 15 C. 2. c. 11; and 5 Geo. 3. c. 43.*—See also *Stats. 1 W. & M. ft. 1. c. 24: 7 & 8 W. 3. c. 30: 8 & 9 W. 3. c. 19*, to prevent frauds by brewers.—Private persons may brew beer in their own houses, for their family or to give away, but must not lend their brewhouse for other purposes, on penalty of 50*l.* Stat. 22 & 23 Car. 2. c. 5. § 10.—By Stat. 32 Geo. 3. c. 8. § 1, Common brewers must not sell beer in less quantities than casks of 4½ gallons. See *Burn's Justice* tit. *Excise* I.—By a By-law of the com-

mon council, brewers' drays shall not be in the streets of *London* after 11 in the forenoon in Summer, and 1, in Winter. 2 *Stra.* 1085: *Hardw.* 405: *Andr.* 91.

BRIBERY, From the Fr. *briber*, to devour or eat greedily.] Is a high offence, where a person in a judicial place takes any fee, gift, reward or brocage, for doing his office, or by colour of his office, but of the king only. 3 *Inft.* 145: *Hawok. P. C.* i. c. 67.

Taken more largely, it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice, whether judge, officer, &c. to influence his behaviour in his office; and sometimes it signifies the taking or giving a reward for appointing another to a public office. 3 *Inft.* 9: 4 *Comm.* 139. To take a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. *Fortescue, cap. 51.*

Bribery in interior judicial or ministerial officers is punished by fine and imprisonment, which may also be inflicted on those who offer a bribe though not taken. 4 *Comm.* 140. 3 *Inft.* 147. Bribery in a judge was anciently looked upon as so heinous an offence, that it was sometimes punished as high treason; and it is at this day punishable with forfeiture of office, fine and imprisonment; and chief justice *Thorpe* was hanged for this offence in the reign of *Edw. III.*—And by a Stat. 11 H. 4, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. 4 *Comm.* 140: cites 3 *Inft.* 140.—In the reign of King *James I.* the earl of *Mildmay*, lord treasurer of *England*, being impeached by the commons for refusing to hear petitions referred to him by the king till he had received great bribes, &c. was, by sentence of the lords, deprived of all his offices, and disabled to hold any for the future, or to sit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure. 1 *Hawok. P. C.* c. 67. § 7. but the fine was remitted on the accession of *C. I.* and the proceeding appears to have been instigated rather by revenge than justice. In 11th King *George I.* the lord chancellor was impeached by the commons with great zeal, for bribery, in selling the places of masters in chancery, for exorbitant sums, and other corrupt practices, tending to the great loss and ruin of the suitors of that court; and the charge being made good against him, being before divested of his office, he was sentenced by the lords to pay a fine of thirty thousand pounds, and imprisoned till it was paid. See 6 *S. T.* 112.

By Stat. 12 R. 2. c. 2, the chancellor, treasurer, justices of both benches, barons of the exchequer, &c. shall be sworn not to ordain or nominate any person in any office for any gift, brocage, &c. And the sale of offices concerning the administration of public justice, &c. is prohibited on pain of forfeiture and disability, &c. by 5 & 6 Ed. 6. c. 16.—In the construction of the last mentioned statute, it has been resolved that the offices of the ecclesiastical courts are within the meaning of that act, as well as the offices in the courts of Common law; but no office in fee is within the statute, and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 & 6 E. 6. c. 16, is so disabled to hold the same, that he cannot be restored to a capacity of holding it by any grant or dispensation what-

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whatsoever. *Cro. Jac.* 269, 386: 1 *Hawk. P. C. c. 67*.—It is said the *Stat.* does not extend to the plantations. *Salk.* 411: 1 *Hawk. P. C. c. 67. § 5*.

To bribe persons either by giving money or promises, to vote at elections of members of corporations, which are erected for the sake of publick government, is an offence for which an information will lie. 12 *Mod.* 314: 2 *Ld. Raym.* 1377: 1 *Blackst.* 383.—But the Court will grant such information very cautiously, since the additional penalties by Statute. 1 *Black.* 380. See title *Parliament*.

An attempt to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 4 *Burr.* 2499.—Offering money to a privy councillor, to procure the reversion of an office in the gift of the crown, has been adjudged demeanour and punishable by information. *Rev. Fauson.* 1 *Hawk. P. C. c. 67. § 7* in note.

As to officers of the Customs, &c. taking bribes, See tit. *Customs*.

Taking money to excuse persons from serving on juries, subjects the offender to a fine, not exceeding ten pounds, at the discretion of the judge. *Stat.* 3 *Geo.* 2. c. 25. *sect.* 6.

As to bribe in elections to parliament. See title *Parliament*.

BRIBOUR, *Fr. brasseur.*] Seems to signify in some of our old statutes, one that bilfers other men's goods. 28 *Ed.* 2. *cap.* 1.

BRICOLLS An engine mentioned in *Cham.* which walls were beat down.

BRICKS AND TILES.—By *Statute* 17 *E.* 4. c. 4. The earth for tiles is to be digged and call up before the 1st of November yearly, stored and turned before the 1st of February, and wrought before the 1st of March following.—Every common tile must be 10½ inches long 6½ broad and ½ an inch thick.—Roof tiles 13 inches long, &c. And persons selling tiles contrary hereto, forfeit double the value, and are liable to fine.

By *Stat.* 17 *Geo.* 3. c. 42, Bricks when burnt are to be 8½ inches long 2½ thick and 4 wide.—Contracts for ingrossing and enhancing the price of bricks made void, and a penalty of 20*l.* imposed on the parties.

The last excise duty imposed on bricks and tiles, made in *Great Britain*, by 27 *Geo.* 3. c. 13.—And the regulations to enforce the excise on bricks or tiles, are settled by *Stats.* 24 *Geo.* 3. *sect.* 2. c. 24. and 25 *Geo.* 3. c. 66.

BRIDGE, *pous.*] A building of stone or wood erected across a river, for the common ease and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. *Hale's P. C.* 143: 13 *Co.* 33: *Cro. Car.* 365.

Where a particular district re-build a foot-bridge over a more convenient part of the stream, and converted it into a bridge for horses, carts and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common publick utility to the county, the *County*, and not the district, are bound to repair it. *Burr.* 2594: *Blackst.* 685.

But a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person, by reason of such a

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special tenure, may be compelled to repair them. *Hale's P. C.* 143: *Dalt. c.* 14: 6 *Mod.* 307.

A tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it become dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound by reason of his possession, to repair it so far as to prevent the Public being prejudiced. *Ld. Raym.* 856.

At Common law those who are bound to repair public bridges, must make them of such height and strength, as shall be answerable to the course of the water; and they are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. *Dalt. cap.* 16. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall notwithstanding repair it: though a person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 *Inst.* 701: 1 *Salk.* 359. Where inhabitants of a county are indicted for not repairing a bridge, they must set forth who ought to repair the same, and traverse that they ought. 1 *Vent.* 256. Unless perhaps, where the real question is, whether it be a public or a common bridge.

A vill may be indicted for a neglect in not repairing a bridge; and the justices of peace in their sessions may impose a fine for defaults. And any particular inhabitant of a county, or tenant of land charged to repairs of a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the fine assessed by the court for the default of the repairs, who are to have their remedy at law for a contribution from those who are bound to bear a proportionable share of the charge. 6 *Mod.* 307.

If a manor is held by tenure of repairing a bridge; or highway, which manor afterwards comes into several hands, in such case every tenant of any parcel of the demesnes and services, is liable to the whole charge, but shall have contribution of the rest: and this though the lord may agree with the purchasers to discharge them of such repairs, which only binds the lord, and doth not alter the remedy which the Public hath. 1 *Danv. Abr.* 744: 1 *Salk.* 358.

So if a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 *Salk.* 358.

If part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also, by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of a county are to repair the rest. 1 *Hawk. P. C. c.* 77. § 2: *Raym.* 384, 385.

Indictments for not repairing of bridges, will not lie but in case of common bridges on highways; though it hath been adjudged they will lie for a bridge on a common footway. *Mod. Caf.* 256. Not keeping up a ferry, being a common passage for all the King's people, is indictable, as well as not keeping up bridges. 1 *Salk.* 12.

By *Stat.* 22 *H.* 8. c. 5, All householders dwelling in any county or town, whether they occupy lands or not; and all persons who have land in their own possession,

whether they dwell in the same county or not, are liable to be taxed as inhabitants, towards the repairs of a publick bridge. Where it cannot be discovered who ought to repair a bridge, it must be presented by the grand jury in quarter-sessions; and after their inquiry, and the order of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c. but it has been usual, in the levying of money for repairs of bridges, to charge every hundred with a sum in gross, and to send such charge to the high constables of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of parishes in particular sums, according to a fixed rate, and collect it; and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money was long observed; but by statute 1 Ann. cap. 18, justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion, towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c. and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred; who is to pay the same to such persons as the justices shall appoint, to be employed according to the order of the justices, towards repairing of the bridge: and the justices may allow any person concerned in the execution of the act, 3 d. per pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by *certiorari*. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment, &c.

By 14 Geo. 2. c. 33, The justices at their general sessions, may purchase or agree with persons for any piece of land, not above one acre, near to any county-bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the money raised by statute of 12 Geo. 2. c. 29, for better assessing, collecting and levying of county rates, &c. See tit. *County-Rates*.

By the said Stat. 12 Geo. 2. c. 29. § 14, When any publick bridges, &c. are to be repaired at the expence of the county, the justices at their general or quarter sessions, after presentment made by the grand jury, of their want of reparation, may contract with any person for rebuilding or repairing the same, for any term not exceeding 7 years, at a certain annual sum.—They are to give publick notice of their intention to make such contracts, which are to be made at the most reasonable prices, and security given by the contractors for performance; which contracts are to be entered with the clerk of the peace.

No persons are compellable to make a new bridge but by act of parliament; and the inhabitants of the whole county cannot, of their own authority, change a bridge from one place to another.

If a man has toll for men and cattle passing over a bridge, he is to repair it; and toll may be paid in three cases, by prescription, or statute.

BRIDGE-MASTERS. There are *bridgemasters* of London-bridge, chosen by the citizens, who have certain

fees and profits belonging to their office, and the cure of the said bridge, &c. *Lex London.* 283.

BRIEF, *brevis*.] An abridgment of the client's case, made out for the instruction of counsel, on a trial at law; wherein the case of the party is to be *briefly* but fully stated, the proofs must be placed in due order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite, that nothing be omitted to endanger the cause.

An attachment has been granted against a party and his attorney for surreptitiously getting possession of the brief of a counsel on the other side, and applying the same to an improper purpose in his defence. See *Bateman v. Conway*, 1 Bro. P. C. 519. 8vo. ed.

Though a brief is not of itself evidence against the party for whom it is prepared, yet, as a discovery of the secrets and merits of his case, may be productive of perjury or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending; the obtaining of it in a surreptitious manner is an offence highly deserving censure and punishment *Id.*

BRIEF AL'EVESQUE, A writ to the bishop, which in *Quare Impedit*, shall go to remove an incumbent, unless he recover, or be presented *pendente lite*. 1 Keb. 386.

BRIEFS, or licences to make collection for repairing churches, restoring lofs by fire, &c. See tit. *Churchwards*, III. 1

BRIGA, Fr. *brigue*.] Debate or contention.

BRIGANDINE. Fr. Lat. *lorica*.] A coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body. This word is mentioned in Stat. 4 & 5 P. & M. cap. 2, and some confound it with *haubergeon*; and others with *brigantine*, a long but low-built vessel, swift in sailing.

BRIGANTES. The antient name for the inhabitants of Yorkshire, Lancashire, bishoprick of Durham, Westmorland and Cumberland. *Blount*.

BRIGBOTE, or BRUG-BOTE, Sax. *brig*, *pontus*, and *bote*, *compensatio*.] The contribution to the repair of bridges, [walls and castles] which by the old laws of the Anglo-Saxons might not be remitted; but by degrees immunities were granted by our kings, even against this duty; and then to be quit of *brig-bote* signified to be exempt from tribute or contribution towards the mending or re-edifying of bridges. *Fleta*, lib. 1. c. 47; *Selden's Titles of Honour*, fol. 622.—*Spelm.* v. *Brigbote* and *Burghote*.

BRISTOL, A great city, famous for trade: the mayor, burgesses and commonalty of the city of *Bristol*, are conservators of the river *Avon* from above the bridge there to *King-road*, and so down the *Severn* to the two islands called *Holmes*; and the mayor and justices of the said city, may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets; and the streets are to be kept clean and paved; and lamps or lights hung out at night. Stat. 14 & 12 H. 3. c. 23.—No person shall act as a broker in the city of *Bristol*, till admitted and licensed by the mayor and aldermen, &c. on pain of forfeiting 500 l. and those who employ any such, to forfeit 50 l. &c. by Stat. 3 Geo. 2. c. 31.—By the Stat. 22 G. 2. c. 20, the Stat. 11 & 12 H. 3, is rendered more effectual so far as it relates to the paving and enlightening the streets; and divers regulations are made in relation to the hackney-coachmen, balliers, draymen, and carters, and the

the markets and sellers of hay and straw, within the said city and liberties thereof.

BROCAGE, *brocagium*] The wages or hire of a broker: which is also termed *brokerage*. 12 R. 2. c. 2.

BROCELIA, This word, as interpreted by Dr. Thoresen, signifieth a wood; and it is said to be a thicket or covert of bushes and brush wood, from the obsolete Lat. *brusca*, terra *bruscosa* & *brocia*, Fr. *bruce*, *brocelle*: and hence is our *broace* of wood, and *broysing* of cattle.

BROCHA, Fr. *broche*.] An awl, or large packing needle. A spit in some parts of England is called a *broche*; and from this word comes to pierce or *broach* a barrel.

BROCHIA, A great can or pitcher. *Brach*, lib. 2. tract. 1. cap. 6. Where it seems that he intends *facere* to carry dry, and *brochia* liquid things.

BRODEHALFPENY, or **BROADHALFPENY**. See *Bordhalfpeny*.

BROKERS, *broccatores*, *broccarii* & *auximarii*.] Are those that contrive, make and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandize, for which they have a fee or reward. These are *Exchange brokers*; and by the Stat. 10 R. 2. cap. 1. they are called *brogers*; also *brogers* of corn is used in a proclamation of Queen Elizabeth, for badgers, *Baker's Chron.* fol. 411. The original of the word is from a trader broken, and that from the Sax. *bioc*, misfortune, which is often the true reason of a man's breaking; so that the name of broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of London, and allowed and approved by the lord mayor and aldermen, for their ability and honesty.

By the stat. 6 Ann. c. 16, they are to be annually licensed in London by the lord mayor and aldermen who administer an oath, and take bond for the faithful execution of their offices: if any persons shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500*l*. And persons employing them 50*l*. and brokers are to register contracts, &c. under the like penalty: also brokers shall not deal for themselves, on pain of forfeiting 200*l*. they are to carry about them a silver medal, having the king's arms and the arms of the city, &c. and pay 40*s*. a year to the chamber of the city.

As to brokers in *Bristol*, See tit. *Bristol*.—And as to *Pawnbrokers*, see that title. As to Brokers illegally dealing in the funds or stocks, who are usually known by the appellation of stock-jobbers, See title *Funds*.

BROK, An old sword or dagger.

BROSSUS, Bruised or injured with blows, wounds, or other casualty. *Cousal*.

BROTHEL-HOUSES, Lewd places, being the common habitations of prostitutes. A *brothelman* was a loose idle fellow; and a *frane bordelier* or *brothelier*, a common whore. And *boiselman* is a contraction of *brothelman*. *Chaucer*. See *Barvy House*.

BRUDBOIE. See *Brigbote*.

BRUEBRE, Lat. *crica*.] Signifies heath ground; and *bruera*, briars, thorns, or heath, from the Sax. *brær*, *bruær*. *Paroch. Antiq.* 620.

BRUILLUS, a wood or grove; Fr. *breil*, *breuil*, a thicket or clump of trees in a park or forest. Hence the abbey of *Bruer*, in the forest of *Wichwood* in com. *Oxon*.

and *Brail*, *Brabul*, or *Brill*, a hunting feat of our ancient kings in the forest of *Burnwood* in com. *Buck*.

BRUILLETUS, a small coppice or wood.

BRUNETA, properly *Burgeta* which see.

BRUSCIA, seems to signify a wood. *Monast. tom. 1. pag.* 773.

BRUSUA and **BRUSULA**, Brouse or brushwood. *Mon. Angl. tom. 1. fol.* 773.

BUBBLES. The South-sea project, and various other schemes, similar in the end intended, that of defrauding the subject, though different as to the means, were called by the name of *bubbles*. The Stat. 6 Geo. 1. c. 18, makes all unwarrantable undertakings by unlawful subscriptions subject to the penalties of a *perjury*.—See title *Funds*.

BUCKLARIUM, A buckler. *Clavf.* 26 Ed. 1. m. 8. *intus*.

BUCKSTALL, A toil to take deer, which by the Stat. 19 Hen. 7. c. 11, is not to be kept by any person that hath not a park of his own, under penalties. See also 3 Jac. 1. c. 13. There is a privilege of being quit of americiaments for *buckstalls*. *Privileg. de Semplingham*. See 4 Inst. 306.

BUCKWHEAT, French wheat, used in many counties of this kingdom: in *Essex* it is called *brank*; and in *Worcestershire*, &c. It is mentioned in the Stat. 15 Car. 2. c. 5.

BUCINUS, A military weapon for a footman. *Trommes*, pag. 74.

BUGGERY, or *Sodomy*, Comes from the Italian *buggerone* or *buggerare*, and it is defined to be a carnal copulation against nature, and this is either by the confusion of species; that is to say, a man or a woman with a brute beast; or of sexes, as a man with a man, or man unnaturally with a woman. 3 Inst. 58: 12 Co. Rep. 36. This sin against God, nature, and the law, it is said was brought into England by the Lombards. Rot. Parl. 50 Ed. 3. numb. 58. In ancient times, according to some authors, it was punishable with burning, though, others say with burying alive: but at this day it is felony excluded clergy and punished as other felonies by Stat. 25 H. 8. cap. 6, enforced by 5 Edw. 17.

By the articles of the navy, (Art. 29. stat. 22 Geo. 2. c. 33.) If any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting, except the person on whom it is committed be a boy under the age of discretion; (which is generally reckoned at fourteen;) when it is felony only in the agent; all persons present, aiding and abetting to this crime, are all principals, and the statutes make it felony generally: there may be accessaries before and after the fact; but though none of the principal offenders shall be admitted to clergy, the accessaries are not excluded it. 1 Hale's Hist. P. C. 670.

In every indictment for this offence, there must be the words, *rem habuit veneream & carvaster cognovit*, &c. and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. 1 Hawk. P. C. c. 4. The general words of these indictments are, that A. B. on such a day, at, &c. with force and arms, made an assault upon C. D. and then and there wickedly, devilishly, feloniously, and against the order

of nature, committed the venereal act with the said C. D. and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable sin called buggery, (not to be named among Christians) to the great displeasure of God, and disgrace of all mankind, &c. This crime is excepted out of our acts of general pardon.—This says *Blackstone* is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for if false, it deserves a punishment inferior only to that of the crime itself.

BUILDINGS. If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. *Hob. 131.* In London a man may place ladders or poles upon the ground, or against houses adjoining for building his own; but he may not break ground: and builders of houses ought to have licence from the mayor and aldermen, &c. for a *boord* in the streets, which are not to be incumbered. *Cit. Lib. 30, 146.* In new building of London, it was ordained, that the outsidcs of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having in the front, balconies; &c. by *Stat. 19 Car. 2. c. 3.*

The laws for regulating of all buildings in the cities of London and Westminster, and other parishes and places in the weekly bills of mortality, the parishes of St. Mary-le-bone, and Paddington, St. Pancras and St. Luke at Chelsea, for preventing mischiefs by fire, are reduced into one act by *Stat. 14 Geo. 3. c. 78.* The regulations of this law being very minute and technical, we must refer the reader to the statute itself.—See title *Fire*.

BULL, bulla. A brief or mandate of the pope or bishop of Rome, from the lead or sometimes gold seal affixed thereto, which *Mat. Paris*, anno 1237, thus describes: *In bulla domini papæ stat imago Pauli in dextris crucis in medio bullæ figurata, & Petri a sinistris.* These decrees of the pope are often mentioned in our statutes, as 25 *Ed. 3. 28 H. 8. cap. 16: 1 & 2 P. & M. c. 8.* and 23 *Eliz. cap. 2:* They were heretofore used, and of force, in this land: but by the statute 28 *Hen. 8. c. 16,* it was enacted, That all bulls, briefs and dispensations had or obtained from the bishop of Rome, should be void. And by *Stat. 13 Eliz. c. 2,* (See *Stat. 23 Eliz. c. 1.*) If any person shall obtain from Rome any bull or writing to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason. See *Rome, Papist.*

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a bull and a boar for the use of the parishioners, in consideration of his having tithes of calves and pigs, &c. 1 *Rel. Abr. 559: 4 Mod. 241.*

BULLIO SALIS, As much salt as is made at one wealing or boiling: a measure of salt, supposed to be twelve gallons. *Mon. Ang. tom. 2.*

BULLION, Fr. billon. The ore or metal whereof gold is made; and signifies with us gold or silver in *billets*, in the mass before it is coined. *Anno 9 Ed. 3. st. 2. c. 2.* See titles *Coin, Money.*

BULTEL, The bran or refuse of meal after dressed: also the bag wherein it is dressed is called a *bulter*, or *ra-*

ther *bouter.* The word is mentioned in the statute *Assisa panis & cervisie, anno 51 Hen. 3.* Hence comes *bulled* or *bouted bread*, being the coarsest bread.

BUNDLES. A sort of records of the Chancery, lying in the office of the Rolls; in which are contained, the files of bills and answers; of *hab. cor. cum causâ*; *certiorari*'s; attachments; &c. *seire fucias*'s; certificates of statute-fugate; extents and liberates; *superfedeas*'s; bails on special parcons; bills from the Exchequer of the names of sheriffs; letters patent surrendered; and deeds cancelled; inquisitions; privy seals for grants; bills signed by the king; warrants of escheators; cutomers, &c.

BURCHETA, from the *Fr. berche.* A kind of gun used in forests.

BURCIFER REGIS, Purse-bearer, or keeper of the king's privy purse. *Pat. 17 Hen. 8.*

BURDARE, Tojestorifice. *Mat. Paris, Addit. p. 149.*

BURGAGE TENURE. See title *Tenures.* III. 11.

TENURE IN BURGAGE, is described by *Glanvil*, (*lib. 7. c. 3.*) and is expressly said by *Littleton*, § 162, to be but tenure in socage: And it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. *Litt. § 162, 3.*

It is indeed only a kind of town-socage; as common socage by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament; (See title *Borough*;) and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the borough. *Tenure in Burgage* or *Burgage-Tenure* therefore is, where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 *Comm. 82.*

The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty: which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is, that called *Borough-English.*—See that title.

Other special customs there are, in different burgage tenures; as in some, that the wife shall be endowed of all her husband's tenements, and not of the third part only, as at common law. *Litt. § 166.*—In others that a man might (previous to *Stat. H. 8.*) dispose of his tenements by will. *Litt. § 167*—though this power of disposal was allowable in the Saxon times—a pregnant proof that these liberties of socage tenure were fragments of Saxon liberty. 2 *Comm. 84.*

BURG, A small walled town, or place of privilege, &c. See *Borough.*

BURG-BOTE, from *burg, castellum,* and *bote, compensatio.* Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city: from which divers had exemption by the ancient charters of the Saxon kings. *Rapin. burg-bote significat quietantiam reparationis murorum civitatis vel burgi. Flota, lib. 1. c. 47: Spelm. v. Burgb-bote.*

BURGESSES, burgarii & burgenſes. Properly men of trade, or the inhabitants of a borough or walled town; but this name is usually given to the magistrates of corporate towns.

In Germany, and other countries, they confound *burgess* and *citizen*; but we distinguish them, as appears by the

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the *Stat. 5 R. 2. c. 4.*, where the classes of the common wealth are thus enumerated, *count, baron, banneret, chevalier de countee; citizen de citie; burghs de burgh.* See *Co. Lit.* 80. Those are also called *burghesses*, who serve in parliament, for any borough or corporation. See title *Parliament*. *Burgesses* of our towns are called, in *Domesday*, the *homines* of the king, or of some other great man; but this only shews whose protection they were under, and is not any infringement of their civil liberty. *Squire Ang. Sax. Gov.* 260 n. *Burgenfes & homines burzorum & willarum*, *Madox Excheq.* 1 V. 333. The aid of burghs, *ib.* 1 V. 600, 601. See title *Borough*.

BURGH BRECHE, *Fidejussionis violatio*. A breach of pledge, *Spelm.*] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. *Leg. Canuti*, cap. 55.

BURGHERISTHE, or *burgheriche*, Used in *Domesday-book*, for a breach of the peace in a city. *Blount*.

BURGBOTE. See *Burgbote*.

BURGMOTE, A court of a borough. *LL. Canuti*, *MS.* cap. 44 — *Bergmote* is different; which see.

BURGHWARE, *quasi burgiver*.] A citizen or *burghs*.

BURGLARY, *Burgi latrocinium*; by our ancient law called *hamefecken*, as it is in Scotland to this day. 4 *Comm.* 223.] A Felony at common law, in (1) *breaking and entering* (2) the mansion house of another, or the walls or gates of a walled town, or a church, (3) *in the night*, (4) to the intent to commit some felony within the same; whether the felonious intent be executed or not. 1 *Hawk. P. C. c.* 38. § 1, 10: 4 *Comm.* 224.

It seems the plainest method to consider the subject according to the four parts of the above definition; and 5. to add something on the punishment of this offence.

1. There must be both a *breaking* and an *entry* to complete this offence. 1 *Hawk. P. C. c.* 38. § 7.

Every entrance into the house by a trespasser is not a *breaking* in this case, but there must be an *actual breaking*. As if the door of a mansion house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64. But the following acts amount to an actual breaking, *viz.* opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hal. H. P. C.* 552.

Having entered by a door which he found open, or having lain in the house by the owner's consent, unlatching a chamber door; or coming down the chimney. 1 *Hawk. P. C. c.* 38. § 4.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob the house, this is burglary. *Kel.* 42.

So if persons designing to rob a house, take lodgings in it and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's consent, bind the constable, and rob the inha-

bitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 *Hawk. P. C. c.* 38. § 5.

If a person be within the house and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 *Inst.* 64. But this was not admitted to be law with any certainty; and therefore by *Stat. 12 An. c. 7*, it is enacted, "that if any person shall enter into the mansion house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night-time break the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night-time, with intent to commit felony."

Any the least entry, either with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word *entered* in an indictment for burglary: as if one do put his foot over the threshold, or his hand, or a hook, or pistol, within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. 1 *Hawk. P. C. c.* 38. § 7, and the authorities there cited.—But where thieves had bored a hole through the door, with a *center-bit*, and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled incomplete. *Id. ib.* in note.

When several come with a design to commit burglary, and one does it, while the rest watch near the house, here his act is, by interpretation, the act of all of them. And upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. *Leach's Hawk. P. C. i. c.* 38. § 9. and n.

2. It is certainly a dangerous, if not an incurable fault to omit the word *dwelling* house in an indictment, for burglary in a house. But it seems not necessary or proper in an indictment for burglary in a church, which by all the ancient authorities is taken as a distinct burglary. See 1 *Hawk. P. C. c.* 38. § 10. and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken by any person in the night, it is burglary. *Popb.* 52.

A chamber in an inn or court, &c. where one usually lodges, is a mansion-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though if a burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. 3 *Inst.* 65: *Kel.* 83. If the owner of the house breaks into the rooms of his lodgers, and steals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. *Wood's Inst.* 378. But see *contra*, 1 *Hawk. P. C. c.* 38. § 13, 14, 15.

If the owner live under the same roof with the inmates, there must be a separate outer door, or the whole is the mansion of the owner; but if the owner inhabit no part of the house, or even if he occupy a shop, or a cellar in it,

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it, but do not sleep therein, it is the mansion of each lodger, although there be but one outer door. *Leach's Hawk. P. C. c. 38. § 15. in n.*—There being only one door in common to all the inhabitants, makes no difference, where the owner does not sleep in any part of the house, for in that case, each apartment is a *separate mansion*. *Id. ib. § 14. n.*

Chambers, in inns of court, &c. have separate outward doors, which are the extremity of obstruction, and are enjoyed as separate property, as estates of inheritance, for life, or during residence.—So a house divided into separate tenements, with a distinct outward door to each, will be separate houses. *Id. ib. § 13. n.*

Part of a house divided from the rest, having a door of its own to the street, is a mansion-house of him who hires it. *Kel. 84.*

To break and enter a *shop*, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which a burglary may be committed. *1 H. H. P. C. 557, 558.*—But see *Stat. 1 Geo. 3. c. 38*, respecting burglary in the work shops of the plate-glass manufactory, which is made single felony, and punishable with transportation for seven years.—If the shop-keeper sleep in any part of the building, however distinct that part is from the shop, it may be alleged to be his mansion-house; provided the owner does not sleep under the same roof also. *Leach's Hawk. P. C. i. c. 38. § 16. in n.*

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber door, and takes it in the house, and goes away, it seems not to be burglary. And where *A.* enters into the house of *B.* in the night, by the doors open, and breaks open a chest, and steals goods without breaking an inner door; it is no burglary by the common law, because the chest is no part of the house: though it is felony ousted of clergy by statute *3 W. & M. c. 9*; and if one break open a counter or cupboard, fixed to a house, it is burglary. *1 Hale's Hist. P. C. 554.*

All out-buildings, as barns, stables, ware-houses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. And if the ware-house, &c. be parcel of the mansion-house, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein.—But an out-house occupied with, but separated from the dwelling-house by an open passage eight feet wide, and not within or connected by any fence, inclosing both, is not within the curtilage or homestead. *Leach's Hawk. P. C. i. c. 38. § 12. n: 4 Comm. 225.*

No burglary can be committed by breaking into any ground inclosed, or booth, or tent, &c. but by *Stat. 5 & 6 E. 6. c. 9*, clergy is taken from this offence.

3. In the day-time there is no burglary.—As to what is reckoned night, and what day for this purpose, antiently the day was accounted to begin only at sun rising, and to end immediately upon sun set; but the better opinion seems to be, that if there be day light, or *crepusculum* enough begun or left to discern a man's face without, it is no burglary. But this does not extend to moonlight; the malignity of the offence, not so properly arising from its being done in the dark, as at the dead of

night, when sleep has disarmed the owner, and rendered his castle defenceless. *4 Comm. 224: 1 Hawk. P. C. c. 38. § 1.*

4. The breaking and entry must be with a felonious intent, otherwise it is only a trespass; and it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt, of which the jury is to judge. And therefore such breaking and entry, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute. *4 Comm. 227: 1 Hawk. P. C. c. 38. § 18, 19.*

One of the servants of the house opened his lady's chamber door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Stran. 481: Kel. 67.*

A servant embezzled money intrusted to his care; left ten guineas in his trunk: quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Leach's Hawk. P. C. i. c. 38. § 18 n. See vide 1 Show. 53.*

5. Every man's house is considered as his castle, as well for defence against injury and violence, as for repose. *5 Co. 92.*—To violate this security is considered of so atrocious a nature, that the alarmed inhabitant, whether he be an owner or a mere inmate, (*Cro. Car. 544*) is by *Stat. 24 H. 8. c. 5*, expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide.—For a course of time however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrors became necessary; therefore by *Stat. 18 Eliz. c. 7*, clergy is taken away from the offence; and by *Stat. 3 & 4 W. & M. c. 9*, from accessories before the fact.

Still further to encourage the prosecution of offenders, it is enacted by *Stat. 10 & 11 W. 3. c. 23*, that whoever shall convict a burglar, shall be exempted from parish and ward offices, where the offence was committed. To this, *Stats. 5 An. c. 31*, and *6 Geo. 1. c. 23*, have superadded a reward of 40*l.* And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See title *Accessory*.

See likewise *Stats. 25 Geo. 2. c. 36: 27 Geo. 2. c. 3*, and *18 Geo. 3. c. 19*, which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor, and poor witnesses.

To remove one inducement to the frequent commission of burglaries, *Stat. 10 Geo. 3. c. 48*, provides that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, *Stat. 23 Geo. 3. c. 84*, enacts, That any person apprehended, having upon him any pick-lock key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and vagabond, within *Stat. 17 Geo. 2. c. 5*.

For further matter, See titles *Clergy, Felony, Larceny, BURGL, Husbandmen. Mon. Angl. tom. 3. p. 183.*

BURIALS,

BURIALS. Persons dying are to be buried in woollen, on pain of forfeiting 5*l*. And assizes to be made of such burying before a justice, &c. under the like penalty. *Stat. 30 Car. 2. c. 3.*

BURNETA. Cloth made of dyed wool. A burnet colour must be dyed; but *brunus color* may be made with wool without dying, which are called medleys or ruffets: *Lyndeswood*. Thus much is mentioned because this word is sometimes wrote *bruneta*.

BURNING IN THE HAND, *Vide Branding*.

BURNING of houses, out-houses, malicious burnings, &c. See title *Arson*—To the malicious burnings mentioned under title *Arson*, may be added, that by *Stat. 6 Geo. 1. c. 23*, assaulting with intention to burn the garments of another in the public street, (by aqua-fortis, &c.) is punishable with transportation—By *Stat. 23 & 24 Car. 2. c. 11*: and 1 *An. fl. 2. c. 9*, to burn any ship to the prejudice of the owners or freighters; and by *Stat. 4 Geo. 1. c. 12*, to the prejudice of the underwriters, is made felony without clergy.—By *Stat. 12 Geo. 3. c. 24*, to burn the king's ships of war, or any of the arsenals or stores, &c. therein, is also made felony without clergy.—By *Stat. 27 Geo. 2. c. 15*, threatening by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy.—As to penalty on servants setting fire to houses by negligence. See title *Fire*. See further titles *Felony, N. y., Ships, Insurance*.

BURNING TO DEATH, See titles *Felony, Treason*.

BURRO-HIUM, A burrock, or small wear over a river, where wheels are laid for the taking of fish. *Cowel*.

BURSA, A purse. *Ex Chart. vet.*

BURSARIA, The bursery, or exchequer of collegiate and conventual bodies; or the place of receiving and paying, and accounting by the *bursarii*, or *bursers*. *Paraph. Antiq. p. 288*. But the word *bursarii* did not only signify the *bursars* of a convent or college; but formerly stipendiary scholars were called by the name of *bursarii*, as they lived on the *burse* or fund, or public stock of the University. At *Paris*, and among the *Cistercian monks*, they were particularly termed by this name. *Johan. Major. Gift Stat. lib. 1. c. 5*.

BURSE, *bur, a, cambium, basilica*.] An exchange, or place of meeting of merchants.

BURSHOLDERS, See title *Headborough*.

BUSONES COMITAIUS: *Bract. lib. 3. tract. 2. cap. 1*. *Blount* says *b fones* is used for *barones*.

BUSSA, A ship. *Blount's Dict*—The vessels used in the herring fisheries are called *buffes* and *Smacks*.

BUSSELLUS, A bushel; from *buxa, butta, buttis*, a standing measure: and hence *butticella, butticellus, buffellus*, a less measure. Some derive it from the old Fr. *bouts*, leather continents of wine; whence come our leather budget and bottles. *Kanmer's Gloss*.

BUSTA and BUSTUS, *busca, and buscus*, &c. See *Brucia* and *Busula*.

BUSTARD, A large bird of game, usually found on downs and plains, mentioned in the *Stat. 25 Hen. 8. c. 11*. See title *Game*.

BUTCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace, &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep dead, from one butcher to another. *Stat. 23 Ed. 3. c. 6*.—By *Stat.*

2 & 3 E. 3. 15, (revived, continued and confirmed by *Stat. 22 & 23 Car. 2. c. 10*, which is now expired, Butchers (and others) conspiring to sell their victuals at certain rates, are liable to 10*l*. penalty, or twenty days imprisonment, for the first offence—20*l*. or pillory for the second—and 40*l*. or pillory, and loss of ear for the third.—The offence to be tried by the sessions or leet.—See title *Conspiracy*.—By *Stat. 4 H. 7. c. 3*, no butcher shall stay any beast within any walled town, except *Carlisle* and *Berwick*.—By the ordinance for *hoblers*, insert. 1600, butchers are not to sell swine's flesh mangled, or flesh dead of the murrain.—By *Stat. 5 C. 1. c. 1*, butchers are not to sell or kill meat on Sunday.—By *Stat. 1 Jac. 1. c. 21*: and 9 *An. c. 11*, regulations are made as to the watering and gashing hides; and the selling putrified and rotten hides by butchers; and by the said *Stat. 1 Jac. 1* no butcher shall be a tanner, or carrier.

See further titles *Cattle*; *Forestalling*; *Villains*.

BUTLER, See *Butler*.

BUTT, *butticum*.] A measure of wine, &c. well known among merchants, and containing 126 gallons of *Malmsey* wine, by *Stat. 1 R. 3. c. 13*.

BUTLER and CHEESE.—By *Stat. 9 H. 6. c. 8*, A weigh of cheese shall contain thirty-two cloves, each clove 7*lb*. = 2 *cwt*. Every kilderkin of butter shall contain 112 pounds, the firkin 56, and pot 14 pounds of good butter, (every pound 160*z*.) besides the casks and pots; and old bad butter shall not be mixed with good, nor shall butter be repacked for sale, which incurs forfeiture of double value, &c. And sellers and packers of butter shall pack it in good casks, and set their names thereon, with the weight of the cask and butter, on pain of 10*s*. per *cwt*. *Stat. 13 & 14 Car. 2. cap. 26*.—Buyers of butter are to put marks on casks; and persons opening them afterwards, or putting in other butter, &c. shall forfeit 20*s*. 4 & 5 *W. & M. c. 7*. The said *Stat. 4 & 5 W. & M. c. 7*, also contains regulations to compel warehouse-keepers, weighers, searchers, and shippers, to receive all butter and cheese for the *London* market, without undue preference.—The *Stats. 8 Geo. 1. c. 27*: and 17 *Geo. 2. c. 8*, regulate the sale of butter; the former in the city of *York*, the latter at *New Malton*.—See titles *Weights and Measures*.

BUTTONS, Foreign buttons are not to be imported on penalty of 100*l*. on the importer, and 50*l*. on the seller, by *Stats. 13 & 14 C. 2. c. 13*: and 4 *W. & M. c. 10*.—And by the same statutes, a justice may issue his warrant to search for and seize the same.

By *Stat. 10 W. 3. c. 2*, No person shall make, sell, or set on, any buttons made of wood only, and turned in imitation of other buttons, under penalty of 40*s*. a dozen. A thimble of wire being added to the button makes no difference. *Ed. Raym. 712*.

By the said *Stat. W. 3.* no person shall make, sell, or set on, buttons made of cloth, or other stuffs of which clothes are usually made, on penalty of 40*s*.

By *Stat. 8 An. c. 6*, no taylor, or other person, shall make, sell, set on, use, or bind, on any clothes, any buttons or button holes of cloth, &c. on pain of 5*l*. a dozen—By this act no power is given to make distress.

Stat. 4 Geo. 1. c. 7, is said in *burn's Justice*, (title *Buttons*) to be a loose, injudicious, ungrammatical act, and which by its *verb* may seem to have been drawn up by taylor, or button makers. This act imposes, (indulgent enough,) 40*s*. a dozen, on all such buttons; and

button holes, with an exception of velvet; it seems levelled against the taylor only, but clothes with such buttons and button holes exposed to sale, are to be forfeited and seized.

By Stat. 7 Geo. 1. §. 1. c. 12, No person shall use, or wear, on any clothes, (velvet excepted) any such buttons or button holes, on pain of 40s. a dozen, half to the witness on whose oath they are convicted; an application of the penalty deservedly reprobated as nearly singular, and on a principle not reconcilable to the usual rules of evidence.—This statute is also incorrect, particularly in making no disposal of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See title *Taylor*.

BUTTS, The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the butts. Also butts are the ends or short pieces of land in arable ridges and furrows: *buttum terminus*, a butt of land. See title *Abbuttals*.

BUTLERAGE OF WINES, See title *Customs*.

BUTHSCARLE, *butscarle*, *butcarle*, (*butcarle* & *butscarle*.) Mariners or seamen. See *Scot. & Marc. Clausum*, fol. 184.

BUZONIS, The shaft of an arrow, before it is flegged or feathered. St. Ed. 1.

BYE, Words ending in *by* or *bee*, signify a dwelling place or habitation, from the Sax. *by*, *habitatio*.

BY-LAWS, *bilagines*, from Sax. *by*, *pagus*, *civitas*, and *lagen*, lex. i. e. the laws of cities, *Spelm. v. bellagines*. Or perhaps laws made *abiter*, or by the *by*.] Certain orders and constitutions of corporations, for the governing of their members; of courts leet and court-baron; commoners or inhabitants in villis, &c. made by common assent, for the good of those that made them, in particular cases, whereunto the public law doth not extend; so that they lay restrictions on the parties, not imposed by the common or statute law: guilds and fraternities of trades, by letters-patent of incorporation, may likewise make *by-laws*, for the better regulation of trade among themselves, or with others. *Kitch* 45, 72: 6 *Rep.* 63.

In Scotland those laws are called laws of *by-law*, or *by-law*; which are made by neighbours elected by common consent in the *by-law courts*, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled *by-law-men*. And *by-laws*, according to *Skene*, are *leges rusticorum*, laws made by husbandmen, or townships, concerning neighbourhood amongst them. *Skene*, pag. 33.

The power of making *By-laws*, being included in the very act of incorporating a corporation; and most by-laws being made by corporations, it seems more regular to consider the nature and effect of them under that head. See title *Corporations*.

In this place therefore we shall chiefly consider, 1, who may make by laws, and 2, the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or *by-laws*, for repairing of a church, or highway, or any such thing, which is for the general good of the Public: and in such cases, the greater part shall bind all: though if it be for their own private profit, as for the well ordering of their common, or the like; they cannot make *by-laws* without a custom to warrant it; and if there be a custom, the greatest part shall

not bind the rest in these cases, unless it be warranted by the custom. 5 *Rep.* 63.—A custom to make a *by-law*, may be alleged in an ancient city or borough—So in an upland town, which is neither city nor borough. 1 *Inst.* 110 b: *Cro. Car.* 498: *Hob.* 212.

The freeholders in a court leet may make *By-laws* relating to the public good, which shall bind every one within the leet. 2 *Daro.* 457: *Mo.* 579, 584. And a court-baron may make *By-laws*, by custom, and add a penalty for the non-performance of them.—So by custom the tenants of a manor may make *by-laws* for the good order of the tenants. 1 *Ro. Ab.* 366. l. 35: *Mo.* 75: *Hob.* 212.—So may the homage. 1 *Ro. Ab.* Dy. 322 (a). But not without a custom. *Sav.* 74.—And a custom that the steward with the consent of the homage may make them, is not good. 3 *Lev.* 49.

2. All *By-laws* are to be reasonable; and ought to be for the common benefit, and not private advantage of any particular persons; and must be consonant to the public laws and statutes, as subordinate to them. And by Stat. 19 H. 7. c. 7, *By-laws* made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40l.

A *By-law* may be reasonable, though the penalty be to be paid to those who make the *By-law*. 1 *Salk.* 397. And generally it shall be reasonable, if it be for the public good of the corporation. *Carth.* 482.

By laws made in restraint of trade are not favoured, but the distinction between such as are made to restrain, and those made to regulate trade seems very nice. See title *Corporation*.—Under a general power to make *by-laws*, a *by-law* cannot be made to restrain trade. 1 *Burr.* 12.—A custom that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a grant cannot do; and where custom has restrained, a *by-law* may be made that upon composition foreigners may exercise a trade. *Carter* 120. See 4 *Burr.* 1951.

So *By-laws* may regulate, but not totally restrain a private right, as in cases of common, &c. See *Com. Dig.* title *By Law*, (B. 2.) and (C. 4.)

If a *By-law* impose a charge without any apparent benefit to the party, it will be void. *R. Raym.* 328.—And a *By-law* being entire, if it be unreasonable for any particular, shall be void for the whole, 2 *Vent.* 183.

A *By-law* cannot impose an oath, nor empower any person to administer it. *Str.* 536.

Where *By-laws* are good, notice of them is not necessary, because they are presumed for the better government and benefit of all persons living in those particular limits where made; and therefore all persons therein are bound to take notice of them. 1 *Lut.* v. 404: *Cro. Car.* 498: 5 *Mod.* 442: 1 *Salk.* 142: *Carth.* 484.

If a *By-law* does not mention how the penalty shall be recovered, debt lies for it. 1 *Ro. Ab.* 366. l. 48. See 5 *Co.* 64: *Hob.* 279.—Or action on the case on *assumpsit*. 2 *Lev.* 252.—It seems that a *By-law* to levy the penalty by distress, sale, or imprisonment, is void, unless by custom. See *Com. Dig.* title *By Law*, (D. 2.) (E. 1, 2.)

The court of K. B. will not enter into a question on the validity of a *By-law*, on the return of a *hab. cor. cum causa*, from any Corporation except the city of London, where it always doth; but the plaintiff must declare there, and defendant may demur if he has objections to the *By-law*. 2 *Burr.* 775.

CABALEA, from the Lat. *caballus*. Belonging to a horse. *Domestica*.

CABBAGES; See *Turnips*.

CABLISH, *cablicium*. Signifies brushwood, according to the writers of the forest laws: but *Spelman* thinks it more properly windfall-wood, because it was written of old *cadibulum*, from *cadere*: or if derived from the Fr. *cabillis*, it also must be windfall-wood.

CABLES for shipping; made of old or damaged materials, liable to forfeiture; and the regulations for manufacturing them settled by *Stat. 25 Geo. 3. c. 56*.

CACHEPOLUS or **CACHERELLUS**, An inferior bailiff, & catchpole. See *Constitution. domus de Parendu. MS. fol. 23*: and *Thorn*.

CADE, Of herrings is 500, of sprats 1000. But it is said, that anciently 600 made the *cade* of herrings, and six score to the hundred, which is called *Magnum Centum*.

CADET, The younger son of a gentleman; particularly applied to a volunteer in the army, waiting for some post.

CAEP GILDUM, See *Caepgilde*.

CAGIA, A cage or coop for birds. *Rev. Clauf. 38 H. 3.*

CALANGIUM AND **CALANGIA**, A challenge, claim, or dispute. *Mon. Angl. tom. 2. fol. 225*.

CALCETUM, **CALCEA**, A causey or common hard way, maintained and repaired with stones and rubbish, from the Lat. *calx*, chalk, Fr. *chaux*, whence their *chaussée* and our *causeway*, or path raised with earth, and paved with chalk-stones, or gravel. *Calcearium operationes* were the work and labour done by the adjoining tenants: and *calcagium* was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing such common roads; from which some persons were especially exempted by royal charter. *Kenner's Gloss.*

CALEFAGIUM, A right to take fuel yearly. *Blount*.

CALENDAR. See *Stat. 24 Geo. 2. c. 23*, for the establishment of the new stile, and *Stat. 25 Geo. 2. c. 36*, which enacts, that the opening of common lands, and other things depending on the moveable feasts shall be according to the new calendar. See title *Distress*, Year.

CALENDAR MONTH, Consists of 30 or 31 days, (except Feb. 28, and in Leap-year 29,) according to the calendar. See the preceding article, and *Stat. 16 Geo. 2. c. 7*. See title *Time*.

CALENDAR OR **PRISONERS**, A list of all the prisoners' names, in the custody of each respective sheriff. Where prisoners are capitally convicted at the assize, the judge may command execution to be done, without any writ. And the usage now is, for the judge to sign the calendar, which contains all the prisoners' names, with their several judgments in the margin, and this calendar is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "hanged by the neck." Formerly in the days of Latin and abbreviation,

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"*for call*" for "*for call*." *Statute-book. P. C. 188*. See *1 Comm. 465*, and the *Trist. Bk. Pardon*.

CALENDS, *calende*. Among the *Romans* was the first day of every month, being spoken of it by itself, or the very day of the new moon, which usually happens together; and if *prima*, the day before, be added to it, then it is the last day of the foregoing month: as *pridie calend. Septemb.* is the last day of *August*. If any number be placed with it, it signifies that day in the former month, which comes so much before the month named; as the tenth *calende* of *October* is the tenth day of *September*; for if one reckons backwards, beginning at *October*, the twentieth day of *September* makes the tenth day before *October*. In *March*, *May*, *July*, and *October*, the *calends* begin at the sixteenth day, but in other months at the fourteenth; which *calends* must ever bear the name of the month following, and be numbered backwards from the first day of the said following month. *Klapp's Concord*, p. 69. In the dates of deeds, the day of the month, by *ones*, *ides*, or *calende*, is sufficient. *2 Inst. 675*. See *Idem*.

CALIBURNE, The famous sword of the great King *Arthur*. *Bruden and Bruden in Vita R.*

CALICO, No person shall wear in apparel any printed or dyed calico, on pain of forfeiting 5*l*. And whoever selling any such calico, shall forfeit 20*l*. But this doth not extend to calicoes dyed all blue. *Stat. 7 Geo. 1. c. 7*. Persons may wear stuff, made of linen yarn, and cotton wool, manufactured and printed with any colours in *Great Britain*; so as the warp be all linen yarn, without incurring any penalty, by *Stat. 5 Geo. 2. c. 4*.—By *Stat. 24 Geo. 3. c. 72*, stuffs wholly made of raw cotton wool within this kingdom, are not to be considered as calicoes, and every person may use the same. These are distinguished by three blue stripes in the selvage. See title *Linen*, and *Burn J. title Excise X*.

CALLING THE PLAINTIFF, It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, or he voluntarily *non-fitted*, or withdraw himself: whereupon the clerk is ordered to call the plaintiff; when neither he nor any for him appears. See title *Nonfit*, Trial.

CALLS, The king's highway mentioned in some of our ancient authors. *Huntingdon. lib. 1.*

CAMBRICK, There were formerly several statutes against the importation and sale of *Cambricks*, or *French lawns*. (*Stat. 18 Geo. 3. c. 36*, *21 Geo. 3. c. 26*;) but now by *Stat. 27 Geo. 3. c. 13*, *27 Geo. 3. c. 34*, *§ 19*, *Cambricks*, or *French lawns*, legally imported, may be worn, or sold, and no person shall be prosecuted for having the same in his possession.—By *Stat. 5 Geo. 3. c. 37*, and *7 Geo. 3. c. 41*, several regulations are made concerning the manufacturing and stamping cambricks and lawns made in *England*; and forbidding counterfeiting the same is felony without clergy. See further titles *Linen*, *Navigation Acts*.

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CAMERA,

CAMERA, From the old Germ. *Cam. Cammen*, crooked; whence comes our English *kembo*, arms in kembo. But *camera*, as first signified any winding or crooked plat of ground; as *nam camera terre*, i. e. a nook of land. *De Feud.* Afterwards the word was applied to any vaulted or arched building; and it was used in the Latin law proceedings, for the judge's chamber, &c. *Camera Stellata*, the Star Chamber, &c.

CAMISIA, A garment belonging to priests, called the *Alb-Pes. Blasph.*

CAMOCA, A garment of silk, or something better. *Mon. Angl. tom. 3. p. 81.*

CAMPANA BAJULA, A small hand-bell, much in use in the ceremonies of the Roman church; and retained among us by sextons, parish clerks and criers. *Giral. Cumb. apud Wharton. Angl. Sac. par. 2. p. 637.*

CAMPARTUM, Any part or portion of a larger field or ground; which would otherwise be in gross or common. *Prime Hybor. Collect. vol. 2. p. 89.*

CAMPERTUM, A corn-field. *Pet. in Parl. 30 Ed. 1.*

CAMP-FIGHT, The fighting of two champions or combatants in the field. *3 Inst. 221. See Art-Fight, Bat-tel, Champion.*

CAMPUS MAIL, or **MARTII**, An assembly of the people every year in *March* or *May*, where they confederated together to defend the country against all enemies. *Leges Edw. Confessor. cap. 35. Sim. Durolm. Anno 1094.*

CANCELLING DEEDS AND WILLS, See those titles.

CANDLES AND CHANDLERS, If any wax-chandlers mix with their wares any thing deceitfully, &c. the candles shall be forfeited. *Stat. 23 Eliz. c. 8.* Tallow-chandlers and wax-chandlers, are by *Stat. 24 Geo. 3. A. 2. c. 41*, to take out annual licenses. And by *Stat. 25 Geo. 3. c. 74*, makers of candles shall be only such persons as are rated to the parish rates. The duties are regulated by *Stat. 27 Geo. 3. c. 13.* (*2d. per lb.* of which was repealed by *Stat. 32 Geo. 3. c. 7.*)—These duties, and the various regulations to enforce them, form one of the numerous branches of the Excise laws, and depend on a variety of statutes; a provision in one of which is not much known, though generally interesting, viz. "during the continuance of the duties upon candles, no person shall use in the inside of his house any lamp, wherein any oil or fat, (other than oil made of fish within Great Britain) shall be burned for giving light, on pain of 40*s.* *Stat. 8 An. c. 9. § 18.* The makers of candles are not to use melting-houses without making a true entry, on pain of 100*l.* and to give notice of making candles to the Excise officer for the duties, and of the number, &c. or shall forfeit 50*l.* *Stats. 8 An. c. 9: 11 Geo. 1. cap. 30: Vide Stat. 23 Geo. 2. c. 21.*

CANDELMAS-DAY, The feast of the purification of the Blessed Virgin Mary, being the second day of February, instituted in memory and honour of the purification of the virgin in the temple of Jerusalem, and the presentation of our blessed Lord. It is called *Candlemas*, or a *Mass of candles*, because before mass was said that day, the Romish Church consecrated and set apart, for sacred use, candles for the whole year; and made a procession with *hallowed candles* in remembrance of the divine light, which with our Saviour illuminated the whole church at his presentation in the temple.

This festival is no day in court, for the judges sit not; and it is the grand day in that term of all the inn of

court, whereas the judges anciently observed many ceremonies, and the societies danced to us with each other, in sumptuous entertainments, accompanied with musick, and almost all kinds of diversions.

CANES OPERTILE, Dogs with whole feet, not lawed. *Antiq. Customar. de Sutton Colfield.*

CANESTELLUS, A basket. In the inquisition of serjeancies, and knight's fees, anno 12 & 13 of King John, for Essex and Hertford, it appears that one John of Lifton held a manor by the service of making the king's baskets. *Ex Libro Rub. Scacc. fol. 137.*

CANFARA, A trial by hot iron formerly used in this kingdom. See *Ordeal*.

CANIPULUS, A short sword. *Blount.*

CANNA, A rod or distance in the measure of ground. *En Registr. Walt. Giffard Archiepisc. Ebor. f. 45.*

CANON, A law or ordinance of the church; from the Greek word *canon*, a rule.

THE CANON LAW consists partly of certain rules taken out of the scriptures; partly of the writings of the ancient fathers of the church; partly of the ordinances of general and provincial councils; and partly of the decrees of the Popes in former ages. And it is contained in two principal parts, the decrees and the decretals: the decrees are ecclesiastical constitutions made by the Pope and Cardinals, and were first gathered by Ivo bishop of *Canterbury*, who lived about the year 1114, but afterwards perfected by Gratian, a Benedictine monk, in the year 1149, and allowed by Pope Eugenius, to be read in schools, and alledged for law. They are the most ancient, as having their beginning from the time of Constantine the Great, the first Christian Emperor of Rome.

The decretals are canonical epistles written by the Pope, or by the pope and cardinals, at the suit of one or more persons for the ordering and determining of some matter of controversy, and have the authority of a law; and of these there are three volumes, the first whereof was compiled by Raymondus Baroniinus, chaplain to Gregory the Ninth, and at his command about the year 1231. The second volume is the work of Boniface the Eighth, collected in the year 1298. And the third volume, called the *Clementines*, was made by Pope Clement the Fifth, and published by him in the council of Vienna, about the year 1308. And to these may be added some novel constitutions of John the 22d, and some other bishops of Rome.

As the decrees set out the origin of the canon law, and the rights, dignities and decrees of ecclesiastical persons with their manner of election, ordination, &c. so the decretals contain the law to be used in the ecclesiastical courts; and the first title in every of them, is the title of the Blessed Trinity, and of the catholic faith, which is followed with constitutions and customs, judgments and determinations in such matters and causes as are liable to ecclesiastical cognizance, the lives and conversation of the clergy, of matrimony and divorces, inquisition of criminal matters, purgation, penance, excommunication, &c. But some of the titles of the canon law are now out of use, and belong to the common law; and others are introduced, such as trial of wills, bastardy, defamation, &c.

Trial of tithes were anciently in all cases had by the ecclesiastical law; though at this time this law only takes place in some particular cases.

Thus much for the canon law in general; and as to the canon laws of this kingdom, by the *Stat. 25 Hen. 8.*

of the revenue and consents of the king. 1. Stat. 1. c. 1. It is declared that all canons not repugnant to the king's prerogative, nor to the laws, statutes and customs of the realm, shall be used and executed.

As for the canons made by the clergy under Jas. 1. A. D. 1604, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity: whereas regard the clergy may think proper to pay them. *Sive*. 1057.

Lord Hardwicke cites the opinion of Lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons, confirmed by the king only; but they must be confirmed by the parliament to bind the laity. 2 *Atk.* 605.—Hence if the Archbishop of Canterbury grants a dispensation to hold two livings distinct from each other, more than thirty miles, no advantage can be taken of it by lapse, or otherwise in the temporal courts; for the restriction to thirty miles was introduced by a canon made since the Stat. 25 H. 8. See 2 *Black. Rep.* 968.

There are four species of courts in which the canon laws, (and the civil laws also, See title *Civil Laws*;) are permitted under different restrictions to be used. 1. The courts of the archbishops and bishops, and their derivative officers; usually called in our law Courts Christian, or the Ecclesiastical Courts.—2. The military courts, or Courts of Chivalry.—3. The Courts of Admiralty.—4. The Courts of the two Universities. In all, the reception of those laws in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated as to the Universities by act of parliament, ratifying those charters which confirm their customary laws. 1 *Comm.* 83.

For the peculiar jurisdiction, &c. of these courts. See this Dict. title *Courts*.—The following particulars relate to them all, and to this subject, in general.

1. The courts of common law, have the *superintendency* over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess; and in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal. See titles *Jurisdiction*; *Prohibition*.

2. The common law has reserved to itself the exposition of all such statutes, as concern either the extent of these courts, or the matters depending before them. And therefore if these courts either refuse to allow those acts of parliament, or will expound them in any other sense than what the law puts on them, the courts at Westminster will grant prohibitions to restrain and controul them. See title *Statutes*.

3. An appeal lies from all these courts to the king in the last resort; which proves that the jurisdiction exercised in them, is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. See Stat. 25 H. 8. c. 21.

From these three strong marks and ensigns of superiority, it appears beyond a doubt that the canon (and civil) laws, though admitted in some cases by custom in some courts, are only subordinate, *et legi sub jacentia*; and that thus admitted, restrained, altered, new-

modelled and amended, they serve to make a distinct independent branch of law, but inferior branches of the ordinary or universal law of England, properly called the King's Ecclesiastical, Military, Maritime, or Admiralty Law. 1 *Comm.* 84.

CANON RELIGIOSORUM. A book wherein the Religion of each order had a full transcript of the rules of their order, which were frequently read among them as their local statutes; and this book was therefore called *Regula* and *Canon*. The public books of the religious were the four following: 1. *Missal*, which contained all their offices of devotion. 2. *Martryologium*, a register of their peculiar saints and martyrs, with the place and time of passion. 3. *Canon* or *Regula*, the institution and rules of their order. 4. *Necrologium* or *Obituarium*, in which they entered the deaths of their founders and benefactors, to observe the days of commemoration of them. *Kamer's Gloss.*

CANTEL, *cautelum*.] Seems to signify the same with what we now call lump, as to buy by measure, or by the lump; but according to *Blount* it is that which is added above measures. *Sep. de Pysor.* cap. 9. Also a piece of any thing, as a *canal* of bread, and the like.

CANTRED, *cantredus*, a British word from *cant*, or *castrum*, Brit. *castrum*, and *trek*, a town or village. In Wales an hundred villager: for the Welsh divide their counties into *cantreds*, as the English do into hundreds. This word is used Stat. 28 H. 8. c. 3.—See *Max. Angl. part. 1. fol.* 319, where it is written *Kantrep*.

CAPACITY, *capacitas*.] An ability, or fitness to receive; and in law it is where a man, or body politick, is able to give or take lands, or other things, or to sue actions. Our law allows the king two capacities, a natural and a politick: in the first, he may purchase lands to him and his heirs; in the latter, to him and his successors. An alien born hath sufficient capacity to sue in any personal action, and is capable of personal estate; but he is not capable of lands of inheritance. See title *Alien*. Persons attainted of treason or felony, idiots, lunatics, infants, feme covert without their husbands, &c. are not capable to make any deed of gift, grant or conveyance, unless it be in some special cases. *Ex. Lit.* 171, 172.—See titles *Age*, *Infant*, and other suitable titles.

CAPE, *Lat.*] A writ judicial, touching plea of lands or tenements; so termed, as most writs are, of that ward in it, which carries the chief intention or end thereof; and this writ is divided into *capa magnum* and *capa parvum*, both of which concern things immovable. *Termes de la ley*.

CAPE MAGNUM, or the *grand cape*. Is a writ that lies before appearance to summon the tenant to answer the default, and also over to the demandant: and in the *Old Nat. Brev.* it is defined to be, where a man hath brought a *praecipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land, &c. See *Reg. Jud. fol.* 1: *Bract. lib.* 3. *tract.* 3. c. 1.

CAPE PARVUM, or *petit cape*. Is where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default;

CAPE.

CAPIAS.

then this writ shall issue for the king, &c. *Old Nat. Bro.* 162. The difference between the *grand cape* and *petit cape* is, that the *grand cape* is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ does not mention the particulars demanded; and the *petit cape* is after appearance or view granted; but whereas the *grand cape* summons the tenant to answer for the default, and likewise over to the demandant; *petit cape* summons the tenant to answer the default only: and therefore it is called *petit cape*; though some say it hath its name, not because it is of small force, but by reason it consists of few words. *Reg. Jud. fol. 2. Fluk. lib. 2. c. 44. Termes de la ley.*

CAPE AD VALENTIAM. This is a species of *cape magnam*, and is where I am impleaded of lands, and vouch to warrant another, against whom the *summons ad warrantandum* hath been awarded; and if he comes not on the day given; then if the demandant recover against me, I shall have this writ against the vouchor, and recover so much in value of the lands of the vouchor, if he hath so much; if not, I shall have execution of such lands and tenements as shall after descend to him in fee; or if he purchases afterwards, I shall have redemption in a redemption, &c. And this writ lies before appearance. *Old Nat. Bro.* 161.—See title *Fine and Recovery.*

CAPELLA. Before the word chapel was restrained to an oratory or depending place of divine worship: it was used also for any sort of chest, cabinet, or other repository of precious things, especially of religious reliques. *Kennet's Paroch. Antiq. p. 380.*

CAPELLUS. A cap, bonnet, or other covering for the head. *Treasures, p. 32.* *Capellus ferreus*, an helmet or iron head-piece. *Hoveden, p. 61.* *Capellus militis* is likewise an helmet or military head-piece. *Conferend. Dicitur de Parochon, MS. fol. 21.*

CAPIAS. A writor process of two sortes; one whereof in the court of C. P. is called *capias ad respondendum*, before judgment, where an original is sued out; &c. to take the defendant and make him answer the plaintiff: and the other a writ of execution, after judgment, being of divers kinds, as *capias ad satisfaciendum*, *capias ulagatum*, &c.

The **CAPIAS AD RESPONDENDUM** in C. B. is drawn from the *præcipe*, which serves both for the original and *capias*, and the return of the original is the test of the *capias*. If a *capias* be special, in case, covenant, &c. the cause of action must be recited at large, and the substance of the intended declaration set forth, as also in the original.

This *Capias* is a writ commanding the sheriff to take the body of the defendant, if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court, on the day of the return to answer to the plaintiff of a plea of debt, trespass, &c. as the case may be.

In cases of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance, provided a process against the defendant's person, in case he neglected to appear on the process of attachment against his goods, or had no substance whereby to be attached; (See titles *Attachmenta domum* and *Processus*.) subjecting his body to imprisonment by this writ of *Capias ad respondendum*. 3 *Rep.* 12. But the immunity of the defendant's person, in case of *præsumptio*, though

fraudulent injuries, producing a great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person in actions of *assumpsit*, though no breach of the peace be suggested by *Stat. Marth. 2. c. 23. Westm. 2. 23. E. 1. c. 12.* In actions of *debt* and *detinue* by *Stat. 25. E. 3. c. 17.* And in all actions on the case by *Stat. 19. H. 7. c. 6.*

Before this last statute, a practice had been introduced of commencing the suit, by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which by the old common law, subjected the defendant's person to be arrested by writ of *capias*; and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expence, in suing out a special original adapted to the particular injury,) still continues in almost all cases, except in actions of debt; though now by virtue of the above and other statutes, a *capias* might be had upon almost every species of complaint. See titles *Common Pleas*, *Assumpsit*, *Processus*.

It is now also usual in practice to sue out the *capias* in the first instance, on a supposed return of the sheriff, (that the defendant being summoned or attached, made default, or that he had no substance whereby to be attached); and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the sheriff, he, by his under-sheriff, grants a warrant to his bailiffs to execute it.

If the sheriff of the county in which the injury is supposed to be committed, and the action is laid, cannot find the defendant in his jurisdiction, he returns *non est inventus*; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is refused, *testatum est*, that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him, as in the former *capias*. Here also when the action is brought in one county, and the defendant lives in another, it is usual for saving trouble, time and expence, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias* to have been granted. And this fiction being beneficial to all parties, is readily acquiesced in, and is now become the settled practice.

But where the defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former; only after these words, *We command you*, this clause is inserted, *as we have formerly*, [or *often*] commanded you, *sicut alias*, or *pluries præcepimus*. See further title *Outlawry*. On the subject also of process in C. P. See this *Dist.* title *Common Pleas*, and 3 *Comm.* 284 &c.

A **CAPIAS** is also in use in criminal cases. The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And

CAPIAS.

And by the Statute to that effect, it appears, that the party taken under the writ, whether he may be detained there a *certis diebus*, until he is bailed from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then upon his non-appearance, a writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assize; and if he cannot be taken upon the first *capias*, an *alias* and a *pluries* shall issue. But an indictment for treason or felony; a *capias* is, the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by Stat. 25 E. 3. c. 14; though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. 2 H. P. C. 195.—And so in the case of misdemeanors, it is now the usual practice for any judge of the court of K. B. upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But in this, as in civil cases, if he absconds, and it is thought proper to pursue him to an outlawry, a greater exactness is necessary. 4 Comm. 318. See title *Outlawry*.

CAPIAS AD SATISFACIENDUM, (Shortly termed a *Ca. Sa.*) A judicial writ which issues out on the record of a judgment, where there is a recovery in the courts at *Westminster*, of debt, damages, &c. And by this writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ, to satisfy the plaintiff his debt and damages. Vide 1 Lill. Abr. 249. And if he does not then make satisfaction he must remain in custody till he does. When the body is taken upon a *ca. sa.* and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can be afterwards had against his lands or goods: except where a person dies in execution, when his lands and goods are liable to satisfy the judgment, by Stat. 21 Jac. 1. c. 24. See *Rel. Abr.* 904.

Properly speaking this writ cannot be sued out against any but such as were liable to be taken upon the *capias* mentioned in the preceding article. 3 Rep. 12: 356, 367. The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs and damages; this writ therefore doth not lie against any privileged persons, peers, or members of parliament; nor against executors or administrators; (except on a *debt* returned by the sheriff. 1 Lill. 250.) nor against such other persons as could not be originally held to bail.

This writ may be sued out, (as may all other executory process) for costs, against a plaintiff as well as a defendant, where judgment is had against him.

In case two persons are bound jointly and severally, and prosecuted in two courts, whereupon the plaintiff hath judgment, and execution by *ca. sa.* against one of them; if he after have an *elegit* against the other, and his lands and goods are delivered upon it, then he that is in prison shall have *audita querela*. Hob. 2, 57. Where one taken on a *ca. sa.* escapes from the sheriff, and no return is made of the writ, nor any record of the award of the *capias*; the plaintiff may bring a *scire fac.* against him, and on that what execution he will. *Rel.* 904. And if the defendant rescue himself, the plaintiff shall have a new *capias*, the first writ not being returned. *Ibid.* 901.

CAPITE.

If a defendant cannot be taken upon a *ca. sa.* in the county where the action is laid, there may thus a *habeas corpus* be taken into another county, and so of the other writs. See title *Capias*.

For further matter, see title *Executions*, *Pluries*, &c.

CAPIAS ULTRA VIAM. It is a writ that lies against a person who is outlawed in any action, by which the sheriff is commanded to apprehend the body of the party outlawed, for not appearing upon the return, and keep him in safe custody till the day of return, and then present him to the Court, there to be dealt with for his contempt; who, in the Common Pleas, was in former times to be committed to the Fleet, there to remain till he had paid out the king's pardon, and appeared to the action. And by a special *capias ultra viam* (against the body, lands, and goods in the same writ) the sheriff is commanded, so that all the defendant's lands, goods and chattels, for the contempt to the king; and the plaintiff, (after an inquisition taken thereupon, and returned into the Exchequer) may have the lands extended, and a grant of the goods, &c. whereby to compel the defendant to appear; which when he doth, if he reverse the outlawry, the same shall be restored to him. *Old Nat. Br.* 154. When a person is taken upon a *capias ultra viam*, the sheriff is to take an attorney's engagement to appear for him, where special bail is not required; and his bond with sureties to appear, where it is required. Stat. 4 & 5 W. & M. c. 18. See *Outlawry*.

CAPIAS PRO FINE. Anciently, when judgment was given in favour of the plaintiff, in any action in the king's courts, it was considered that the plaintiff be arrested for his willful delay of justice, or *capias pro fine*, till he paid a *fine* to the king, considering it as a public misdemeanor coupled with the private injury. But now in cases of *trespass*, *ejectment*, *assault* and *false imprisonment*, it is provided, by Stat. 5 & 6 W. & M. c. 12, that no writ of *capias* shall issue for the *fine*, nor any *fine* be paid; but the plaintiff shall pay 6 s. 8 d. to the proper officer, and be allowed it against the defendant among his other costs. See title *Judgments*. See also title *Fines for Offences*.

CAPIAS IN WITHERNAM. A writ lying (where a distress taken is driven out of the county, so that the sheriff cannot make deliverance in replevin,) commanding the sheriff to take as many beasts of the distrainer, &c. *Reg. Orig.* 82, 83. See titles *Distress*; *Withernam*.

CAPITULUM. See title *Capias pro fine*.

CAPITA, distribution per j. i. e. To every man an equal share of personal estate, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jura representationis*. See title *Executor*, V. 8.

CAPITA, Succession per j. Where the claimants are next in degree to the ancestor, in their own right, and not by right of representation. See title *Descent*.

CAPITALE. A thing which is stolen, or the value of it. *Leg. H. 1. cap.* 59.

CAPITALE VIVENS. Live cattle. *Leg. Athelstan.*

CAPITE, from *caput*, i. e. *Refr. unde tenere in capite, & tenere de capite, omnium terrarum capite*. **TENURE IN CAPITE**, was an ancient tenure, whereby a man held lands of the king immediately as of the crown, whether by knight's service, or in socage. This tenure was likewise called, tenure holding of the person of the king; and a person might hold of the king, and not in *capite*; that is, not immediately of the crown, but by means

means of some honour, castle, or manor belonging to it. According to *Kitchin*, one might hold land of the king by knight's service, and not in capite; because it might be held of some honour in the king's hands, descended to him from his ancestors, and not immediately of the king, as of his crown. *Kitch.* 129: *Dyer* 44: *P. N. R.* 5.

The very ancient tenure in capite, was of two sorts; the one principal and general, and the other special or subaltern; the principal and general was of the king as *caput regni, et caput generalissimum, omnium feodorum*, the fountain whence all feuds and tenures have their main original: the special was of a particular subject, as *caput feudi, seu terre illius*, so called from his being the first that granted the land in such manner of tenure; from whence he was styled *capitalis dominus, &c.* But tenure in capite is now abolished; and by *Stat. 12 Car. 2. c. 24. All tenures* are turned into free and common socage: so that tenures hereafter to be created by the king are to be in common socage only; and not by capite, knight's service, &c. *Blount.* See title *Tenures*.

CAPITULITIMUM, Poll-money. *Blount.*

CAPITITUM, A covering for the head. It is mentioned in the *Stat. 1 Hen. 4.* and other old statutes, which prescribe what dresses shall be worn by all degrees of persons.

CAPITULI AGRI, The head-lands, lands that lie at the head or upper end of the lands or furrows. *Kennet's Paroch. Antiq.* p. 137.

CAPITULA RURALIA, Assemblies or chapters held by rural deans and parochial clergy within the precinct of every distinct deanery; which at first were every three weeks, afterwards once a month, and more solemnly once a quarter. *Cowell.*

CAPTAIN, *capitaneus*.] One that leadeth or hath the command of a company of soldiers: and is either general, as he that hath the governance of the whole army: or special, as he that leads but one band.—There is also another sort of captains. *Qui urbium preefecti sunt, &c. Blount.*

CAPTION, *captio*.] That part of a legal instrument, as a commission, indictment, &c. which shews where, when, and by what authority it is taken, found or executed. Thus when a commission is executed, the commissioners subscribe their names to a certificate, declaring when and where the commission was executed.—These kind of captions relate chiefly to business of three kinds, i. e. to commissions to take fines of lands, to take answers in chancery, and depositions of witnesses: on the taking of a fine it is thus.—*Taken and acknowledged the — day of, &c. at, &c.*—The word caption is also used (rather vulgarly) for an arrest.—See title *Indictments*.

CAPTIVES. An act was made for relief of captives, taken by Turkish, Moorish, and other pirates, and to prevent taking of others in time to come. *Stat. 16 & 17 Car. 2. c. 24.* See title *Negro; Slavery*.

CAPTURE, *captura*.] The taking of a prey, an arrest, or seizure: and it particularly relates to prizes taken by privateers, in time of war. See title *Admiral, Insurance, Navy, Privateer*.

CAPUTAGIUM Some think this word signifies head poll-money, or the payment of it: but it seems rather what we otherwise call *chevageum*.

CAPUT ANNI, New-year's day, upon which of old was observed the solemn *Quinquagesima*.

CAPUT BARONIE, In the castle or chief seat of a nobleman; which descends to the eldest daughter, if there be no son, and must not be divided amongst the daughters, like unto lands, &c. See title *Coparceners, Dowry*.

CAPUT JEJUNII, In our records is used for *Ash Wednesday*, being the head, or first day of the beginning of the Lent-Fast. *Paroch. Antiq.* p. 131.

CAPUT LOCI, The head or upper end of any place; *ad caput ville*, at the end of the town.

CAPUT LUPINUM, Anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf.—Now the wilful killing of such a one would be murder. 1 *Hal. P. C.* 497: Vide *Bracton* fo. 125.—See title *Outlawry*.

CAR AND CHAR, The names of places beginning with car and char signify a city, from the Brit. *caer, Crutis*; as *Carlisle, &c.*

CARAVANNA, *A caravan*, or joint company of travellers in the Eastern countries, for mutual conduct and defence. *Gaufrid. Pinesau Richards Regis, Iter Hierosol.* lib. 5. cap. 52.

CARCAN, Is sometimes expounded for a pillory; as is *carcanum* for a prison. *LL. Canon. Regis*.

CARCATUS, Loading; a ship freighted. *Pat.* 10 R. 2.

CARDS AND DICE. A duty of two shillings (four six-pences) is imposed on all playing cards; and a duty of fifteen shillings (two 5s. and two 2s. 6d.) by *Stat. 9 Ann. c. 23: 29 Geo. 2. c. 13: 16 Geo. 3. c. 34: and 29 Geo. 3. c. 30.*—These duties are under the control of the Stamp Commissioners.

By *Stat. 10 Ann. c. 19*, No playing cards or dice shall be imported.—Selling second-hand cards incurs a penalty of 20s. *Stat. 29 Geo. 2. c. 13. § 10*; and of 5s. per pack by *Stat. 16 Geo. 3. c. 34*.—Several other regulations are made by statute to prevent frauds in manufacturing the above articles.—If cards or dice unstamped are used in any publick gaming house, a penalty of 5s. attaches on the seller. 10 *Ann. c. 19. § 162.*—See also *Stat. 5 Geo. 3. c. 46. § 9—17.*

CARECTA AND CARECTATA. A cart and cart-load. *Man. Angl. rem. 2. f. 340.*

CARETARIUS, or CARECTARIUS, A carter. *Blount.* See *Carretts*.

CARISTIA, Dearth, scarcity, dearthness. *Pat. 8 Ed. 1.*

CARITAS, *Ad caritatem, peculum caritatis*.] A gracecup; or an extraordinary allowance of the best wine, or other liquor, wherein the religious at festivals drank in commemoration of their founders and benefactors. *Cartular. Abat. Glaston. A. S. f. 29*: See *Cowell*.—It is sometimes written *Karrie*.

CARK, A quantity of wool, whereof thirty make a sarper. *Stat. 27 H. 6. c. 2.*

CARLE See *Karle*.

CARNARIUM, A charnel house, or repository for the bones of the dead.

CARNO. This word hath been used for an immunity or privilege, as appears in *Crompt. Jurisd* fol. 191.

CARPEMEALS, Cloth made in the Northern parts of England, of a coarse kind; mentioned in 7 *Jac. 1.* cap. 16.

CARR,

CARRIER. II.

CARRIAGE, is called, in law, with wheels. Vide *Commons*. **CARRIAGE**. A weight of four pounds in diamonds. *See* *Stat. 2 R. 2. c. 4.* This word is in fact, was formerly used for any weight or burden.

CARRIAGE. A carriage, cart, or wain load; as *Carriage* is used in an old charter for a load of hay. *See* *Stat. 2 R. 2. c. 4.*

CARRIAGE. Closets, or apartments, for privacy and retirement. — Three pews or carrels, where every one of the old monks, after they had dined, did resort, and there study. *Devil's Man. of Durham. p. 31.*

CARRICK; or **CARRACK**, *carrocha*. A ship of great burden, so called of the Italian word *carica* or *cargo*, which signifies a burden or charge: it is mentioned in the Statute 2 R. 2. c. 4. They were not only used in trade, but also in war. *See* *Walsingham. in Hen. 5. fol. 394.*

CARRIER. A person that carries goods for others for his hire.

I. Who are to be considered as Carriers; and generally how chargeable.

II. For what Defaults unfavourable; and the Exceptions in their favour.

III. What Circumstances must concur to charge them.

I. All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen, (but not hackney-coachmen in London,) and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm for their faults or miscarriages. *See* 1 *Com. Rep. 25*; *Bull. N. P. 70.* — And as to the duty and engagement of a carrier. *See* title *Bailment* 5. and V.

In an action on the case upon the custom of the realm against the defendant, master of a stage-coach, the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendant, by negligence, lost the plaintiff's trunk; upon Not-guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promised to take care of it, but lost it; and the question was, whether the master was chargeable; and adjudged that he was not, unless the master takes a price for the carriage of the goods as well as for the carriage of the person, and then he is within the custom as a carrier; that a master is not chargeable for the acts of his servant, but when they are done in execution of the authority given by the master, then the act of the servant is the act of the master, 1 *Salk. 282.* — But by the custom and usage of stages, every passenger pays for the carriage of goods above a certain weight; and there the coachman shall be charged for the loss of goods beyond such weight. 1 *Com. Rep. 25.*

If a common carrier loses goods he is intrusted to carry, a special action on the case lies against him, on the custom of the realm; and so of a common carrier by boat. 1 *Rel. Abr. 6.* An action will lie against a porter, carrier or bargeman, upon his bare receipt of the goods, if they are lost by negligence. 1 *Sid. 36.* Also a lighterman spoiling goods he is to carry, by letting water come to them, action on the case lies against him on the common custom. *Palm 528.*

If one be not a common carrier, and takes hire, he may be charged on a special *assumpsit*; for where hire is taken, a promise is implied. *Cro. Jac. 262.* So if a

man take hire of a common carrier, and who is not to receive a premium, undertakes to carry goods for hire, he is answerable for any damages they may sustain through his neglect or default. This was the explicit point determined in *Coggs v. Bernard*, 1 *Com. Rep. 25*, 1 *W. & A. 262.*

Where a carrier entrusted with goods, opens the pack, and takes away and disposes of part of the goods, this, showing an intent of stealing them, will make him guilty of felony. *H. P. C. 61.* And it is the same if the carrier receives goods to carry them to a certain place, and carrieth them to some other place, and not to the place agreed. 3 *Ass. 307.* That is, if he do it, with intent to defraud the owner of them. If a carrier, after he hath brought goods to the place appointed, take them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 *Howk. P. C. c. 43. § 1.* *See* *Barbery, 201.*

If a common carrier, who is offered his hire, and who has convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 *Shew. Rep. 327.* — But a carrier may refuse to admit goods into his warehouse at an unreasonable time, or before he is ready to take his journey. *Ld. Raym. 652.*

A common carrier may have action of trover or trespass for goods taken out of his possession by a stranger; he having a special property in the goods, and being liable to make satisfaction for them to the owner; and where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods; though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon. *Kel. 39.*

By *Stat. 3 Car. 1. c. 1*, Carriers are not to travel on the Lord's Day.

By the *Stat. 3 W. & M. c. 12*, The justices are annually to assess the price of land-carriage of goods to be brought into any place within their jurisdiction, by any common carrier, who is not to take more, under the penalty of 5 *l.* And by the *Stat. 21 Geo. 2. c. 28. § 3*, A carrier is not to take more, for carrying goods from any place in London, than is settled by the justices for the carrying goods from London to such a place, under the same penalty.

By *Stat. 24 Geo. 2. c. 8. sect. 9*, Commissioners for regulating the navigation of the river Thames are to rate the price of water carriage.

By *Stat. 30 Geo. 2. c. 22. sect. 3*, Justices of the city of London are to assess the rates of carrying goods between London and Westminster.

Carriers and waggoners are to write or paint on their waggons or carts their names and places of abode. *See* titles *Carts, Highways.*

II. At common law a carrier is liable by the custom of the realm to make good all losses of goods entrusted to him to carry, except such losses as arise (1) from the act of God, or inevitable accident; or (2) from the act of the king's enemies—to which may be added (3) the default of the party sending them. 1 *Inst. 89*; *Coggs v. Bernard*. 2 *Ld. Raym. 909*; *E/p. N. P. 619.*

1. Where

1. Where the defendant's boy in coming through *London bridge*, was by a sudden gust of wind driven against the arch and sunk, the owner of the boy was held not to be liable, the damage having been occasioned by the act of God, which no care of the defendant could provide against or foresee.—*But* in this case it was held that if the boy-man had gone out voluntarily in bad weather, so that there was a probability of his being lost, he would have been liable.—*Amies v. Stephens*, 1 *Str.* 128.

Upon this ground of its being the act of God, if a bargeman in a tempest, for the safety of the lives of his passengers, throws over-board any trunks or packages of value, he is not liable for the loss, 1 *Rol. Rep.* 79, and *see Bull.* 280, and 1 *Vent.* 190: 1 *Wils.* 281.

The defendant having lodged his waggon in an inn, an accidental fire broke out, which consumed it—he was adjudged liable; and it was held that negligence does not enter into the grounds of this action, for though the carrier uses all proper care, yet in case of a loss he is liable. *Forward v. Pittard*, 1 *Term Rep.* 27.

But where a common carrier, between two places, (*Stourport* and *Manchester*), employed to carry goods from one place to the other, is to be forwarded from thence to a third place (*Stockport*), carries them to *Stourport*, there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; in this case the carrier was held not to be liable, the keeping them in the warehouse in this case being not for the convenience of the carrier, but of the owner.

2. If a carrier is robbed, he shall be liable for the loss; not on the ground that he may charge the hundred under the statute of *Winchester*, but because if it were otherwise he might by collusion with robbers, defraud the owner of the goods; and so in other cases, where the grounds are the same. 1 *Ro. Ab.* 338: 1 *Salk.* 143.

But if a carrier be robbed of goods, either he or the owner may bring an action against the hundred, to make it good. 2 *Saund.* 380.

Where in the case of a master of a ship it appeared there was a sufficient crew for the ship, but that at night eleven persons boarded the ship as pirates, under pretence of pressing, and plundered her of the goods, it was adjudged the master (the ship being *infra corpus comitatus*) was liable, for superior force shall not excuse him. *Morse v. Slue*, 1 *Vent.* 109: 2 *Lev.* 69: 2 *Mod.* 85: *Barclay v. Higgins*, 1 *Geo.* 3; cited 1 *Term Rep.* 53.

3. In an action against a carrier, for negligently carrying a pipe of wine, which by that means burst, and the wine was spilt, it was good evidence for the defendant that the loss happened while he was driving quickly, and arose from the wine being in a ferment; so that the loss was occasioned by its being sent in that state. *Bull. N. P.* 74.—So if a carrier's waggon is full, and yet a person forces goods on him, and they are lost, the carrier is not liable. *Lovett v. Hobbs*, 2 *Show.* 127.

4. But the following exemptions by statute have been found necessary for the security of owners of ships.

By *Stat. 7 Geo. 2. c. 15*, No owners of any ship shall be liable to answer any loss, by reason of *embarkment* by the master or mariners, of any [gold, silver, &c. see now post *Stat. 26 Geo. 3.* or other] goods shipped on board, or for any act done by the master or mariners, without the owner's privity; beyond the value of the ship and freight.

By *Stat. 16 Geo. 3. c. 25*, No owner of any ship shall be subject to make good any loss by reason of any robbery, *embarkment*, *stealing* or *making away* with any gold, silver, jewels, diamonds, precious stones or other goods from on board; or for any act or forfeiture done or occasioned without the knowledge of such owner, beyond the value of the ship and freight, *although* the master or mariners shall not be concerned in, or privy to, such robbery, &c.

These acts do not impeach any remedy for fraudulent *embarkment*, and if several proprietors or freighters sustain such loss, and the value of the ship and freight is not sufficient to make full compensation, the loss shall be averaged amongst them.

No owner shall be subject to answer for loss happening by fire on board ship. *Stat. 26 Geo. 3. c. 86. § 2.*

No master or owners shall be subject to answer for any loss of gold, silver, diamonds &c. by reason of any robbery, &c. unless the shipper of such goods insert the true nature, quality and value of the gold, &c. in his bills of lading. *Stat. 26 Geo. 3. c. 86.*

Previous to this last statute it was determined, that the owner of a ship was not liable beyond the value of the ship and freight, under *Stat. 7 Geo. 2. c. 15*; in the case of a robbery (of dollars) in which one of the mariners was concerned, by giving intelligence, and afterwards sharing the spoil; *Sutton v. Mitchell*, 1 *Term Rep.* 18; where it was said, the statute was made to protect the owners against all *treachery* in the master or mariners.

III. In order to charge the carrier, these circumstances are to be observed.

1. The goods must be lost while in the possession of the carrier himself, or in his sole care.—Therefore where the plaintiffs, the *East India Company*, sent their servants with the goods in question on board the vessel, who took charge of them, and they were lost, defendant was held not to be liable. 1 *Str.* 690.

2. The carrier is liable only so far as he is paid, for he is chargeable by reason of his reward.

One brought a box to a carrier, in which there was a large sum of money, and the carrier demanded of the owner what was in it; he answered it was filled with silks, and such like goods; upon which the carrier took it, and was robbed: and adjudged, that the carrier was liable to make it good: but a special acceptance, as provided there is no charge of money, would have excused the carrier. 1 *Vent.* 238: 4 *Rep.* 83.

A person delivered to a carrier's book-keeper two bags of money sealed up, to be carried from *London* to *Exeter*, and told him that it was 200 *l.* and took his receipt for the same, with promise of delivery for 10 *s.* per cent. carriage and risk: though it be proved that there was 400 *l.* in the bags, if the carrier be robbed he shall answer only for 200 *l.* because there was a particular undertaking for the carriage of that sum and no more, and his reward, which makes him answerable, extends no farther. *Carth.* 486.

3. Under a special or qualified acceptance the carrier is bound no further than he undertakes.

For where the owner of a stage-coach puts out an advertisement "That he would not be answerable for money, plate or jewels above the value of 5 *l.* unless he had notice, and was paid accordingly;" all goods received

quired by that coach are under that special acceptance; and if money or plate be sent by it, without notice and being paid for; if lost, the coach-owner is not liable: *Gibson v. Paynton*, 4 Burr. 2298; not even to the extent of the 5 l. or the sum paid for booking: *Clay v. Willan*, H. Black. Rep. 298.—In these cases a personal communication is not necessary to constitute a special acceptance. Advertisements, notices in the warehouse, and handbills, which it is probable the plaintiff saw, or which he might have seen, are sufficient.

From these cases and the opinion of Lord Mansfield, it seems safest, that in all instances of sending things of value by a carrier, the carrier should have notice and be paid accordingly. See ante II. 4.

4. A delivery to the carrier's servant is a delivery to himself, and shall charge him; but they must be goods, such as it is his custom to carry, not out of his line of business. *Salk.* 282.

5. Where goods are lost which have been put on board a ship, the action may be brought, either against the master or against the owners. 2 *Salk.* 440.—If one owner only is sued, he must plead it in abatement, that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff. 5 Burr. 2611. See ante II. 4.

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu*, while immediately under his care; for he is bound to deliver them to the consignee, or send notice to him according to the direction, and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. 3 *Wils.* 429; 2 *Bl. Rep.* 916.

As to the proof necessary in an action against a carrier, See title *Bailment* 5.—That a carrier may retain goods for his hire, See 1 *Ld. Rym.* 166, 758.

CART-BOTE. See title *Bote*.

CARIS, By the Stat. 2 *W. & M. Stat.* 2. c. 8. sect. 19, 20; 18 *Geo.* 2. c. 33, the wheels of every cart or dray for the carriage of any thing from and to any place where the streets are paved, within the bills of mortality, &c. shall contain six inches in the felly, not to be shod with iron, nor be drawn with above two horses, under the penalty of 40 s.—By the Stat. 18 *Geo.* 2. c. 33, they may be drawn with three horses and not more, and the wheels being of six inches breadth, when worn, may be shod with iron, if the iron be of the full breadth of six inches, made flat, and not set on with rose-headed nails; and no person shall drive any cart, &c. within the limits aforesaid, unless the name of the owner, and number of such cart, &c. be placed in some conspicuous place of the cart, &c. and his name be entered with the commissioners of hackney-coaches, under the penalty of 40 s. and every person may seize and detain such cart till the penalty be paid.—By the Stat. 1 *Q. 3. & 2. c.* 57; 24 *Geo.* 2. c. 43, The driver of any such cart, &c. riding upon such cart, &c. not having a person on foot to guide the same, shall forfeit 10 s. And by Stat. 24 *Geo.* 2. c. 43, the owner so guilty shall forfeit 20 s. and any person may apprehend the offender.

On changing property new owners' names to be affixed, 30 *Geo.* 2. c. 12. sect. 2, and to be entered with the commissioners of hackney-coaches. And see Stat. 24 *Geo.* 3. & 2. c. 27, to compel the entry of all carts driven, within five miles of Temple Bar.

CARVAGE, See post *Curator*.

CARUCA, Fr. *charrue*.] A plough; from the old Gallic *carv*, which is the present Irish word for any sort of wheeled carriage (hence *charl* and *car*, a plowman or rustic. Vide *Kerle*.

CARUCAGE, *carucagium*.] A tribute imposed on every plough, for the public service; and as *hidage* was a taxation by hides, so *carucage* was by carucates of land. *Mon. Angl. rom.* 1. f. 294.

CARUCATE, or CARVE or LARA; *carucata terra*.] A plough-land; which in a deed of *Thomas de Arden*, 19 *Edw.* 2, is declared to be one hundred acres, by which the subjects have sometimes been taxed; whereupon the tribute so levied was called *carucagium*, or *carucagium*. *Bract. lib. 2. cap.* 26. But *Stow* says, it is as great a portion of land as may be tilled in a year and a day by one plough; which also is called *hilda*, or *hilda terra*, a word used in the old British laws. And now by Statute 7 & 8 *W.* 3. c. 29, a plough-land, which may contain houses, mills, pasture, meadow, wood, &c. is 50 l. per annum.

Luttrell, in his chapter of tenure in forage, saith, that *foca idem est quod carucata*, a foke or plough-land are all one. *Stow* says, King *Hen.* III. took *carvage*, that is, two marks of silver of every knight's fee, towards the marriage of his sister *Isabella* to the Emperor. *Stow's Annals*, page 271.

Rafel, in his exposition of words, says *carvage* is to be quit, if the king shall tax all the lands by *carves*; that is, a privilege whereby a man is exempted from *carvage*. The word *carve* is mentioned in the Stat. 28 *Ed.* 1, of wards and reliefs, and in *Magna Charta*, c. 5. And A. D. 1200, on peace made between England and France, King *John* sent the King of France thirty thousand marks, for which *carvage* was collected in England, viz. iii s. for each plow. *Spelm. v. Carua. Kennet's Gloss.* 1 *Inst.* 69. and n.

CARUCATARIUS, He that held lands in *carvage*, or plough-tenure. *Paroch. Antiq.* p. 354.

CASE Action on; See title *Action*, and also *Com. Dig.* 3 *V. tit. Action*.

CASSATUM AND CASSATA, By the Saxons called *hida*; by *Bede*, *familia*, is a house with land sufficient to maintain one family; *Rex Ang. Ethelred*, de 310 *Callata*, annum *triarem*, &c. *Hoveden* anno 1008. And *Hen. Huntingdon*, mentioning the same thing, instead of *cassata* writes *hiden*.

CASHLITE, *Saxon*. A mulct or fine, *Blount*.

CASIDILE, A little sack, purse, or pocket. *Mat. Westm.*

CASK, An uncertain quantity of goods; and of sugar contains from eight to eleven hundred weight. There are also casks for liquors, of divers contents; and by Stat. 25 *Eliz.* c. 11, none were to transport any wine casks, &c. except for victualling ships, under a certain penalty.

CASSOCK, or CASSULA, A garment belonging to the priest, *quasi minor cassia*. See *Tassale*.

CASTEL, or CASTLE, *castellum*.] A fortress in a town; a principal mansion of a nobleman. In the time of *H. 8.* there were in England 1115 castles; and every castle contained a manor; but during the civil wars in this kingdom these castles were demolished, so that generally there are only the ruins or remains of them at this day. 2 *Inst.* 31.

CASTELLAIN, castellanus.] The lord, owner, or captain of a castle, and sometimes the constable of a fortified house. *Bract. lib. 5. tract. 2. cap. 16: 3 Ed. 1. cap. 7.* It hath likewise been taken for him that hath the custody of one of the king's mansion-houses, called by the Lombards *curier*; in English courts; though they are not castles or places of defence. *2 Inst. 31.* And *Mareward*, in his *Forest-Laws*, says, there is an officer of the forest called *castellanus*.

CASTELLARIUM, CASTELLARI, The precinct or jurisdiction of a castle.—Et unum iustum iuxta castellarium. Men. Angl. tom. 2. f. 402.

CASTELLORUM OPERATIO, Castle-work, or service and labour done by inferior tenants, for the building and upholding of castles of defence; towards which some gave their personal assistance, and others paid their contribution. This was one of the three necessary charges, to which all lands among our Saxon ancestors were expressly subject. And after the conquest an immunity from this burden was sometimes granted. As king Hen. II. granted to the tenants within the honour of Wallingford — *Ut sint quieti de oper. hominum castellorum. Paroch. Antiq. page 114.* It was unlawful to build any castle without leave of the king, which was called *castellatio. Du Fresne.*

CASTIGATORY for scolds. A woman indicted for being a common scold, if convicted, shall be sentenced to be placed on a certain engine of correction, called the tre bucket, *tambrel, tymborella, castigatory, or cucking-stool*, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into *ducking stool*, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment. *3 Inst. 219: 4 Comm. 169.*—It is also termed *gogin-stole* and *coke-stole* and by some is thought corrupted from *chocking stool*. Though this punishment is now disused, a former Editor of *Jacob's Dict.* (Mr. *Morgan*.) mentions that he remembers to have seen the remains of one, on the estate of a relation of his in *Warwickshire*, consisting of a long beam, or rafter moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed.

At *Banbury* in *Oxfordshire*, this punishment has been used towards common whores, within the memory of persons now (1793) living—and the pool for the purpose yet retains the name of *the cucking pool*, but the engine was not long since removed. See *Lamb. Biron. lib. 1. f. 12.*

In *Domesday-book* it is called *Cathedra Stercoralis*, and was used by the Saxons for the same purpose, and by them called *secastrig stole*. It was anciently also a punishment inflicted on *brewers and bakers* transgressing the laws, who were ducked *in stercore*, in stinking water.

CASTLE-WARD, Castlegardum, vel windum castri.] An imposition laid upon such persons as dwelled within a certain compass of any castle, towards the maintenance of such as watch and ward the castle. *Magna Charta, cap. 15, 20: 32 Hen. 8 cap. 48.* It is sometimes used for the circuit itself, which is inhabited by those that are subject to this service. *Castle guard rents* were paid by persons dwelling within the liberty of any castle, for the maintaining of watch and ward within the same. By *Stat. 22 & 23 Car. 2. c. 24. sect. 2*, these and other rents in the Dutchy of *Lancaster*, payable to the king, were vested in trustees to be sold.

CASTER, and CHESTER: The names of places ending in these words are derived from the Lat. *castrum*; for this termination at the end was given by the Romans to those places where they built castles.

CASTRATION, See title Maiming.

CASUAL EJECTOR, In ejectment, a nominal defendant, and who continues such until appearance by or for the tenant in possession. See title Ejectment.

CASU CONSIMILI, is a writ of entry granted where tenant by the curtesy, or tenants for life, aliens in fee or in tail, or for another's life; and is brought by him in reversion against the party to whom such tenant so aliens to his prejudice, and in the tenant's life time. It takes its name from this, that the clerks of the Chancery did, by their common assent, frame it to the likeness of the writ called in *casu proviso*, according to the authority given them by the *Stat. Westm. 2. (13 E. 1.) cap. 24*, which statute, as often as there happens a new case in Chancery something like a former, yet not specially fitted by any writ, authorises them to frame a new form answerable to the new case, and as like the former as they may. *7 Rep. 4: See Fitz. Nat. Br. fo. 206: Termes de la ley. See 3 Comm. 51.*

CASU PROVISIO, A writ of entry, given by the statute of Gloucester cap. 7, where a tenant in dower aliens in fee, or for life, &c. and it lies for him in reversion against the alienor. *Fitz. N. B. 205.* This writ, and the writ of *casu consimili*, supposes the tenant to have aliened in fee, though it be for life only: and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien; but if an ancestor lease for life, and the tenant alien in fee, &c. the heir in reversion must have this with the title included therein. *F. N. B. 206, 207.*

CASUS OMISSUS, Is where any particular thing is omitted out of, and not provided against by a statute, &c.

CATALS, Catalla, Goods and chattels. See Chattels.

CATALIS CAPTIS NOMINE DISTRICTIO, Anciently a writ that lay where a house was within a borough, for rent going out of the same; and which warranted the taking of doors, windows, &c. by way of distress for rent, *Old Nat. Br. 66.* This writ is now obsolete.

CATALIS REDDENDIS, An ancient writ which lay where goods being delivered to any man to keep till a certain day, are not, upon demand, delivered at the day. It may be otherwise called a writ of *detinere*: and is answerable to *actio depositi* in the Civil law. See *Reg. Orig. 139, and Old Nat. Br. 63.*

CATAPULTA, A warlike engine to shoot darts: or rather a cross bow.

CATASCOPUS. An archdeacon. Du Cange.

CATCHLAND. In Norfolk there are some grounds which it is not known to what parish they certainly belong, so that the minister who first seizes the tithes, does by that right of pre-occupation enjoy them for that year: and the land of this dubious nature is there called *catchland*, from this custom of seizing the tithes. *Cowel.*

CATCHPOLE, See Catchpollus. Sheriff's officers are commonly so called.

CATHEDRAL, ecclesia cathedralis.] The church of the bishop, and head of the diocese: wherein the service of the church is performed with great ceremony. See title Church.

CATHEDRATICK,

CATHEDRATICK, [*ecclesiasticus*.] A title of respect, held at the bishop by the inferior clergy, in argument of their rank at *hohen cathedra*. *Brit. precure. & Synodals*, p. 52.

CATZURUS, A hunting horse. *Tamara*, page 68. Vide *Chazars*.

CATTLE. Several ancient laws were made to regulate the number of sheep to be kept by any farmer: See title *Sheep*.

As to the importation of cattle.—By Stat. 5 Geo. 3. c. 43, Beasts may be freely imported from the *Ile of Man*.—By the 6th article of the Union, 5 Ann. c. 8, No Scotch cattle carried into England shall be liable to any other duties than the cattle of England are.—By Stat. 5 Geo. 3. c. 10, which was of temporary continuance, but made perpetual by Stat. 16 G. 3. c. 8, all sorts of cattle may be imported from Ireland duty free.—And this notwithstanding Stat. 18 G. 2. c. 2; 20 G. 2. c. 7; and 32 G. 2. c. 2.

As to buying and selling cattle, &c.—No person shall buy any ox, cow, calf, &c. and sell the same again alive in the same market or fair, on pain of forfeiting double the value. Stat. 3 Ed. 6. c. 19; 5 G. 1. c. 49, 7, 8.—And the said act 3 Ed. 6. c. 19, is not repealed by Stat. 12 Geo. 3. c. 71, which repeals the general forfeiting act of 5 Ed. 6. c. 14, and other subsequent acts enforcing the same, but hath no reference to any preceding act.—By Stat. 21 Geo. 2. c. 46, No salesman, broker, or factor employed in buying cattle for others, shall buy and sell for himself, in London, or within the bills of mortality, on penalty of double the value of the cattle bought or sold.

By several statutes made from time to time, the king has been empowered to make regulations to prevent the spreading of distempers among huddled cattle: And by Stat. 9 Geo. 3. c. 39, he may prohibit the importation of hides, skins, horns, &c.

By Stat. 3 Car. 1. cap. 1, No drovers are to travel with cattle on Sundays, on penalty of 20s.

By Stat. 21 Geo. 3. c. 67, Several wholesome regulations are made, to prevent the cruelties of drovers and others, in driving cattle in London, Westminster, and the bills of mortality, by which a fine from 20s. to 50s. is imposed on them for misbehaviour; or one month's imprisonment; and power is given to the lord mayor and aldermen of London, to make regulations to further the purposes of the act, and which was accordingly done.

As to killing, maiming, and stealing cattle.—By Stat. 37 Ed. 3. c. 6, Whoever shall take out the tongue of any tame beast, the property of another person, the beast being alive, shall pay treble damages and forfeite 10s.

By Stat. 23 & 24 Geo. 2. c. 7, Maliciously, unlawfully, and willingly to kill any horses, sheep, or other cattle in the night-time, is felony; but the felon may make his election to be transported for seven years.

And if any shall maliciously maim, wound or hurt such cattle in the night-time, he shall forfeit treble damages, by action of trespass, or on the oath, to be tried before three justices of peace and a jury.

By Stat. 14 Geo. 2. c. 6, and 19 Geo. 2. c. 34, feloniously driving away or stealing any oxen, bullocks, cows, sheep, &c. or killing them with intent to steal the carcass, or any part of it, is made felony without benefit of clergy; and any person prosecuting an offender to conviction shall have a reward of 10s.

By the Stat. 48, (see that title) 9 Geo. 3. c. 22, Unlawfully and maliciously, to maim or wound any cattle, is felony without clergy, and the hundred shall be answerable as for an assize; and persons convicting offenders shall receive 5s. reward.

To prevent the stealing of horses and other cattle for the purpose of selling them, merely for their skin, the Stat. 16 Geo. 3. c. 81, provides that every person keeping a slaughter-house for cattle, not killed for butchers' meat, shall take out licenses and be subject to an inspector—and shall not slaughter, but at certain times, &c. &c.

CAUDA TERRE. A land's end, or the bottom of a ridge in arable land. *Opus. Agric. Glouc.* fol. 117.

CAVEAT, is a kind of process in the spiritual courts to stop the institution of a clerk, or a benefice, or probate of a will, &c. When a caveat is entered against an institution, if the bishop afterwards institutes a clerk, it is void; the caveat being a *superior*; but a caveat has been adjudged void when entered in the life-time of the incumbent. A caveat entered against a will stands in force for three months; and this is for the caution of the ordinary, that he do no wrong; though it is said the temporal courts do not regard these sorts of caveats. 2 *Rel. Rep.* 191: 1 *Nat. Ab.* 416, 417.

CAVERS, Offenders relating to the mines in Derbyshire, who are punishable in the *bergheims*, or miners' court.

CAULCEIS, See Stat. 6 H. 6. cap. 5, respecting sewers. Ways pitched with flint, or other stones.—See *Colcum*.

CAURCINES, [*Carmeni*.] *Italians* that came into England about the year 1235, terming themselves the *Rapa merchants*, but driving no other trade than lending out money; and having great banks in England, they differed little from Jews, save (as history says) that they were rather more merciful to their debtors; Cowell says, they have their name from *Carmum*, *Carm*, a town in Lombardy, where they first practised their art of usury and extortion; from whence spreading themselves, they carried their cursed trade through most parts of Europe, and were a common plague to every nation where they came. The then bishop of London excommunicated them; and King Hen. 3. banished them from this kingdom in the year 1240. But being the pope's solicitors and money-changers, they were permitted to return in the year 1250; though in a very short time after, they were driven out of the kingdom again for their intolerable extortions. *Mat. Paris* 403.

CAUSA MATRIMONII PRÆLOCUTI, Is a writ which lies where a woman gives land to a man in fee-simple, &c. to the intent he should marry her, and he refuseth to do it in any reasonable time, being thereunto required. *Rep. Orig.* 66. If a woman makes a feoffment to a stranger of land in fee, to the intent to infee her, and one who shall be her husband; if the marriage shall not take effect, she shall have the writ of *causa matrimonii prælocuti* against the stranger, notwithstanding the deed of feoffment be absolute. *New Nat. Br.* 456. A woman infeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment; and afterwards the woman, for not performing the condition, entered again into the land, and her entry was adjudged lawful, though upon a second feoffee. *Lib. Aff.*

anno 40 Ed. 3. The husband and wife may sue the writ *causa matrimonii prelocuti* against another who ought to have married her: but if a man give lands to a woman to the intent to marry him, although the woman will not marry him, &c. he shall not have his remedy by writ *causa matrimonii prelocuti*. *New Nat. Br.* 455.

CAUSAM NOBIS SIGNIFICES, A writ directed to a mayor of a town, &c. who was by the king's writ commanded to give seisin of lands to the king's grantee, on his delaying to do it, requiring him to *show cause* why he so delays the performance of his duty.

CAUSES and EFFECTS. In most cases the law hath respect to the *cause*, or beginning of a thing, as the principal part on which all other things are founded: and herein the *next*, and not the *remote* cause is most looked upon, except it be in covinous and criminal things; and therefore that which is not good at first will not be so afterwards; for such as is the cause, such is the effect. *Plowd.* 208, 268. If an infant or feme-covert make a will, and publish it, and after die of full age, or sole, the will is of no force, by reason of the original *cause* of infancy and coverture. *Finch* 12. Where the *cause* ceaseth, the effect or thing will cease. *Co. Lit.* 13.

CAUTIONE ADMITTENDI, A writ that lies against a bishop, who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient caution or security to obey the orders and commandment of the church for the future. *Reg. Orig.* 66. And if a man be excommunicated, and taken by a writ of *significavit*, and after offers caution to the bishop to obey the church, and the bishop refuseth it; the party may sue out this writ to the sheriff to go against the bishop, and to warn him to take caution, &c. But if he stands in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another writ, directed to the sheriff reciting the case, and the end thereof; *Tibi precipimus, quod ipsum A. B. à prisona prædicti. nisi in præsentia tua cautionem pignorat. ad minus eidem episc. de satisfaciend. abtulerit, nullatenus deliveras absque mandato nostro seu ipsius episcopi in hac parte specialiter*, &c. When the bishop hath taken caution, he is to certify the same in the Chancery, and thereupon the party shall have a writ unto the sheriff to deliver him. *New Nat. Br.* 142.

CEAPGILDE, From Sax. *ceap*, pecus, cattle; and *gild*, i. e. *solutio*;] Hence it is *solutio pecudis*: from this Saxon word *gild*, it is very probable we have our English word *yield*; as yield, or pay. *Cowel*.

CÉLER LECTI, The top, head, or tester of a bed. *Hist. Elen apud Wharton, Angl. Sax. par. 1. p.* 673.

CELLERARIUS, The butler in a monastery: in the Universities they are sometimes called *maniple*, and sometimes *caterer*, and steward.

CENDULÆ, Small pieces of wood laid in form of tiles, to cover the roof of a house. *Pat. 4 Hen. 3. p.* 1. m. 10.

CENEGILD, An expiatory mulct, paid by one who killed another, to the kindred of the deceased. *Spelm.*

CENELLÆ, Acorns, from the oak. In our old writings, *peffona cenellarum*, is put for the pannage of hogs, or running of swine, to feed on acorns.

CENNINGA, Notice given by the buyer to the seller, that the thing sold was claimed by another, that he might appeal and justify the sale: it is mentioned in the laws of *Athelstan*, *apud Brompton*, cap. 4.

CENSARIA, A farm, or house and land, let at *cenfum* at a standing rent: it comes from the Fr. *censt*, which signifies a farm.

CENSARII, Farmers, *Blount*.

CENSUALES, A species or class of the *oblatis*, or voluntary slaves of churches or monasteries, i. e. those who, to procure the protection of the church, bound themselves to pay an annual tax or quit-rent out of their estates to a church or monastery. Besides this, they sometimes engaged to perform certain services. *Robert. Hist. Emp. C. V. 1 V. 271, 2: Potgiesserus de Statu Ser-vorum, lib. 1. cap. 1. sec. 6, 7.*

CENSURE, from Lat. *cenfus*.] A custom called by this name, observed in divers manors in *Cornwall* and *Devon*, where all persons residing therein above the age of sixteen are cited to swear fealty to the lord, and to pay 11 d. per poll, and 1 d. per ann. ever after: and these thus sworn are called *cenfers*. *Survey of the Dutchy of Cornwall*.

CENTENARII, Petty judges, under-sheriffs of counties, that had rule of an hundred, and judged smaller matters among them. *1 Vent.* 211.

There were anciently inferior judges so called in *France*: who were set over every hundred freemen, and were themselves subject to the count or comes. *1 Comm.* 115.

CEOLA, A large ship. *Malmshury, lib. 1. c. 1.*

CEPI CORPUS, A return made by the sheriff, upon a *capias*, or other process to the like purpose, that he hath taken the body of the party. *F. N. B.* 26.

CEPPAGIUM, The stumps or roots of trees which remain in the ground after the trees are felled. *Fleta, lib. 2. cap. 41.*

CERAGIUM, Cerage, a payment to find candles in the church. *Mat. Paris. See Waxfat.*

CERTAINTY, Is a plain, clear, and distinct setting down of things, so that they may be understood. *5 Rep.* 121. A convenient certainty is required in writs, declarations, pleadings, &c. But if a writ abate for want of it, the plaintiff may have another writ: 'tis otherwise if a deed become void by uncertainty, the party may not have a new deed at his pleasure. *11 Rep.* 25, 121: *Dyer* 84. That has certainty enough, that may be made certain: but not like what is certain of itself. *4 Rep.* 97. See generally title *Pleading*—and particularly titles *Deed*; *Fine*; *Will*.

CERAMIFICANDO DE RECOGNITIONE STAPULE. A writ commanding the mayor of the staple to certify to the Lord Chancellor a statute staple taken before him, where the party himself detains it, and refuseth to bring in the same. *Reg. Orig.* 152. There is the like writ to certify a statute-merchant; and in divers other cases. *Ibid.* 148, 151, &c.

CERTIFICATE, A writing made in any court to give notice to another court of any thing done therein; which is usually by way of transcript, &c. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it; containing the tenor and effect of what is done. The clerks of the crown, assize and peace, are to make certificates into *B. R.* of the tenor of indictments, convictions, &c. under penalties, by the *Stat.* 34 & 35 *Hen. 8. c.* 14: 3 *W. & M. c.* 9. See tit. *Clergy, benef.* of.

CERTIFICATE.

The question of *certificatio* arises in the course of a cause in Chancery, (as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator, shall operate as a remainder, or an executory devise,) it is the practice of that court, to refer it to the opinion of the judges of the court of K. B. or C. P. upon a case stated for the purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such *certificate*, the decree is usually founded. 3 Comm. 453.

THE TRIAL BY CERTIFICATE, is allowed in such cases, where the evidence of the person certifying, is the only proper criterion of the point in dispute. Thus, 1. The question whether one were absent with the king in his army out of the realm, in time of war, might be tried by the certificate of the marshal of the king's host under seal. *Litt.* § 102.—2. If in order to avoid an outlawry, it be alledged the defendant was in prison, &c. at *Bourdeaux* or *Calais*; this when those places belonged to the crown of England, was allowed to be tried by the certificate of the mayor. 9 Rep. 31: 2 Ro. Ab. 583. And therefore by parity of reason, it should now hold that in similar cases arising at *Jamaica*, &c. the trial should be by certificate from the governor 3 Comm. 334.

3. For matters within the realm; the *customs* of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of the recorder, upon a surmise from the party alledging it, that it should be so tried; else it must be tried by the country, as it must also if the corporation of London be a party, or interested in the suit. 1 Inst. 74. 4 Burr. 248: Bro. Ab. 1. Trial, pl. 96: Hob. 85: But see 1 Term Rep. 423. If the recorder has once certified a custom, the court are in future bound to take notice of it. Doug. 380.

4. In some cases the Sheriff of London's certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 1 Inst. 74. Of a nature somewhat similar to which is the trial of the privilege of either University when the Chancellor claims cognizance of the cause; in which case the charters confirmed by parliament, allow the question to be determined by the certificate of the chancellor under seal—But in case of an issue between two parties themselves, the trial shall be by jury. 2 Ro. Ab. 583: 3 Comm. 335.

5. In matters of ecclesiastical jurisdiction, as marriage, general bastardy, excommunication, and orders, these and other like matters shall be tried by the bishop's certificate See titles *Bastardy*, &c. Ability of a clerk presented, admission, institution and deprivation of a clerk, shall also be tried by certificate from the ordinary or metropolitan. 2 Inst. 632: Show P. C. 88: 2 Ro. Ab. 583, &c. But induction shall be tried by a jury; being the corporal investiture of the temporal profits. Dy. 229. Resignation of a benefice may be tried either way, but seems most properly to fall within the bishop's cognizance. 2 Ro. Ab. 583; 3 Comm. 336.

6 The trial of all customs and practice of the courts shall be by certificate from the proper officer of those courts respectively: and what return was made on a writ

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by a sheriff or under-sheriff, shall be only tried by his own certificate. 9 Rep. 31: 3 Comm. 336

As to certificates in cases of *Cass*, of *Bankrupts*, or relative to the settlement of the *Poor*, See those titles in this Dict.

CERTIFICATE OF CERTIFICATION OF ASSISE, *certificatio assise nove diffinitive*, &c.] A writ anciently granted for the re-examining or re-trial of a matter passed by assise before justices: used where a man appearing by his bailiff to an assise, brought by another, lost the day; and having something more to plead for himself, which the bailiff did not, or might not plead for him, desired a farther examination of the cause, either before the same justices, or others, and obtained letters-patent to them to that effect; whereupon he brought a writ to the sheriff to call both the party for whom the assise passed, and the jury that was impanelled on the same, before the said justices at a certain day and place, to be re-examined. It was called a certificate, because therein mention is made to the sheriff, that upon the party's complaint of the defective examination, as to the assise passed, the king hath directed his letters-patent to the justices for the better certifying of themselves, whether all points of the said assise were duly examined. Reg. Orig. 200: F. N. B. 181: *Bracton*, lib. 4. c. 13: *Horn's Mirr.* lib. 3.—This writ is now entirely superseded by the remedy afforded by means of *new trials*. See 3 Comm. 389.

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This is an Original Writ, issuing out of the court of Chancery or K. B. directed in the king's name to the judges or officers of inferior courts, commanding them to certify, or to return the records of a cause depending before them; to the end the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause. See F. N. B. 145, 242.

This writ is either returnable in the king's bench, and then hath these words, "send to us;" or in the *Common Bench*, and then has "to our justices of the bench;" or in the Chancery, and then hath "*in our Chancery*, &c."

On this subject we may briefly consider, 1. In what cases this writ is grantable; or not.—2. In what manner.—3. The effect of it when granted, and 4. Of the return, with the form of that and the writ.

1. A writ of certiorari may be had at any time before trial, to certify and remove *indictments*, with all the proceedings thereon from any inferior court of criminal jurisdiction, into the court of K. B. the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of four purposes, 1. To consider and determine the validity of appeals and indictments, and the proceedings thereon; and to quash or confirm them accordingly.—2. To have the prisoner or defendant tried at the bar of the courts, or before justices of *Nisi Prius* where it is surmised that a partial or insufficient trial will probably be had in the inferior court.—3. To plead the king's pardon in the court of K. B.—4. To issue process of outlawry against the offender, in those counties or places where the process of inferior judges will not reach him 2 H. P. C. 210: 4 Comm 320

A certiorari lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all interior jurisdictions, erected by act of parliament, to have

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have their proceedings returnable in K. B. *Ld. Raym.* 469, 580.

But without laying a special ground before the court, it cannot be sued out to remove proceedings in an action from the courts of the counties palatine. *Doug.* 749.—It does not lie to judges of oyer and terminer to remove a recognisance of appearance. *Lucas* 378.—Nor to remove a poor's rate. *Sira.* 932, 975. See *Leach's Hawk. P. C.* ii. c. 27. § 23. *in n.*

A certiorari lies to justices of the peace and others, even in such cases, which they are empowered by statute finally to hear and determine; and the superintendency of the court of K. B. is not taken away without express words. 2 *Hawk. P. C.* c. 27. § 23, 23.

That a certiorari does not lie to remove any other than judicial acts, See *Cald.* 309: *Sny.* 6.

Where a certiorari is by law grantable for an indictment, at the suit of the king, the Court is bound to award it, for it is the king's prerogative to sue in what court he pleases: but it is at the discretion of the court to grant or not, in case of private prosecutions, and at the prayer of the defendant: and the court will not grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; or where there is so much difficulty in the case, that the judge desires it may be determined in B. R. &c. *Burr.* 2456. Also on indictments of perjury, forgery, or for heinous misdemeanors, the court will not generally grant a certiorari to remove at the instance of the defendant. 2 *Hawk. P. C.* c. 27. § 27, 28. But see 2 *Ld. Raym.* 1452.

But in particular cases, the court will use their discretion to grant a certiorari; as if the defendant be of good character, or if the prosecution be malicious or attended with oppressive circumstances. *Leach's Hawk. P. C.* ii. c. 27. § 28. *n.*

Where issue is joined in the court below, it is a good objection against granting a certiorari: and if a person doth not make use of this writ till the jury are sworn, he loses the benefit of it. *Mod. Ca.* 16: *Stat.* 43 *Elix.* c. 5. After conviction, a certiorari may not be had to remove an indictment, &c. unless there be special cause; as if the judge below is doubtful what judgment is proper to be given, when it may. See *Sira.* 1227: *Burr.* 749. And after conviction, &c. it lies in such cases where writ of error will not lie. 1 *Salk.* 149. The court on motion in an extraordinary case will grant a certiorari to remove a judgment given in an inferior court; but this is done where the ordinary way of taking out execution is hindered in the inferior court. 1 *Lill. Abr.* 253.

In common cases a certiorari will not lie to remove a cause out of an inferior court, after verdict. It is never sued out after a writ of error, but where diminution is alleged: and when the thing in demand does not exceed 5*l.* a certiorari shall not be had, but a writ of error or attain. *Stat.* 21 *Jac.* 1. *cap.* 23: See *Stat.* 12 *Geo.* 1. c. 29. A certiorari is to be granted on matter of law only; and in many cases there must be a judge's hand for it. 1 *Lill.* 252. Certiorari's to remove indictments, &c. are to be signed by a judge: and to remove orders, the fiat for making out the writ must be signed by some judge. 1 *Salk.* 150.

Certiorari lies to the courts of *Wales*; and the ports, counties palatine, &c. 2 *Hawk. P. C.* c. 27. § 25.

Things may not be removed from before justices of peace, which cannot be proceeded in by the court where removed; as in case of refusing to take the oaths, &c. which is to be certified and inquired into, according to the statute. 1 *Salk.* 145. And where the court which awards the certiorari cannot hold plea on the record, there but a tenor of the record shall be certified; for otherwise if the record was removed into B. R. as it cannot be sent back, there would be a failure of right afterwards. 1 *Dartv. Abr.* 792. But a record sent by certiorari into B. R. may be sent after by *mittimus* into C. B. *Ibid.* 789. And a record into B. R. may be certified into Chancery, and from thence be sent by *mittimus* into an inferior court, where an action of debt is brought in an inferior court, and the defendant pleads that the plaintiff hath recovered in B. R. and the plaintiff replies *Nul tial record*, &c. 1 *Saund.* 97, 99.

The court of B. R. will grant a new certiorari to affirm a judgment, &c. though generally one person can have but one certiorari. *Cro. Jac.* 369.

A certiorari may not be had to a court superior, or that has equal jurisdiction, in which case day is given to bring in the record, &c.

Besides the statutes hereafter mentioned, there are several which restrain, and many which absolutely prohibit a certiorari; in order to avoid frivolous and unfounded delays in justice. For a complete list of these, if needed, the student should consult the index to the statutes.—The following seem to have deserved a short mention in this place.

By *Stats.* 12 *Car.* 2. cc. 23, 24. no certiorari shall be allowed in certain cases of transgression of the *Excise-Laws*.

By *Stat.* 13 *Geo.* 3. c. 78, (which see at large title *Highways*) no presentment, &c. of any highway shall be removed from the sessions, until it be traversed, except the right to repair be the question.—Or by *Stat.* 5 & 6 *W. & M.* c. 11, may come in question.—But this means on the part of the defendant only, for on the part of the prosecution it lies before.—No other proceedings under the highway-act may be removed by certiorari.—But if the sessions manifestly exceed their authority in making orders, they may be removed into K. B. by certiorari and quashed. *Leach's Hawk. P. C.* ii. c. 27. § 37. *and v.*

By *Stat.* 16 *Geo.* 3. c. 30, against deer-stealers, no certiorari shall issue, unless the party convicted shall become bound to the prosecutor in 100*l.* to pay full costs and damages within thirty days, and to the Justice in 60*l.* to prosecute the certiorari with effect.—But in appeal to the sessions, he may sue out a certiorari 'on six days' notice, to prosecute. And the like in effect is enacted by *Stats.* 4 & 5 *W. & M.* c. 23. and 5 *An. Jess.* 2. c. 44, concerning game. 2 *Hawk. P. C.* c. 27. § 60, 61.

Also by *Stat.* 1 *An.* c. 18, concerning the repair of bridges, no certiorari shall be allowed.—Nor by *Stat.* 8 *Geo.* 2. c. 20 for punishing destroyers of turnpikes.—Nor by *Stat.* 12 *Geo.* 2. c. 29, for assessing county rates.—Nor on *Stat.* 19 *Geo.* 2. c. 21, against carrying and stowring.—Nor on *Stat.* 23 *Geo.* 2. c. 13, against seducing artificers.—Nor on *Stat.* 25 *Geo.* 2. c. 36, against bawdy-houses.—Nor on 29 *Geo.* 2. c. 40, against stealing lead, iron, &c.—Nor on 30 *Geo.* 2. c. 21, for preserving fish in the Thames.—Nor on 30 *Geo.* 2. c. 24, for restraining gaming in public houses.—Nor on 31 *Geo.* 2. c. 29, for regulating bread.—Nor on

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2 Geo. 3. c. 39, for preventing thefts in bumb-boats.—
Not on 10 Geo. 3. c. 18, against *dog-stealers*.

For a long detail of further matter on the subject of *certiorari*. See 2 Hawk. P. C. c. 27

2. By Stat. 1 & 2 P. & M. c. 13, no [Habeas Corpus or] *Certiorari* shall be granted to remove any recognizances, unless signed by the Chief Justice, or in his absence by one of the other judges.

By Stat. 5 & 6 W. & M. c. 11. and 8 & 9 W. 3. c. 33, A *certiorari* may be granted in vacation time by any of the judges of B. R. and security is to be found before it is allowed. No *certiorari* is to be granted out of B. R. to remove an indictment, or presentment, before justices of peace at the sessions before trial, unless motion be made in open court, and the party indicted and security by two persons in 20*l.* each to plead to the indictment in B. R. &c. And if the defendant prosecuting the *certiorari* be convicted, the court of B. R. shall order costs to the prosecutor of the indictment. In case of *certiorari* granted in vacation, the name of the judge and party applying to be indorsed on the writ. See title *Habeas Corpus*.

If on a *certiorari* to remove an indictment the party do not find manueptors in the sum of 20*l.* to plead to the indictment and try it, according to the statute, it is no *superfedeas*. *Mish. Ca.* 33. And a *procedendo* may be granted where bail is not put in before a judge, on a *certiorari*. As to costs, See 1 Wils. 139; 1 Burr. 54; 2 Term Rep. 47.

No judgment or order to be removed by *certiorari*, without sureties found to the amount of 50*l.* Stat. 5 Geo. 2. c. 19.

Certiorari, to remove convictions, orders or proceedings of justices, to be applied for within six calendar months, and upon six days' notice to the justices. Stat. 13 Geo. 2. c. 18. See *Stra.* 991.

It is said a *certiorari* to remove an indictment is good, although it bear date before the taking thereof: but on a *certiorari* the very record must be returned, and not a transcript of it; for if so, then the record will still remain in the inferior court. 2 Lil. 253. In B. R. the very record itself of indictments is removed by *certiorari*; but usually in Chancery, if a *certiorari* be returnable there, it removes only the tenor of the record; and therefore, if it be sent from thence into the King's Bench, they cannot proceed either to judgment or execution, because they have but such tenor of the record before them. 2 Hale's Hist. P. C. 215. In London a return of the tenor only is warranted by the city charters. 2 Hawk. P. C. c. 27. § 26, 76.

On a *certiorari* to remove a record out of an inferior court, the file of their court, and power to hold plea, and before whom, ought to be shewn on their certificate. *Jenk. Cent.* 214, 232.

A *certiorari* to remove an order of bastardy should be applied for in six months, *Rex v. Howlett*, 1 Wils. 35.

If a *certiorari* be prayed to remove an indictment out of London or Middlesex, three days' notice must be given the other side, or the *certiorari* shall not be granted. *Raym.* 74.

3. After a *certiorari* is allowed by the inferior court, it makes all the subsequent proceedings, on the record that is removed by it, erroneous. 2 Hawk. P. C. c. 27. § 62, 64. But if a *certiorari* for the removal of an indictment before justices of peace, be not delivered before the jury

be sworn for the trial of it, the justices may proceed. 2 *Hist. P. C. c.* 27. § 64.—And the justices may sit to see to complete their judgment after a *certiorari* delivered. *Ld. Raym.* 1315. See ante 1.

A *certiorari* removes all things done between the writ and return. *Ld. Raym.* 835, 1305.—And as it removes the record itself out of the inferior court, therefore if it removes the record against the principal, the accessory cannot be tried there. 2 Hawk. P. C. c. 29. § 54.—And if the defendant be convicted of a capital crime, the person of the defendant must be removed by *Habeas Corpus*, in order to be present in court, if he will move in arrest of judgment.—And herein the case of a conviction differs from that of a special verdict. *Burr.* 930.

Although on a *habeas corpus* to remove a person, the court may bail or discharge the prisoner: they can give no judgment upon the record of the indictment against him, without a *certiorari* to remove it, but the same stands in force as it did, and new process may issue upon it: a *H. P. C.* 211. If an indictment be one; but the offences several, where four persons are indicted together; a *certiorari* to remove this indictment against two of them, removes it not as to the others, but as to them the record remains below. 2 Hale's Hist. 214.

If a cause be removed from an inferior court by *certiorari*, the pledges in the court below are not discharged; because a defendant may bring a *certiorari*, and thereby the plaintiff may lose his pledges. *Stir. Rep.* 244, 246. A *certiorari* from K. B. is a *superfedeas* to restitution in a forcible entry. 1 Hawk. P. C. c. 64. § 62.

4. The return of a *certiorari* is to be under seal: and the person to whom a *certiorari* is directed may make what return he pleases, and the court will not stop the fillog of it, on affidavit of its falsity, except where the public good requires it: the remedy for a false return is action on the case, at the suit of the party injured; and information, &c. at the suit of the king. 2 Hawk. P. C. c. 27. § 70.

If the person to whom the *certiorari* is directed, do not make a return, then an *alias*, then a *pluries*, *vel causam nobis significes quare*, shall be awarded, and then an attachment. *Crompt.* 116.

FORM OF A CERTIORARI

TO CERTIFY THE RECORD OF A JUDGMENT.

GEORGE the Third, &c. To the Mayor and Sheriffs of our city of E. and to every of them, in our court at the Guildhall thus greeting: Whereas A. B. hath lately in our said court in the said city, according to the custom of the same court, impleaded C. D. late of, &c. in an action of debt upon demand of thirty pounds and thereupon, in our said court before you, obtained judgment against the said C. for the recovery of the said debt; and we, being desirous for certain reasons, that the said record should by you be certified to us, Do command you, that you find under your seals the record of the said recovery, with all things touching the same, into our court before us at Westminster, on the day, &c. plainly and distinctly, and in as full and ample manner as it now remains before you, together with this writ; so that we on the part of the said A. may be able to proceed to the execution of the said judgment, and do what shall appear to us of right ought to be done. Witness, &c.

The return of a certiorari may be thus.—First, on the back of the writ indorse these or similar words, “The execution of this writ appears in a schedule to the same writ annexed.” Which schedule may be in the following form, on a piece of parchment, (not paper, 1 Barn. K. B. 113;) by itself, and filed to the writ.

“Middlesex.—I A. B. one of the keepers of the peace and justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed by virtue of this writ to me delivered, do under my seal certify unto his Majesty in his court of King’s Bench; the indictment, of which mention is made in the same writ, together with all matters touching the said indictment. In witness whereof I the said A. B. have to these presents set my seal. Given at — in the said county, the — day of —, in the — year of the reign of —.

Then take the record of the indictment, and close it within the above schedule, and seal up, and send them both together with the certiorari.

CERT-MONEY, *quasi* certain money.] Head-money, paid yearly by the tenants of several manors to the lords thereof, for the certain keeping of the keet; and sometimes to the hundred: as the manor of Hook, in Dorsetshire, pays cert-money to the hundred of Egerdon. In ancient records this is called *centum lota*. See *Common Fine*.

CERVISARII, The Saxons had a duty called *chinclean*, that is *retributio posus*, payable by their tenants; and such tenants were in *Domesday* called *cervisarii*, from *cervisia*, ale, their chief drink: though *cervisarius* vulgarly signifies a beer or ale brewer.

CERURA, A mound, fence, or inclosure. *Cart. priorat. de Thelesford MS.*

CESSAT EXECUTIO, In trespass against two persons, if it be tried and found against one, and the plaintiff takes his execution against him, the writ will abate as to the other; for there ought to be a *cessat executio* till it is tried against the other defendant. 10 Ed. 4. 11. See title *Execution*, &c.

CESSAVIT, A writ which lies (by the Stat. of Gloucester, 6 E. 1. c. 4: and *Westm.* 2. 13 E. 1. cc. 21, 41.) when a man who holds lands by rent or other services, neglects or ceases to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers, or giving alms, and neglects it, in either of which cases if the *cessat* or neglect shall have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself. *F. N. B.* 208.—In some instances relating to religious houses, called *Cessavit de Cantuariâ*.

By the Stat. of Gloucester, the *cessavit* does not lie for lands let upon fee farm rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises, or unless the tenant hath so enclosed the land, that the lord cannot come upon it to distrain. *F. N. B.* 209: 2 / 298. For the law prefers the simple and ordinary remedies, by distress, &c. to this extraordinary one of forfeiture; and therefore the same statute has provided farther, that on tender of

rears, and damages before judgment, and giving security for the future performance of the services, (that he will no more cease) the process shall be at an end, and the tenant shall retain his land, to which the Stat. of *Westm.* 2. conforms so far as may stand with convenience and reason of law. 2 Inst. 401, 460.

The Stat. 4 Geo. 2. c. 28, and 11 Geo. 2. c. 19, seem evidently borrowed from the above ancient writ of *cessavit*.—The former of these statutes permits landlords who have a right of re-entry for non-payment of rent, to serve an ejectment on their tenants when half a year’s rent is due, and no sufficient distress on the premises. See title *Ejectments*. And the same remedy is in substance adopted by the Stat. 11 Geo. 2. c. 16, which enacts, that where any tenant at rack-rent shall be one year’s rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had, two justices of the peace, (after notice affixed on the premises for fourteen days) may give the landlord possession thereof; and the lease shall be void. See title *Distress, Lease, Rent*.

By Stat. *Westm.* 2. § 2, the heir of the demandant may maintain a *cessavit* against the heir or assignee of the tenant. But in other cases, the heir may not bring this writ for *cessure* in the time of his ancestor: and it lies not but for annual service, rent, and such like; not for homage or fealty. *Termes de la ley: New Nat. Br.* 463, 464.

The lord shall have a writ of *cessavit* against tenant for life, where the remainder is over in fee to another: but the donor of an estate tail shall not have a *cessavit* against the tenant in tail: though if a man make a gift in tail, the remainder over in fee to another, or to the heirs of the tenant in tail, there the lord of whom the lands are holden immediate, shall have a *cessavit* against the tenant in tail, because that he is tenant to him, &c. *Ibid.* If the lord distrains pending the writ of *cessavit* against his tenant, the writ shall abate. The writ *cessavit* is directed to the sheriff, To command A. B. that, &c. he render to C. D. one messuage, which he holds by certain services, and which ought to come to the said C. by force of the Statute, &c. because the said A. in doing those services had ceased two years, &c. Dict.

CESSE, Signifies an assessment or tax, and is mentioned in the Stat. 22 Hen. 8. cap. 3. *Cesse* or *cessse*, in Ireland, is an exaction of victuals, at a certain rate, for soldiers in garrison. *Antiq. Hiberniæ*.

CESSIO BONORUM. A process in the law of Scotland, similar in effect to that under the statutes relating to *Bankruptcy* in England.

CESSION, *Cessio*.] A ceasing, yielding up, or giving over. When an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation or being otherwise not qualified, &c. in both cases their first benefices are become void, and are in the law said to be void by *cession*; and to those benefices that the person had who was created bishop, the king shall present for that time, whoever is patron of them; and in the other case, the patron may present. *Convel.*

But cession in the case of bishops does not take place till consecration. *Dyer* 223. See title *Commendam, Advowson* II.

No person is entitled to dispensation, but chaplains of the king and others mentioned in the Stat. 21 H. 8. c. 13; the

the brethren, and the sons of lords and knights (not of barons) and doctors and bachelors of divinity and law in the Universities of this realm. 1 *Comm.* 392. See title *Chaplain*.

Both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeacons, chancellorships, treasurerhips, chanterhips, prebends and sinecure rectories. See tit. *Chaplain, Parson*.

In case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases; but it seems that a lapse will not incur from the time of institution against the patron, unless notice be given him; but it will from the time of induction. 2 *Wils.* 200; 3 *Burr.* 1504. See title *Advowson II*.

CESSOR, *Lat.*] He who *cesset*, or neglects so long to perform a duty, that he thereby incurs the danger of the law. *Old Nat. Br.* 136.—See title *Cessavit*.

CESSURE, or *cessur*; *cessing*, giving over; or departing from. *Stat. Westm.* 2. c. 1. See title *Cessavit*.

CESTUI QUE TRUST, Is he in trust for whom, or to whose use or benefit, another man is enfeoffed or seised of lands or tenements. By *Stat.* 29 *Car.* 2. s. 3, lands of *cestui que trust* may be delivered in execution. See title *Trusts, Uses*.

CESTUI QUE USE, *Fr.* *cestui à l'usage de qui.*] He to whose use any other man is enfeoffed of lands or tenements. 1 *Rep.* 133. Feoffees to uses were formerly deemed owners of the lands; but now the possession is adjudged in *cestui que use*, and without any entry he may bring assise, &c. *Stat.* 27 *Hen.* 8. c. 10: *Cro. Eliz.* 46. See tit. *Use*.

CESTUI QUE VIE, He for whose life any lands or tenements are granted. *Perk.* 97. See title *Overpursuants*.

CHACEA, A station of game more extended than a park, and less than a forest: and is sometimes taken for the liberty of chafing or hunting within such a district. And according to *Blount* it hath another signification, *i. e.* the way through which cattle are drove to pasture, commonly called in some places a *choue way*. *Bracton*, lib. 4. c. 44. Vide *Chafe*.

CHACFARE *ad lepores, vel vulpes*: To hunt hare or fox. *Cartular. Abbat. Glasen.* MS. 87.

CHACURUS, from the *Fr.* *chasseur*.] A horse for the chase; or rather a hound or dog, a courser. *Rot.* 7 *Johan.*

CHAFE, from the *Fr.* *chauffer* to heat, whence our *chafing dish*.

CHAFEWAX, An officer in *Chancery*, that fitteth the wax for sealing of the writs, commissions and such other instruments as are there made to be issued out.

CHAFFERS, Seem to signify wares or merchandise; and *chaffring* is yet used for buying and selling, or rather a kind of bartering of one thing for another. The word is mentioned in the *Stat.* 3 *Ed.* 4. c. 4.

CHAINS, *Hanging in*. See title *Murder*.

CHAIRS, See *Coaches*.

CHALDRON or CHALDER of coals. See title *Coals*.

CHALKING, The merchants of the staple require to be eased of divers new impositions, as *chalking*, ironage, wharfage, &c. *Rot. Parl.* 50 *Ed.* 3.

CHALLENGE, *Culmina*, from the *Fr.* *challenger*.] An exception taken either against persons or things. *Persons* as to jurors, or any one or more of them: or in

case of felony, by the prisoner at the bar against things, as a declaration, &c. *Terms de la ley*, 109.—The former is the most frequent signification in which this term is used, and which shall here be shortly mentioned; referring for further matter to titles *Jury*, *Trial*, in this Dictionary.

There are two kinds of challenge; either to the array, by which is meant the whole jury as it stands arrayed in the panel, or little square pane of parchment, on which the jurors' names are written; or to the polls; by which are meant the several particular persons or heads in the array. 1 *Inst.* 156, 8.

Challenge to jurors is also divided into *challenge principal* or *peremptory*; and *challenge per cause*, *i. e.* upon cause or reason alleged: *challenge principal* or *peremptory*, is that which the law allows without cause alleged, or further examination; as a prisoner at the bar, arraigned for felony, may challenge peremptorily the number allowed him by law, one after another, alleging no cause, but his own dislike, and they shall be put off, and new taken in their places: but yet there is a difference between *challenge principal*, and *challenge peremptory*; the latter being used only in matters criminal, and barely without cause alleged; whereas the former is in civil actions for the most part, and by assigning some such cause of exception, as being found true the law allows. *Stamdf.* P. C. 124, 157: *Lamb. Eiren lib.* 4. cap. 14.

Challenge to the favour, which is a species of challenge for cause, is where the plaintiff or defendant is tenant to the sheriff, or if the sheriff's son hath married the daughter of the party, &c. and is also when either party cannot take any principal challenge, but sheweth cause of favour; and causes of favour are infinite. If one of the parties is of affinity to a juror, the juror hath married the plaintiff's daughter, &c. If a juror hath given a verdict before in the cause, matter or title; if one labours a juror to give his verdict; if after he is returned, a juror eats and drinks at the charge of either party; if the plaintiff, &c. be his master, or the juror hath any interest in the thing demanded, &c. these are challenges to the favour. 2 *Roll. Abr.* 636: *Hob.* 294.

CHALLENGE TO FIGHT.—It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c. 1 *Hawk.* P. C. c. 63. § 3.

By *Stat.* 9 *An.* c. 14. § 8; (See title *Gaming*;) "Whoever shall [assault and beat,] or challenge, or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in that act, shall on conviction by indictment or information, forfeit all their goods, chattels and personal estate, and suffer imprisonment without bail, in the county prison for two years."

It is now every day's practice for the court of K. B. to grant informations against persons sending challenges to justices of the peace, and in other heinous cases.

For further matter, See title *Murder*.

CHAMBERDEKINS, or *Chamber-deacons*, were certain poor *hish* scholars, clothed in mean habit, and living under no rule; or rather beggars banished England by *Stat.* 1 *Hen.* 5. cap. 7, 8.

CHAM

CHAMBERLAIN, *Camērarius*.] Is variously used in our laws, statutes and chronicles: as first there is *Lord Great Chamberlain of England*, to whose office belongs the government of the palace at *Westminster*; and upon all solemn occasions the keys of *Westminster-Hall*, and the court of *Richests* are delivered to him; he disposes of the sword of state to be carried before the king when he comes to the parliament, and goes on the right hand of the sword next to the king's person: he has the care of providing all things in the House of Lords in the time of parliament; to him belongs *livery* and lodgings in the king's court, &c. And the gentleman usher of the black rod, yeoman usher, &c. are under his authority.

The office of *Lord Great Chamberlain of England* is hereditary; and where a person dies seized in fee of this office, leaving two sisters, the office belongs to both sisters, and they may execute it by deputy: but such deputy must be approved of by the king, and must not be of a degree inferior to a knight. 2 *Bro. P. C.* 146, 840. *ed.*

The *Lord Chamberlain of the Household* has the oversight and government of all officers belonging to the king's chamber, (except the bed-chamber, which is under the groom of the stole), and also of the wardrobe; of artificers retained in the king's service, messengers, comedians, revels, musick, &c. The serjeants at arms are likewise under his inspection; and the king's chaplains, physicians, apothecaries, surgeons, barbers, &c. And he hath under him a vice-chamberlain, both being always privy councillors.

There were formerly chamberlains of the king's courts. 7 *Ed. 6. cap. 1.* And there are chamberlains of the Exchequer, who keep a controlment of the pells, of receipts and *exitus*, and have in their custody the leagues and treaties with foreign princes, many ancient records, the two famous books of antiquity called *Domesday*, and the *Black book of the Exchequer*; and the standards of money, and weights, and measures are kept by them. There are also under chamberlains of the Exchequer, who make searches for all records in the treasury; and are concerned in making out the tallies, &c. The office of chamberlain of the Exchequer is mentioned in the *Stat. 34 & 35 H. 8. cap. 16.* Besides these, we read of a chamberlain of *North Wales*. *Stowe*, p. 641.

A chamberlain of *Chester*, to whom it belongs to receive the rents and revenues of that city; and when there is no Prince of *Wales*, and Earl of *Chester*, he hath the receiving and returning of all writs coming thither out of any of the king's courts. See title *Counties-Palatine*.

The chamberlain of *London*, who is commonly the receiver of the city rents payable into the chamber; and hath great authority in making, and determining the rights of freemen; as also concerning apprentices, orphans, &c. See title *London*.

CHAMBERS OF THE KING, *Regie camere*.] The havens or ports of the kingdom are so called in our ancient records. *Mari Claus.* fol. 242.

CHAMBRE DEPINCT, anciently *St. Edward's chamber*, now called the *painted chamber*.

CHAMPARTY, or **CHAMPERTY**, *campi partitio*, because the parties in *champerty*, agree to divide the land, &c. in question.] A bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or

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other thing sued for, if the party that undertakes *champerty* vails thereof. Whereupon the Chancellor is to carry on the party's suit at his own expence. See 4 *Comm.* 435: 1 *Inst.* 368. It is a species of maintenance, and punished in the same manner. This seems to have been an ancient grievance in our nation; for notwithstanding the several statutes of *Westm.* 1. 3 *Ed. 1. cap. 35*: *Westm.* 2. 13 *Ed. 1. c. 49*: 28 *Ed. 1. St. 3. c. 11.* and 35 *Ed. 1. Stat. 3. c. 11.* and a form of a writ framed to them; yet *Stat. 4 Ed. 3. c. 11.* and 32 *Hen. 8. cap. 9.* enacted, That whereas former statutes provided redress for this evil in the King's Bench only, from henceforth it should be lawful for justices of the *Common Pleas*, justices of assize, and justices of peace in their quarter sessions, to inquire, hear and determine this and such like cases, as well at the suit of the king, as of the party: and this offence is punishable by common law and statute; the *Stat. 33 Ed. 1. Stat. 3.* makes the offenders liable to three years' imprisonment, and a fine at the king's pleasure. By the *Stat. 28 Ed. 1. c. 11.* it is ordained, that no officer, nor any other, shall take upon him any business in suit, to have part of the thing in plea; nor none upon any covenant, shall give up his right to another; and if any do, and be convicted thereof, the taker shall forfeit to the king so much of his lands and goods as amounts to the value of the part purchased.

In the construction of these statutes, it hath been adjudged, that under the word *covenant*, all kinds of promises and contracts are included, whether by writing, or parol: that rent granted out of land in variance, is within the statute of *champerty*: and grants of part of the thing in suit made merely in consideration of the maintenance, or *champerty*, are within the meaning of this statute; but not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. *F. N. B.* 172: 2 *Inst.* 209: 2 *Roll. Abr.* 113.

It is said not to be material, whether he who brings a writ of *champerty*, did in truth suffer any damage by it; or whether the plea wherein it is alledged be determined or not. 1 *Hawk. P. C. c. 84.* A conveyance executed pending a plea, in pursuance of a bargain made before, is not within the statutes against *champerty*: and if a man purchase land of a party, pending the writ, if it be *bonâ fide*, and not to maintain, it is not *champerty*. *F. N. B.* 272: 2 *Roll. Abr.* 113. But it hath been held, that the purchase of land while a suit of equity concerning it is depending, is within the purview of the statute 28 *E. 1. Stat. 3. c. 11*: *Moor* 665. A lease for life, or years, or a voluntary gift of land, is within the statutes of *champerty*; but not a surrender made by a lessee to his lessor: or a conveyance relating to lands in suit, made by a father to his son, &c. 1 *Hawk. P. C. c. 84.*

The giving part of the lands in suit, after the end of it, to a counsellor for his reward, is not *champerty*, if there be no precedent bargain relating to such gift; but if it had been agreed between the counsellor and his client before the action brought, that he should have part for his reward, then it would be *champerty*. *Bro. Champert.* 3. And it is dangerous to meddle with any such gift, since it carries with it a strong presumption of *champerty*. 2 *Inst.* 564. If any attorney follow a cause to be paid in gross, when the thing in suit is recovered, it hath been adjudged,

adjudged, that this is *champerty*, *Hob. 117*. Every *champerty* implies maintenance; but every maintenance is not *champerty*. *Grom. Jur. 39: 2 Inst. 208*.

[To this head may be referred the provision of the *Stat. 32 H. 8. c. 9*, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant; or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor, shall each forfeit the value of such land to the king and the prosecutor. See title *Maintenance*.

CHAMPERTORS, By statute, are those who move pleas or suits, or cause them to be moved, either by their own procurement, or by others, and sue them at their proper costs, to have part of the land in variance, or part of the gain. *33 Ed. 1. Stat. 2*. See the preceding article

CHAMPION, *campio*.] Is taken in the law not only for him that fights a combat in his own cause, but also for him that doth it in the place or quarrel of another. *Bract. lib. 3. tract. 2. cap. 21*. And in Sir *Edmond Bysshe's* notes on *Upon*, fol. 36, it appears that *Hemy de Feneburg*, for thirty marks fee, did by charter covenant to be *champion* to *Roger* abbot of *Glastenbury*. *Ar. 42 Hen. 3*. These *champions*, mentioned in our law books and histories, were usually hired; and any one might hire them, except parricides, and those who were accused of the highest offences: before they came into the field, they shaved their heads, and made oath that they believed the persons who hired them, were in the right, and that they would defend their cause to the utmost of their power; which was always done on foot, and with no other weapon than a stick or club, and a shield: and before they engaged, they always made an offering to the church that God might assist them in the battle. When the battle was over, the punishment of a *champion* overcome, and likewise of the person for whom he fought, was various: if it was the *champion* of a woman for a capital offence, she was burnt, and the *champion* hanged: if it was of a man, and not for a capital crime, he not only made satisfaction, but had his right hand cut off; and the man was to be close confined in prison, till the battle was over. *Bract. lib. 2. c. 35*. See title *Battel*.

Victory in the trial by *battel* is obtained, if either *champion* proves *recrout*; that is, yields and pronounces the horrible word of *craven*; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished *champion*: since as a punishment to him for forfeiting the land of his principal, by pronouncing that shameful word, he is condemned as a recreant to become infamous, and not to be accounted *liber & legalis homo*; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. *3 Comm. 345*.

CHAMPION OF THE KING, *campio regis*.] An ancient officer, whose office it is at the coronation of our kings, when the king is at dinner, to ride armed *cap-à-pied* into *Westminster-Hall*, and by the proclamation of a herald make a challenge, *That if any man shall deny the king's title to the crown, he is there ready to defend it in single combat, &c.* Which being done, the king drinks to him, and sends him a gilt cup with a cover full of wine, which the *champion* drinks, and hath the cup for his fee. This

office, ever since the coronation of King *Richard II.* when *Baldwin Freville* exhibited his petition for it, was adjudged from him to Sir *John Dymocke* his competitor, (both claiming from *Marion*), and hath continued ever since in the family of the *Dymockes*: who hold the manor of *Scrivelsby* in *Lincolnshire*, hereditary from the *Marions*; by grand serjeanty, *viz.* That the lord thereof shall be the king's *champion*, as aforesaid. Accordingly Sir *Edward Dymocke* performed this office at the coronation of King *Charles II.* And a person of the name of *Dymocke* performed it, at the coronation of his present Majesty *George the Third*.

CHANCE, Where a man commits an unlawful act, by misfortune, or *chance*, and not by design, it is a deficiency of the will; as here it observes a total neutrality, and doth not co operate with the deed; which therefore wants one main ingredient of a crime. Of this as it affects the life of another, See title *Murder*.—It is to be observed however generally, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt: but if a man be doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour. *1 Hal. P. C. 39*. See title *Chance meley*.

CHANCELLOR, *Cancellarius*.] Was at first only a chief notary or scribe under the emperor, and was called *cancellarius*, because he sat *intra cancellos*, to avoid the crowd of the people. This word is by some derived from *cancello*, and by others from *cancellis*, an inclosed or separated place, or chancel, encompassed with bars, to defend the judges, and other officers from the press of the public. And *cancellarius* originally, as *Lupanus* thinks, signified only the register in court; *Grapharius, scilicet qui conscribendis & excipiens judicium actus dant operam*. but this name and officer is of late times greatly advanced, not only in this, but in other kingdoms; for he is the chief administrator of justice, next to the Sovereign, who anciently heard equitable causes himself.

All other justices in this kingdom are tied to the strict rules of the law, in their judgments; but the Chancellor hath power to moderate the written law, governing his judgment by the law of nature and conscience, and ordering all things *juxta æquum & bonum*: and having the king's power in these matters, he hath been called the keeper of the king's conscience. It has been suggested, that the Chancellor originally presided over a political college of secretaries, for the writing of treaties, grants, and other public business; and that the court of equity under the old constitution was held before the king and his council in the palace, where one supreme court for business of every kind was kept: and at first the Chancellor became a judge to hear and determine petitions to the king, which were referred to him; and in the end, as business increased, the people intitled their suits to the chancellor, and not the king: and thus the chancellor's equitable power had by degrees commencement by prescription. *Hist. Chan. p. 3. 10, 44. &c.*

Stamford says, the Chancellor hath two powers; one absolute, the other ordinary; meaning, that although by his ordinary power, in some cases, he must observe the

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form of proceeding as other inferior judges; in his absolute power he is not limited by the law, but by conscience and equity, according to the circumstances of things. See post title *Chancery*.

And though *Polydore Virgil*, in his history of England, makes *William the First*, called the Conqueror, the founder of our chancellors; yet *Dugdale* has shewn that there were many chancellors of England long before that time, which are mentioned in his *Origines Juridicales*, and catalogues of chancellors; and *Sir Edward Coke* in his fourth *Institute* saith, it is certain, That both the *British* and *Saxon* kings had their chancellors, whose great authority under their kings were in all probability drawn from the reasonable custom of neighbouring nations and the civil law.

He that bears this chief magistracy, is styled the *Lord High Chancellor of Great Britain*, which is the highest honour of the long robe. A chancellor may be made so at will, by patent, but it is said not for life, for being an ancient office, it ought to be granted as hath been accustomed. 2 *Inst.* 87. But *Sir Edward Hyde*, afterwards Earl of *Clarendon*, had a patent to be lord chancellor for life, though he was dismissed from that office, and the patent declared void. 1 *Sid.* 338.

By the *Stat. 5 Eliz. cap. 18*, The Lord Chancellor and Keeper have one and the same power; and therefore since that statute, there cannot be a Lord Chancellor and Lord Keeper at the same time; before, there might, and had been. 4 *Inst.* 78. King *Hen. V.* had a great seal of gold, which he delivered to the Bishop of *Durham*, and made him Lord Chancellor, and also another of silver, which he delivered to the Bishop of *London* to keep. But the Lord *Bridgman* was Lord Keeper, and Lord Chief Justice of the *Common Pleas*, at the same time; which offices were held not to be inconsistent. *Ibid.* By *Stat. 1 W. & M. cap. 21*, Commissioners appointed to execute the office of Lord Chancellor, may exercise all the authority, jurisdiction, and execution of laws, which the Lord Chancellor, or Lord Keeper, of right ought to use and execute, &c. since which statute this high office hath been several times in commission.

The office of LORD CHANCELLOR or LORD KEEPER, is now created by the mere delivery of the King's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedence to every temporal lord.—And the act of taking away this seal by the king, or of its being resigned or given up by the Chancellor, determines his office. (See 1 *Sid.* 338).—He is a privy councillor by his office; and, according to Lord Chancellor *Ellesmere*, prolocutor of the House of Lords by prescription.—To him belongs the appointment of all Justices of peace throughout the kingdom. Being formerly usually an Ecclesiastical (for none else were then capable of an office so conversant in writings) and presiding over the Royal Chapel, he became keeper of the King's conscience; visitor, in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of *twenty marks* a year in the king's books. (38 *Ed.* 3. 3: *F. N. B.* 35. though *Hob.* 214. extends this value to *twenty pounds*).—He is the general guardian of all infants, idiots and lunatics; and has the general superintendence of all charitable uses in the kingdom.

And all this over and above the vast and extensive jurisdiction, which he exercises in his judicial capacity in the Court of Chancery. 3 *Comm.* 47.

The *Stat. 25 E. 3. c. 2*, declares it to be treason to slay the Chancellor (and certain other judges) being in their places doing their offices; and it seems that the Lord Keeper and Commissioners of the great seal, are within this statute by virtue of *Stats. 5 Eliz. c. 18*; and 1 *W. & M. c. 21*, already mentioned. See title *Treason*.

The Lord Chancellor, now there is no Lord High Steward, is accounted the first officer of the kingdom; and he not only keeps the king's great seal, but all patents, commissions, warrants, &c. from the king, are perused and examined by him before signed; and Lord *Coke* says the lord chancellor is so termed à cancellando, from cancelling the king's letters patent, when granted contrary to law; which is the highest point of his jurisdiction. 4 *Inst.* 88. He by his oath swears well and truly to serve the king, and to do right to all manner of people, &c. In his judicial capacity, he hath divers assistants and officers, viz. The master of the rolls, the masters in chancery, &c. And in matters of difficulty, he calls one or more of the chief justices, and judges to assist him in making his decrees; though in such cases they only give their advice and opinion, and have no share whatever of the judicial authority.

The Master of the Rolls, however has judicial power, and is an assistant to the Lord Chancellor when present, and his deputy when absent; but he has certain causes assigned him to hear and decree, which he usually doth on certain days appointed at the chapel of the Rolls, being assisted by one or more Masters in chancery: he is, by virtue of his office, chief of the masters of chancery, and chief clerk of the petty-bag office.

The Twelve Masters in Chancery sit some of them in court, and take notice of such references as are made to them, to be reported to the court, relating to matters of practice, the state of the proceedings, accounts, &c. and they also take affidavits, acknowledge deeds and recognisances, &c.

The Six Clerks in chancery transact and file all proceedings by bill and answer; and also issue out some patents that pass the great seal; which business is done by their under clerks, each of whom has a feat there, and whereof every six clerk has a certain number in his office, usually about ten; the whole body being called the *sixty clerks*.

The Curstors of the court, four and twenty in number, make out all original writs in chancery, which are returnable in *C. B.* &c. and among these the business of the several counties is severally distributed.

The Register is a place of great importance in this court, and he hath several deputies under him, to take cognizance of all orders and decrees, and enter and draw them up, &c.

The Master of the Subpœna Office issues out all writs of subpœna.

The Examiners are officers in this court, who take the depositions of witnesses, and are to examine them, and make out copies of the depositions.

The Clerk of the Affidavits files all affidavits used in court, without which they will not be admitted.

The Clerk of the Rolls sits constantly in the rolls to make searches for deeds, offices, &c. and to make out copies.

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The Clerks of the Petty-Bag Office, in number three, have great variety of business that goes through their hands, in making out writs of summons to parliament, *congés d'élire* for bishops, patents for customers; *liberates* upon extent of statute-staple, and recovery of recognizances forfeited, &c. And also relating to suits for and against privileged persons, &c. And the clerks of this office have several clerks under them.

The Usher of the Chancery had formerly the receiving and custody of all money ordered to be deposited in court, and paid it back again by order: but this business was afterwards assumed by the Masters in Chancery; till by Stat. 12 Geo. 1. c. 32, a new officer was appointed, called *The Accountant General*, to receive the money lodged in court, and convey the same to the Bank, to be there kept for the suitors of the court.

There is also a *Serjeant at Arms*, to whom persons standing in contempt are brought up by his substitute as prisoners.

A *Warden of the Fleet*, who receives such prisoners as stand committed by the court, &c.

Besides these offices, there is a clerk of the crown in Chancery; clerk and controller of the hanaper; clerk for inrolling letters patent, &c. not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof. A clerk of the faculties, for dispensations, licences, &c.; clerk of the presentations, for benefices of the crown in the chancellor's gift; clerk of appeals, on appeals from the courts of the archbishop to the court of chancery: and divers others officers, who are constituted by the chancellor's commission.—See post title *Chancery*.

CHANCELLOR of a DIOCESE; or, of a BISHOP—A person appointed to hold the Bishop's courts, and to assist him in matters of ecclesiastical law. This officer, as well as all other ecclesiastical ones, if lay or married, must be a Doctor of the civil law so created in some university. Stat. 37 H. 8. c. 17.

CHANCELLOR of the DUTCHY of LANCASTER.—An officer before whom, or his deputy the court of the *Dutchy Chamber of Lancaster* is held. This is a special jurisdiction concerning all matter of equity relating to lands holden of the king in right of the *Dutchy of Lancaster*. Hob. 77. 2 Lev. 24.—This is a thing very distinct from the county palatine, which hath also its separate Chancery for sealing of writs and the like. 1 Vent. 257.—This Dutchy comprizes much territory which lies at a vast distance from the county, as particularly a very large district surrounded by the city of *Westminster*. The proceedings in this court are the same as on the Equity side in the courts of *Exchequer* and *Chancery*. 4 Inst. 206. So that it seems not to be a court of record: and it has been holden that those courts have a concurrent jurisdiction with the Dutchy Court, and may take cognizance of the same causes. 1 C. R. 55: *Talb.* 145: *Hard.* 171.

This court is held in *Westminster-Hall*, and was formerly much used. Under the chancellor of the Dutchy are an attorney of the court, one chief clerk or register, and several auditors, &c.—see further title *Counties Palatine*.

CHANCELLOR of the EXCHEQUER, Is likewise a great officer, who, it is thought by many, was originally appoint-

ed for the qualifying extremities in the Exchequer: he sometimes sits in court, and in the Exchequer-Chamber; and with the judges of the court, orders things to the king's best benefit. He hath by the Stat. 33 H. 8. c. 30. power, with others, to compound for the forfeitures upon penal statutes, bonds and recognizances entered into to the king: he hath also great authority in the management of the royal revenue, &c. which seems of late to be his chief business, being commonly the first commissioner of the treasury. And though the court of equity in the Exchequer-chamber, was intended to be holden before the treasurer, chancellor, and barons, it is usually before the barons only. When there is a lord-treasurer, the chancellor of the exchequer is under treasurer.

As to the *Chancellor of the Order of the Garter*. See Stow's Annals, pag. 706.—*Chancellor of the Universities*. See title *Courts of the Universities*.—The office of *Chancellor in Cathedral Churches*, is thus described in the *Monasticon*. *Lectiones legendas in ecclesia per se vel per suum vicarium audire, male legentes emendare, scholas conferre, sigilla ad causas conferre, literas capituli facere & consignare, libros servare, quotiescumque voluerit predicare, predicationes in ecclesia vel extra ecclesiam predicare, & cui voluerit predicationis officium assignare*. See Mon Angl. tom. 3. p. 24, 339.

CHANCE-MEDLEY, From the Fr. *chance*, lapsus and *mêler*, miscere.] Such killing of a man as happens either [in self-defence] on a sudden quarrel; or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. 1 Hawk. P. C. c. 30. § 1.

The self-defence here meant, is that whereby a man may protect himself from an assault or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by this word *chance-medley*, or as some rather choose to write it, *chaud-medley*; the former of which, in its etymology signifies a casual asray, the latter an affray in the heat of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide, by *misadventure*; whereas it appears by Stat. 24 H. 8. c. 5, and in ancient law-books, that it is properly applied to such killing as happens to self-defence, in a sudden encounter. 4 Comm. 183; cites *Starin. P. C.* 16: 3 Inst. 55, 7: *Foster* 275, 6.—This being in fact a species of excusable homicide, comes more properly under the division of *murder*, and is therefore treated of in that place. See title *Murder*.—In *chance-medley* the offender forfeits his goods, but hath a pardon of course. See Stat. 6 Ed. 1. c. 9.

CHANCERY.

CANCELLARIA] The highest court of judicature in this kingdom next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds; *ordinary* and *extraordinary*. The *ordinary* jurisdiction, is that wherein the Lord Chancellor, Lord Keeper, &c. in his proceedings and judgments, is bound to observe the order and method of the common law; and the *extraordinary* jurisdiction is that which this Court exercises in cases of equity.

The *Ordinary Court* holds plea of recognizances acknowledged in the Chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court, and by acts of parliament of several offences and

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causes. All original writs, commissions of bankrupt, of charitable uses, and other commissions, as ideots, lunacy, &c. issue out of this court, for which it is always open; and sometimes a *superfetas*, or writ of privilege, hath been here granted to discharge a person out of prison. An *habeas corpus*, prohibition, &c. may be had from this in the vacation; and here a *subpoena* may be had to force witnesses to appear in other courts, when they have no power to call them. 4 *Inst.* 79: 1 *Danv. Abr.* 776.

The *Extraordinary Court*, or Court of Equity, proceeds by the rules of equity and conscience, and moderates the rigour of the Common law, considering the *intention* rather than the words of the law. Equity being the correction of that wherein the law, by reason of its universality, is deficient.—On this ground therefore, to maintain a suit in Chancery, it is always alledged that the plaintiff is incapable of obtaining relief at common law; and this must be without any fault of his own, as by having lost his bond, &c. Chancery never acting *against*, but in assistance of the common law, supplying its deficiencies, not contradicting its rules. A judgment at law not being reversible by a degree in chancery. *Cio. Eliz.* 220. But a bill in chancery may be brought to compel the discovery of the contents of a letter which would discharge the plaintiff of an action at law, before verdict obtained. 3 *C. Rep.* 17.

A sensible modern writer remarks, that it is not a very easy task, accurately to describe the jurisdiction of our courts of equity.—They who have attempted it have generally failed.—The following extract from that writer on the subject may perhaps prove more acceptable than any thing which could fall from the Editor's own pen.

Early in the history of our jurisprudence, the administration of justice by the ordinary courts, appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment, assuming the power of enforcing the principles, upon which the ordinary courts also decide when the powers of those courts or their modes of proceeding are insufficient for the purpose;—of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice;—and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending a litigation; by restraining the assertion of doubtful rights, in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigations, and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. This establishment has obtained throughout the whole system of our judicial policy; most of the inferior branches of that system having their peculiar courts of equity: [e. g. the court of exchequer, courts of *Wals.*, the counties palatine, cinque-ports, &c.]

and the Court of Chancery assuming a general jurisdiction in cases which are not within the bounds, or which are beyond the powers, of other jurisdictions. *Merrivord's Treatise on the Pleadings in Chancery*, 8vo. 1787. 2d edition.

It is not therefore to be expected that all the cases within the jurisdiction of this court can be enumerated with any degree of accuracy in such a work as this.—What confusedly follows may serve to shew the leading principles of its decisions.—They who desire further and more precise information, will consult *VINER's* and the other Abridgment and Digests, which enter so much more fully into the subject.

This Court gives relief for and against infants, notwithstanding their minority: and for and against married women, notwithstanding their coverture: in some cases a woman may sue her husband for maintenance; she may sue him when he is beyond sea, &c. and be compelled to answer without her husband. All frauds and deceptions, for which there is no remedy at Common Law may here be redressed; as also unreasonable and deceitful engagements and agreements entered into, without consideration. 1 *Vern.* 205. See title *Fraud*.—All breaches of trust and confidence; and accidents; as to relieve obligors, mortgagors, &c. against penalties and forfeitures, where the intent was only to pay the debt; Titles to lands, where the deeds are lost, or supposed, may by this court be confirmed, conveyances rendered defective by mistake, may be made perfect, &c.

In this Court executors may be called upon to give security and pay interest for money that is to lie long in their hands. Here executors may sue one another, or one executor alone be sued by the legatees or others, without the rest: order may be made for performance of a will: it may be decreed who shall have the tuition of a child, and other matters are regulated as to the disposal of the goods of testators and intestates. See 3 *Comm.* 437.—Under this head it may be observed that money articulated to be laid out in land, shall be taken as land in equity and descend to the heir. 1 *Salk.* 154. Personal estate in the hands of executors, shall be applied in discharge of the heir, where there are sufficient assets to pay the debts and legacies. 1 *Danv.* 770. There shall be no bill in equity against an executor, to discover assets before a suit commenced at law. *Hard.* 115. *Sed. qu.* Legal assets shall be applied in a course of administration; but equitable assets amongst all the creditors proportionably, on a bill brought, &c. 2 *Vern.* 62. See title *Assets, Executor*.

Mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, or where other particular circumstances do not interfere, &c. 2 *Vent.* 340. See title *Mortgage*.

Copyhold tenants may be relieved against the lords of manors—inclosures of common lands may be decreed—assignments of choses in action for a good consideration, though not valid in law, may be carried into effect—accounts are compelled to be rendered—the limitation of actions by statute may be relieved against.

A deed appearing to be cancelled, has been decreed to be a good deed, on special circumstances. 1 *Ch. Caf.* 249. Articles of agreement upon marriage reduced into writing, though not signed by either party, being proved to be agreed to, were decreed to be performed. 2 *Vern.* 200.

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an agreement in writing made since the statute of frauds, has been decreed to be discharged by parol. 1 *Fern.* 240.

A release shall be avoided for fraud, where there is *suppositio veri*, or *suppositio falsi*; and a release may be set aside in Chancery on reason of the apprehension of the party that gave it. 1 *Fern.* 20, 32. A will concerning lands may be avoided in a court of equity when obtained by fraud; *2 Gb. Rep.* 97. Heirs may be relieved in equity against unconscionable contracts made during their fathers' lives in payment of large sums of money on their out-living their fathers, and the securities are frequently decreed to be delivered up, on payment of the sum actually advanced. 2 *Chan. Rep.* 397: 1 *Fern.* 467.

A purchaser of land, without notice of an incumbrance, shall not be hurt thereby in equity; and in pleading a purchase the defendant ought to deny notice of incumbrances, &c. Indentures of apprenticeship have been decreed to be delivered up, and the money given with the apprentice to be paid back by the master, on ill usage of the apprentice, &c. *Finch Rep.* 125. Charity lands being let at a great under-value, as was found by inquisition, on a commission of charitable uses, the lease was avoided in equity, and the lessee decreed to pay the arrears in rent according to the first value, and to yield up the possession. 2 *Fern.* 415. Other cases of relief, with respect to public charities and charitable corporations, come also under the immediate direction of the Court of Chancery.

It is common to give relief in chancery, notwithstanding there is an agreement between the parties that there shall be no relief in law or equity. 1 *Mol.* 141, 305. In cases which tend to restrain freedom, or introduce corruption into marriage contracts, the court are always most ready to afford relief. If a portion be given to a woman, provided she marries not without the consent of a certain person, although she marries without such consent, she shall be relieved in Chancery, and have her portion: unless the portion, on such marriage, had been limited over to another, in which case it is otherwise. 1 *Danv.* 752: 1 *Mol.* 300. If a father, on the marriage of his son, take a bond of the son that he shall pay him so much, &c. this is void in equity, being adjudged by coercion while he is under the awe of his father. 1 *Salk.* 158. Also where a son, without privity of the father, treating the match, gives bond, to return any part of the portion, in equity it is void. *Ibid.* 156. But a man is not bound to discover the consideration of a bond generally given, which in itself implies a consideration. *Hurd.* 200. See titles *Fraud*, *Marriage*, &c.

If a factor to a merchant hath money in his hands, it shall be accounted his own; for equity cannot follow money; but it may goods to make them the merchant's which may be known, though money cannot. 1 *Salk.* 260.

Where trustees convert money raised out of land for payment of debts, to their own use, the heir shall have the land discharged, which hath borne its burden, and the trustees are liable to the debts in equity. 1 *Salk.* 153. If lessee for years, without impeachment of waste, about the end of his term cuts down timber-trees, the court of chancery may stop him by injunction. 1 *Roll. Ab.* 380. And tenant after possibility of issue extinct, or for life, punishable of waste, may be stopped in equity from pulling down houses, &c. 1 *Danv.* 761.

The following is a general and comprehensive view of the nature and reason of the pleadings in Chancery, extracted and abridged from Mr. *Mifford's Treatise*.

Previous to entering on the subject, it should be remembered, that Chancery will not retain a suit for any thing under 10 l. value, except in cases of charity, nor for lands under 40 s. *per annum*.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a *bill* (signed by counsel) in the nature of a petition to the lord chancellor, lord keeper or lords commissioners of the great seal; or to the king himself, in his court of Chancery, in case the person holding the seal is a party, or the seal is in the king's hand. But if the suit is instituted on behalf of the crown, or of those who partake of it's prerogative, or whose rights are under its particular protection, as the objects of a publick charity, the matter of complaint is offered by way of *information*, given by the proper officers [usually the attorney general]. Except in some few instances, bills and informations have been always in the *English* language; and a suit thus preferred is therefore commonly termed a suit by *English bill*, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which 'till the stat. of 4 *Geo.* II. c. 26, were entered and enrolled more anciently in the *French* or *Roman* tongue, and afterwards in the *Latin*; in the same manner as the pleadings in the other courts of common law.

Every *bill* must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may 1, either complain of some injury which the person exhibiting it suffers, and pray relief, according to the injury; or, 2, without praying relief, may seek a discovery of matter necessary to support or defend another suit; or, 3, although no actual injury is suffered, it may complain of a *threatened* wrong; and, stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill to defend himself against the injury whenever it shall be attempted to be committed.

As the court of Chancery has general jurisdiction in matters of equity which are not within the bounds, or which are beyond the powers, of inferior jurisdictions, it assumes a controul over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this it requires the party injured to institute a suit in the court of Chancery, the sole object of which is, the removal of the former suit, by means of the writ of *certiorari*; and the prayer of the bill used for this purpose is confined to that object.

The *bill*, except it merely prays the writ of *certiorari*, [in which case it does not require any defence, nor can there be any pleading beyond the bill.] requires the answer of the defendant or party complained of, upon oath; unless the party is entitled to privilege of peerage, or as a lord of parliament, or unless a corporation aggregate is made a party. In the first case the answer is required upon the *honour* of the defendant, and in the latter under the corporation seal.

[In the case of exhibiting a bill against a peer, the Lord Chancellor writes a letter to him, called a *letter* in *chancery*.

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missive, and if he does not put in his answer, a *subpœna* issues, and then an order to shew cause, why a *sequestration* should not issue, and if he still stands out, then a *sequestration* is granted; for there can be no process of contempt against the person of a peer: The process is the same against a member of the house of commons, except the latter *missive*.]

An answer is thus required in the case of a bill, seeking the *decree* of the court on the subject of the complaint, with a view—1, To obtain an admission of the case made by the bill either in aid of proof; or—2, to supply the want of it—3, To obtain a discovery of the points in the plaintiff's case, controverted by the defendant, and—4, of the grounds on which they are controverted—5, To gain a discovery of the case on which the defendant relies; and—6, of the manner in which he means to support it.

If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant, upon oath, may be required to obtain an *admission* of the plaintiff's title, and a *discovery* of the claims of the defendant, and the grounds on which those claims are intended to be supported.

When the sole object of the bill is a *discovery* of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery; which oath however the plaintiff may, if he thinks proper dispense with, by consenting to or obtaining an order of court for the purpose; and this is frequently done for the convenience of parties.

To the bill thus preferred (unless it is merely for a *certiorari*) it is necessary for the person or persons complained of to *make defence*, or to *disclaim* all rights to the matters in question.

As the bill calls upon the defendant to answer the several charges it contains, he must do so, unless he can dispute the right of the plaintiff to compel such answer; either, 1, From some *impropriety* in requiring the discovery sought; or 2, From some objection to the proceeding to which the discovery is proposed to be assent; or 3, Unless by disclaiming all right to the matters in question, he shews a further answer from him to be unnecessary.

The grounds on which *defence* may be made to a bill either by answer, or by disputing the right of the plaintiff to compel such answer, are various. 1. The subject of the suit may not be within the jurisdiction of a court of Equity; 2. Some other court of Equity may have the proper jurisdiction. 3. The plaintiff may not be entitled to sue, by reason of some personal disability. 4. The plaintiff may not be the person he pretends to be.—5. He may have no interest in the subject, or 6, Though he has such interest he may have no right to call upon the defendant concerning it. 7. The defendant may not be the person he is alledged to be by the bill; or 8, He may not have that interest in the subject to make him liable to the claims of the plaintiff.—And notwithstanding all these requisites concur. 9. Still the plaintiff may not be entitled in the whole, or in part to the relief or assistance he prays; or 10. Even if he is so entitled, the defendant may *also* have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties.—The effecting complete justice, and finally determining as far as

possible, all questions concerning the subject being the constant aim of courts of Equity.

Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill; and may not be sufficient to protect him from making the discovery sought by it: and where there is no ground for disputing the plaintiff's right to relief, or if no relief is prayed, the *impropriety* or *immateriality* of the discovery may protect the defendant from making it.

The form of making *defence* varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court.—If it rests on the bill, and, on the foundation of the matter there apparent, demand the judgment of the court, whether the suit shall proceed at all, it is termed *A Demurrer*. If on the foundation of new matter offered, it demands judgment whether the defendant shall be compelled to answer further, it assumes a different form, and is termed *A Plea*. If it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called *An Answer*.—If the defendant disclaims all interest in the matters in question, his answer to the complaint made is different from all the others, and is termed *A Disclaim*.—And these several forms, or any of them may be used together, if applied to separate and distinct parts of the bill.

A Demurrer being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in that part of it to which the demurrer extends; and therefore as no *fact* can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer; which, if favourable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer thus allowed consequently prevents any further proceeding.

A Plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and it therefore admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea.—Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment if favourable to the defendant, is not definitive; for the truth of the plea may be denied by *A Replication*, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings, though if the truth of the plea is not supported, further proceedings may be had, which will be noticed presently.

An Answer generally controverts the facts stated in the bill, or some of them; and states other facts to shew the rights of the defendant, in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case, thus made, to the judgment of the court. If an answer admits the facts stated in the bill, or such of them as are material to the plaintiff's case; and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the court will decide on the answer, considering

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considering it as true. So if the sole object of the suit is to obtain a *discovery*, there can be no proceeding beyond an answer by which the discovery is obtained. But if necessary to maintain the plaintiff's case, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill may be asserted by a *replication*, which in this case also concludes the pleadings according to the present practice of the court.

If a *Demurrer* or *Plea* is over-ruled upon argument, the defendant must make a new defence. This he cannot do by a second demurrer of the same extent with that over-ruled; for although, by a standing order of the court, a cause of demurrer must be set forth in the pleading, yet if that is over-ruled, any other cause appearing on the bill may be offered on argument of the demurrer, and if valid, will be allowed, the rule of court affecting only the costs. But after a demurrer has been over-ruled, new defence may be made by a demurrer less extended, or by plea or answer.—And after a plea has been over-ruled, defence may be made by demurrer, by a new plea, or by an answer, and the proceedings upon the new defence will be the same as if it had been originally made.

A *Disclaimer* neither asserting any fact, nor denying any right sought by the bill, admits of no further pleading.

Suits thus instituted are sometimes *imperfect* in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed, pending the suit, in various ways.—To supply the defects arising from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party, sometimes renders necessary a litigation by another party, to operate as a defence, or to obtain a full decision on the rights of all parties. [And bills filed for this purpose are termed *cross-bills*.]—Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court.—Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes; [as bills of *review*, (which among other causes may be brought, where new matter is discovered, in time, after the decree made) bills of *revivor*, &c. See 3 Com. 448, &c.] and on all the different kinds of bills there may be the same pleadings as on a bill used for instituting an original suit.

It frequently happens, that pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleadings, the court will in many cases permit it.—If his indulgence is most extensive in the case of bills; which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiencies, and avoid the consequences of errors by *special replications*. but this tending to long and intricate pleading, the special replication, requiring a *rejoinder* in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might *sur-rejoinder*, the special replication is now disused, for this purpose: and the court will in general permit a plaintiff to rectify any error, or supply any defect in his bill, either by amend-

ment or by a *supplemental bill*, and will also permit, in some cases, a defendant in like manner to complete his answer, either by amendment or by a further answer.

If the plaintiff conceives a defendant's answer to be insufficient to the charges contained in the bill, he may take exceptions against it, on which it is referred to a Master to report, whether it be sufficient or not; to which report exceptions may be also made. The *answer*, *replication*, and *rejoinder*, &c. being settled, and the parties come to issue, witnesses are examined upon *interrogatories*, either in court, or by commission in the country, wherein the parties usually join; and when the plaintiff and defendant have examined their witnesses, *publication* is made of the *depositions*, and the cause is set down for hearing, after which follows the *decree*.

If however in the process of the cause the parties come to an issue of fact, which by the common law is triable by a jury, the Lord Chancellor in this case, delivers the record into the King's Bench to be tried there; and after trial had, the record is remanded into Chancery, and judgment given there. Trials and issues at law are frequently directed by the Court, which in that case makes an *interlocutory decree or order*, that after trial the parties shall resort to the court on the equity referred.

Interlocutory orders and decrees are also made on other occasions; as for *injunctions* till a hearing, where the injury sustained by the plaintiff requires such immediate interference. See title *Injunction*.

If the plaintiff dismisses his own bill, or the defendant obtains the dismissal of it for want of prosecution, or if the decree is in behalf of the defendant, the bill is dismissed with costs to be taxed by a Master. *Stat. 4 & 5 An. c. 16*. If the defendant does not appear, on being served with the process of *subpoena*, in order to answer, upon affidavit of the service of the writ, an *attachment* issues out against him: and if a *non est inventus* is returned, an attachment with proclamation goes forth against him; and if he stands further out in contempt, then a *commitment of rebellion* may be issued, for apprehending him, and bringing him to the Fleet prison; in the execution whereof the persons to whom directed may justify breaking open doors. If the defendant stands further in contempt, a serjeant at arms is to be sent out to take him; and if he cannot be taken, a *sequestration* of his land may be obtained till he appears. And if a decree, when made, is not obeyed, being served upon the party under the seal of the court, all the aforementioned processes of contempt may issue out against him, for his imprisonment till he yields obedience to it.—The court of Chancery, notwithstanding its very extensive power binding the person only, and not the estate or effects of the defendant. And in the last, we presume, it is said that it is no court of record. 1 *Danv. Ab.* 749, and *Chan. Rep.* 193, *Howard v. Suffolk*.

Where there is any error in a decree in matter of law, there may be a *bill of review*, which is in nature of a writ of error; or an appeal to the House of Lords. Ordinances have been quoted, that a writ of error lies returnable in *B. R.*—And that a judgment of Chancery may be referred to the twelve judges. 4 *Inq. 80* 3 *Bull.* 116. But it is now usual to appeal to the House of Lords; which appeals are to be signed by two counsel of eminence, and exhibited by way of petition; the petition or appeal is lodged with the clerk of the House of Lords,

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and read in the house, whereon the appellee is ordered to put in his answer, and a day fixed for hearing the cause; and after counsel heard, and evidence given on both sides, the Lords affirm or reverse the decree of the Chancery, and finally determine the cause by a majority of votes. &c. Though it is to be observed on an appeal to the Lords from a decree in Chancery, no proofs will be permitted to be read as evidence, which were not made use of in the Chancery. *Preced. Canc.* 212.

For further matter as to the jurisdiction of the court, its modes of proceeding, and the various cases wherein it relieves, &c. vide *Com. Dig.* (2 V.) tit. *Chancery*, and Mr. *Misford's* treatise before quoted.

There are several statutes relating to the court of Chancery. By *Stat.* 28 *Ed.* 1. c. 5, the court of Chancery is to follow the king. By *Stat.* 18 *Ed.* 3. *Stat.* 5, the oaths of the clerks in Chancery are appointed. The chancellor and treasurer may correct errors in the Exchequer. Whoever shall find himself grieved with any statute, shall have his remedy in Chancery 36 *Ed.* 3. c. 9: 31 *Ed.* 3. *Stat.* 1. c. 12. And see 15 *R.* 2. c. 12: 17 *R.* 2. c. 6: & 4 *H.* 8. c. 9.

No *subpoena*, or other process of appearance, shall issue out of Chancery, &c. till after a bill is filed, (except bills for injunctions to stay waste, or to stay suits at law commenced), and a certificate thereof brought to the *subpoena* office. *Stat.* 4 & 5 *An.* c. 16. Persons in remainder, or reversion of any estate, after the death of another, on making affidavit in the court of Chancery, that they have cause to believe such other person dead, and his death concealed by the guardian, trustees or others, may move the lord chancellor to order such guardian, trustees, &c. to produce the person suspected to be concealed; and if he be not produced, he shall be taken to be dead, and those in reversion, &c. may enter upon the estate: and if such person be abroad, a commission may be issued for his being viewed by commissioners. *Stat.* 6 *An.* c. 18.

Infants under the age of twenty-one years, seised of estates in trust, or by way of mortgage, are enabled by statute to make conveyances thereof; or they may be compelled thereto, by order of the court of Chancery, &c. upon petition and hearing of the parties concerned. 7 *An.* c. 9. And see the statute of 4 *Geo.* 2. c. 10. whereby ideots and lunatics seised of estates in trust, &c. may make conveyances by order of the Chancery, &c. See titles *Infant*, *Lunatic*.

By 12 *Geo.* 1. c. 32 and 33, the power of the Masters was abridged, with respect to the suitors' money, which is now to be paid into the *Bank of England*: and an additional stamp-duty, on writs, processes, &c. is granted for relief of the suitors, and as a common stock of the Court of Chancery.

All orders and decrees made and signed by the Master of the Rolls, shall be deemed and taken to be good and valid orders and decrees of the court of Chancery; but not to be enrolled till signed by the lord chancellor, and subject to reversal, &c. by him. *Stat.* 3 *Geo.* 2. c. 30.

Where a defendant does not appear after *subpoena* issued, but keeps out of the way to avoid being served with the process; on affidavit that he is not to be found, and suspected to be gone beyond sea, or to abscond, &c. the court of Chancery will make an order for his appearance at a certain day; a copy of which order is to be published in the *London Gazette*, &c. and then, if he do

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not appear, the plaintiff's bill shall be taken *pro confesso*, and the defendant's estate sequestered, &c. But persons out of the kingdom, returning in seven years, may have a rehearing in six months, and be admitted to answer; otherwise to be barred, by final decree. 5 *Geo.* 2. c. 25.

By 12 *Geo.* 2. c. 24, Part of the suitors' cash is to be placed out at interest, for defraying the charge of the *Accountant General's* office. And see 23 *Geo.* 2. c. 25, for making good deficiencies to the clerk of the Hanaper, and for augmenting the income of the Master of the Rolls.

By 1 *Geo.* 3. c. 1, The king is empowered to grant a sum not exceeding 5000*l.* per annum to the chancellor.

By 4 *Geo.* 3. c. 32, Part of the suitors' cash unclaimed to be placed at interest, to be applied to the *Accountant-General's* third clerk, and other purposes.

By 5 *Geo.* 3. c. 28, 80,000*l.* of the suitors' cash was placed at interest; and 200*l.* per annum paid thereout half-yearly, to each of the eleven masters of the court.

By 9 *Geo.* 3. c. 19, 20,000*l.* more of the suitors' money was placed at interest: out of which 460*l.* per annum is paid in salaries, viz. 250*l.* to the accountant-general; 50*l.* to his first clerk; 40*l.* to his second clerk; and 120*l.* to his 4th clerk, in lieu of all fees. The residue being brought to account.

By 14 *Geo.* 3. c. 43, 50,000*l.* more was in like manner placed out; and out of the interest thereof, and the surplus interest under 12 *Geo.* 2. c. 24; 5 *Geo.* 3. c. 28; and 9 *Geo.* 3. c. 19, the Chancellor is by his order to direct the re-building of the Six Clerks' office, and apply 10,000*l.* (and by 20 *Geo.* 3. c. 33, 3000*l.* more) for building the Register's and Accountant-General's offices; to be vested in the Accountant-General and his successors.

By 15 *Geo.* 3. c. 22, Part of *Lincoln's-Inn* garden was vested in the Accountant General, in trust, for the purposes in the last act, as to the Register's and Accountant-General's office.

By 15 *Geo.* 3. c. 56, the Lord Chancellor may apply certain sums to be raised, as mentioned in 14 *Geo.* 3. for the purposes of this and that act; the Six Clerks' Office to be built on part of *Lincoln's-Inn* garden, and the same vested in the Six Clerks.

The *Stat.* 17 *Geo.* 3. c. 59, regulates the leases to be made from time to time, by the Master of the Rolls for the time being.

By *Stat.* 32 *Geo.* 3. c. 42, 300,000*l.* further is to be employed in building offices for the Masters in Chancery, &c.

For other parts of this subject. See titles *Injunction*, *Interrogatories*, &c.

CHANGER, An officer belonging to the king's mint, whose office consists chiefly in exchanging coin for bullion, brought in by merchants or others: it is written after the old way, *chaunger*. *Stat.* 2 *Hen.* 6. cap. 12.

CHANTER, *cantator*.] A Singer in the choir of a cathedral church; and is usually applied to the chief of the singers. This word is mentioned in 13 *Eliz.* c. 10. At St. David's cathedral in Wales, the chanter is next to the bishop; for there is no dean. *Camb. Britan.*

CHANTRY, or CHAUNTRY, *cantaria*.] A little church, chapel, or particular altar, in some cathedral church, &c. endowed with lands, or other revenues, for the maintenance of one or more priests, daily to sing mass, and officiate divine service for the souls of the donors.

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nors, and such others as they appointed. See *Stat. 1 E. 6. c. 14*, which in effect put an end to these chantries, by declaring it not to be lawful for any person to enter for non-performance of the conditions on which they were founded.

Of these chantries, mention is made of forty-seven belonging to St. Paul's church in London, by Dugdale, in his history of that church.

CHAPEL, *capella*, Fr. *chapelle*.] Is either adjoining to a church, for performing divine service; or separate from the mother-church, where the parish is wide, which is commonly called a *Chapel of ease*. And chapels of ease are built for the ease of those parishioners who dwell far from the parochial church, in *prayer* and *preaching* only; for the *sacraments*, [marriages,] and *burials* ought to be performed in the parochial church. 2 *Vol. Abr.* 340.

These chapels are served by inferior curates, provided at the charge of the rector, &c. And the curates are therefore removable at the pleasure of the rector or vicar: but chapels of ease may be parochial, and have a right to sacraments and burials, and to a distinct minister, by custom; (though subject in some respects to the mother-church.) and *parochial chapels* differ only in name from parish churches, but they are small, and the inhabitants within the district are few. In some places chapels of ease are endowed with lands or tithes, and in other places by voluntary contributions; and in some few districts there are chapels which baptize and administer the sacraments, and have chapel-wardens; but these chapels are not exempted from the visitation of the Ordinary, nor the parishioners who resort thither from contributing to the repairs of the mother-church; especially if they bury there; for the *chapel* generally *belongs to*, and is as it were a *part of* the mother-church; and the parishioners are obliged to go to the mother church, but not to the chapel. 2 *Vol. Abr.* 289. And hence it is said, that the offerings made to any chapel, are to be rendered to the mother-church; unless there be a custom that the chaplain shall have them.

Public chapels, annexed to parish churches, shall be repaired by the parishioners, as the church is; if any other persons be not bound to do it. 2 *Inst.* 489. Besides the fore-mentioned chapels, there are *free* chapels, perpetually maintained and provided with a minister, without charge to the rector or parish; or that are free and exempt from all ordinary jurisdiction; and these are where some lands or rents are charitably bestowed on them *Stat. 37 Hen. 8. cap. 4: 1 Ed. 6. c. 14*. There are also *private chapels*, built by noblemen, and others, for private worship, in or near their own houses, maintained at the charge of those noble persons to whom they belong, and provided with chaplains and stipends by them; which may be erected without leave of the bishop, and need not be consecrated, though they anciently were so, nor are they subject to the jurisdiction of the Ordinary.

There are likewise *chapels in the Universities*, belonging to particular colleges, which, though they are consecrated, and sacraments are administered there, yet they are not liable to the visitation of the *bishop*, but of the *founder*. 2 *Inst.* 363.—See title *Marriage*.

CHAPELRY, *capellania*.] Is the same thing to a chapel, as a parish to a church; being the precinct and limits thereof.

CHAPLAIN.

CHAPERON, Fr.] A hood or bonnet, anciently worn by the knights of the garter, as part of the habit of that noble order: but in *heraldry* it is a little escutcheon fixed in the forehead of the horses that draw a hearse at a funeral.

CHAPTERS, Lat. *capitula*, Fr. *chapitres*, i. e. chapters of a book] Signify in our common law a summary of such matters as are to be enquired of, or presented before justices in eyre, justices of assize, or of peace, in their sessions. *Britton*, cap 3, useth the word in this signification: and chapters are now most commonly called *articles*, and delivered by the mouth of the justice in his charge to the inquest; whereas, in ancient times, (as appears by *Bracton* and *Britton*) they were, after an exhortation given by the justices for the good observance of the laws and the king's peace, first read in open court, and then delivered in writing to the grand inquest, for their better observance, and the grand jury were to answer upon their oaths to all the articles thus delivered them, and not put the judges to long and learned charges to little or no purpose, for want of remembering the same, as they do now, when they think their duty well enough performed, if they only present those few of many misdeemeanors which are brought before them by way of indictment.

It is to be wished that this order of delivering written articles to grand juries were still observed, whereby crimes would be more effectually punished in some inferior courts, as the court leet, &c. in several parts of *England*, it is usual at this day for stewards of those courts to deliver their charges in writing to the juries sworn to enquire of offences. *Hume*, in his *Mirror of Justice*, expresses what those articles were wont to contain. *Lib. 3. cap. des Articles in Eyre*. And an example of articles of this kind, may be found in the book of assizes. *F. 138*.

CHAPLAIN, *capellanus*] Is most commonly taken for one that is depending upon the king, or other noble person, to instruct him and his family, and say divine service in his house, where there is usually a private chapel for that purpose. The *King*, *Queen*, *Prince*, *Princess*, &c. may retain as many chaplains as they please; and the king's chaplains may hold any such number of benefices of the king's gift, as the king shall think fit to bestow upon them.

An *Archbishop* may retain eight chaplains; a *Bishop*, six; *Marquis* or *Earl*, five; *Vicomte*, four; *Baron*, *Knight of the Garter*, or *Lord Chancellor*, three; a *Duchess*, *Marchioness*, *Countess*, *Baroness*, (being widows) the *Treasurer*, and *Controller of the king's house*, the *King's Secretary*, *Dean of the Chapel*, *Almoner*, and *Master of the Rolls*, each of them two; the *Chief Justice of the King's Bench*, and *Warden of the Cinque Ports*, one; all which chaplains may purchase a licence or dispensation, and take two benefices with cure of souls. *Stat. 21 Hen. 8. cap. 13*.

But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerhips, chinterhips, prebends, and sinecure rectories. A dispensation in this case can only be granted to hold one benefice more, except to clerks who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice, without a dispensation. and in that case, if the first is under 8*l.* per annum, [in

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the king's book] it is so far void, that the patron may present another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. See title *Advowson*.—But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l. per ann. m.*, except the last, and then by a dispensation under the statute, he may hold one more. 1 *Comm.* 392 in *n.*

By the 41*st*. canon of 1603, the two benefices must not be further distant from each other than thirty miles; and the person obtaining the dispensation, must at least be a Master of Arts in one of the Universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Bl. Rep.* 968. See *ante* title *Canon Law*.

Also every Judge of the King's Bench and Common Pleas; and Chancellor and Chief Baron of the Exchequer, and the King's Attorney and Solicitor General, may each of them have one chaplain, attendant on his person, having one benefice with cure, who may be non resident on the same, by *Stat.* 25 *Hen.* 8. *cap.* 16.

And the Groom of the stole, Treasurer of the king's chamber, and Chancellor of the duchy of Lancaster, may retain each one chaplain. *Stat.* 33 *Hen.* 8. *cap.* 28. But the chaplains under these two last statutes, are not entitled to dispensations under *Stat.* 21 *Hen.* 8. If a nobleman hath his full number of chaplains allowed by law, and retains one more, who has dispensation to hold plurality of livings, it is not good. *Cro. Eliz.* 723.

If one person has two or more of the titles or characters mentioned in *Stat.* 21 *H.* 8. *c.* 13, united in himself, he can only retain the number of chaplains limited to his highest degree. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation; but a king's chaplain being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the *Stat.* § 29: 1 *Salk.* 161.

A person retaining a chaplain, must not only be capable thereof at the time of granting the instrument of retainer, but he must continue capable of qualifying till his chaplain is advanced: and therefore if a duke, earl, &c. retain a chaplain, and die; or if such a noble person be attainted of treason; or if an officer, qualified to retain a chaplain, is removed from his office, the retainer is determined: but where a chaplain hath taken a second benefice before his lord dieth, or is attainted, &c. the retainer is in force to qualify him to enjoy the benefices.

And if a woman that is noble by marriage, afterwards marries one under the degree of nobility, her power to retain chaplains will be determined; though it is otherwise where a woman is noble by descent, if she marry under degree of nobility, for in such case her retainer before or after marriage is good. A *Banquet*, &c. during the coverture, may not retain chaplains; if the doth, the lord, her husband, may discharge them; as likewise her former chaplains, before their advancement. 2 *Rep.* 118.

A Chaplain must be retained by letters testimonial under hand and seal, or he is not a chaplain within the statute; so that it is not enough for a spiritual person to be retained by word only to be a chaplain, by such person

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as may qualify by the statutes to hold livings, &c. although he abide and serve as chaplain in the family. And where a nobleman hath retained and thus qualified his number of chaplains, if he dismisses them from their attendance upon any displeasure, after they are preferred, yet they are his chaplains at large, and may hold their livings during their lives; and such nobleman, though he may retain other chaplains in his family, merely as chaplains, he cannot qualify any others to hold pluralities while the first are living: for if a nobleman could discharge his chaplain when advanced, to qualify another in his place, and qualify other chaplains, during the lives of chaplains discharged, by these means he might advance as many chaplains as he would, whereby the statutes would be evaded. 4 *Rep.* 90.—See further tit. *Advowson, Parson*.

CHAPTER, *capitulum*.] A congregation of clergymen under the Dean in a cathedral church: *congregatio clericorum in ecclesia cathedrali, conventuali, regulari, vel collegiata*. This collegiate company is metaphorically termed *capitulum*, signifying a little head, it being a kind of head, not only to govern the diocese in the vacation of the bishoprick, but also in many things to advise and assist the bishop when the see is full, for which, with the Dean, they form a council. *Co. Lit.* 103. The chapter consists of *prebendaries* or *canons*, which are some of the chief men of the church, and therefore are called *capita ecclesie*: they are a spiritual corporation aggregate, which they cannot surrender without leave of the bishop, because he hath an interest in them; they with the dean, have power to confirm the bishop's grants; during the vacancy of an archbishoprick, they are guardians of the spiritualities, and as such have authority by the *Stat.* 25 *Hen.* 8. *cap.* 21, to grant dispensations; likewise as a corporation they have power to make leases. &c.

When the Dean and Chapter confirm grants of the bishop, the Dean joins with the Chapter, and there must be the consent of the major part; which consent is to be expressed by their fixing of their seal to the deed, in one place, and at one time, either in the chapter-house, or some other place; and this consent is the will of many joined together. *Dyer* 233. They had also a check on the bishop at common law; for 'till *Stat.* 32 *H.* 8. *c.* 28, his grant or lease would not have bound his successors, unless confirmed by the Dean and Chapter. 1 *Inst.* 103.

A chapter is not capable to take by purchase or gift, without the dean, who is the head of the body: but there may be a chapter without a dean, as the chapter of the collegiate church of *Southwell*; and grants by, or to them, are as effectual as other grants by dean and chapter. Yet where there are chapters without deans, they are not properly chapters: and the chapter in a collegiate church, where there is no episcopal see, as at *Westminster* and *Windsor*, is more properly called a college.

Chapters are said to have their beginning before Deans; and formerly the bishop had the rule and ordering of things without a dean and chapter, which were constituted afterwards; and all the ministers within his diocese were as his chapter, to assist him in spiritual matters. 2 *Roll. Rep.* 454: 3 *Co.* 75. The bishop hath a power of visiting the dean and chapter: but the dean and chapter have nothing to do with what the bishop transacts as ordinary. 3 *Rep.* 75. Though the bishop and chapter are but one body, yet their possessions are for the most part divided;

vided; as the *bishop* hath his part in right of his *bishopric*; the *dean* hath a part in right of his *deanery*; and each *prebendary* hath a certain part in right of his *prebend*; and each too is incorporated by himself.

Deans and Chapters have some of them ecclesiastical jurisdiction in several parishes, (besides that authority they have within their own body), executed by their officials; also temporal jurisdiction in several manors belonging to them, in the same manner as bishops, where their stewards keep courts, &c. 2 *Roll. Abr.* 229. It has been observed, that though the chapter have distinct parcels of the bishop's estate assigned for their maintenance, the bishop hath little more than a power over them in his visitations, and is scarce allowed to nominate half of those to their prebends, who were originally of his family: but of common right it is said he is their patron. *Roll. ibid.*—They are now sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other. 1 *Comm.* 383 see further title *Dean*.

CHARGE of Justices in Sessions, &c. See title *Chapiters*.

CHARGE and DISCHARGE, A charge is said to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof and discharge is the removal, or taking away of that charge. *Terms de Ley* Land may be charged divers ways; as by grant of rent out of it, by statutes, judgments, conditions, warrants, &c. Lands in fee-simple may be charged in fee: and where a man may dispose of the land itself, he may charge it by a rent, or statute, one way or other. *Lit. sect.* 648 *Moor Ca.* 129 *Dyer* 10. If one charge land in tail, and land in fee simple, and die; the land in fee only shall be chargeable. *Bro. Cha.* 9

Lands intailed may be charged in fee, if the estate-tail be cut off by recovery: if tenant in tail charge the land, and after levy a fine or suffer a recovery of the lands, to his own use; this confirms the charge, and it shall continue 1 *R. p.* 61. A tenant for life charges the land, and then makes a feoffment to a stranger, or doth waste, &c. whereby it is forfeited, he in reversion shall hold it charged during his (the tenant's) life: and if one have a lease for life or years of land, and grant a rent out of it, if after he surrenders his estate, yet the charge shall continue so long as the estate had endured, in case it had not been surrendered 1 *Rep.* 67, 145: *Dyer* 10.

If one *jointenaut* charge land, and after release to his companion and die, the survivor shall hold it charged: but if it had come to him by survivorship, it would be otherwise. 6 *Rep.* 76. 1 *Shrop. Abr.* 345. He that hath a remainder or reversion of land may charge it, because of the possibility that the land will come into possession, and then the possession shall be charged. But where one leases land for life, and grants the reversion or remainder over to A. B. who charges the land, and dies, and the tenant for life is heir to the fee, in this case he shall hold it discharged, for he had the possession by purchase, though he had the fee by descent *Bro.* 11, 16 1 *R. p.* 62.

If a rent be issuing out of a house, &c. and it falls down, the charge shall remain upon the soil 9 *E.* 4. 20. But when the estate is gone upon which the charge was grounded, there, generally, the charge is determined. *Ca. Lit.* 349. And in all cases where any executory thing is created by deed, there by consent of all the parties it may

be *estate, Limitations, Mortgage, &c.* 10 *Rep.* 49. See titles

CHARITABLE CORPORATION. A Society of persons in the late reign obtained a statute to lend money to *industrious poor*, at 5 l. per cent. interest on pawns and pledges, to prevent their falling into the hands of the pawn-brokers, and therefore they were called the *Charitable Corporation*: but they likewise took 5 l. per cent. for the charge of officers, warehouses, &c. And in the fifth year of King Geo. 2 the chief officers of this corporation, by connivance of the principal directors, absconded and broke, and defrauded the public proprietors of great sums; for relief of the sufferers wherein, as to part of their losses, several statutes were made and enacted. See *Stats.* 5 *Geo.* 2 c. 31, 32; 7 *Geo.* 2 c. 11.

CHARITABLE USES. The laws against devises in *Mortmain* (see that title) do not extend to any thing but *superstitious uses*, it is therefore held, that a man may give lands for the maintenance of a school, an hospital, or any other *charitable uses*. But as it was apprehended, from recent experience, that persons on their death beds might make large and improvident dispositions, even for these good purposes, and defeat the political end of the statutes of *Mortmain*, it is therefore enacted by *Stat.* 9 *Geo.* 2. c. 36, that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable uses* whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor; and enrolled in the court of Chancery within six months after its execution; (except stock in the public funds, and which must be transferred at least six calendar months previous to the donor's death;) and unless such gift be made to take effect immediately and be without power of revocation, and that all other gifts shall be void. The two *Universities*, then colleges, and the scholars on the foundation of the colleges of *Paton*, *Winchester* and *Westminster*, are exempted out of this act, but with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students on their foundations.

Corporations are excepted out of the statutes of Wills (32 *H.* 8 c. 1 34 *H.* 8 c. 5 See titles *Devise, Will*), to prevent the extension of gifts in *mortmain*, but now by construction of *Stat.* 43 *E.* 2 c. 4, (See the next paragraph) it is held that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment, rather than of a bequest. And indeed the piety of judges hath formerly carried them great lengths in supporting such charitable uses (*Pier. Ch.* 272) it being held that the *Stat.* of *Eliz.* which favours appointments to charities, supercedes and repeals all former statutes (*Gibb. R. p.* 45 1 *P. Wms.* 248) and supplies all defects of assurances (*D. k.* 54, And therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrender, to the use of his will, and a devise, nay even a settlement by tenant in tail, without either fine or recovery, if made to a charitable use, is good by way of appointment *Moor* 890 2 *Roll.* 433 *Pier. Ch.* 16: 2 *Comm.* 375.

The king as *paterfamilias* has the general superintendence of all charities, which he exercises by the *Lord Chancellor*. And therefore whenever it is necessary, the Attorney-General, at the relation of some informant, who

is usually called the *relator*, files *ex officio*, an information in the court of Chancery, to have the Charity properly established. Also by *Stat. 43 Eliz. c. 4*, authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the *Duchy of Lancaster*, respectively, to grant commissions under their several seals, to enquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the Petty Bag Office in the court of Chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of Equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue. and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. An appeal lies from the Chancellor's decree to the House of Peers, notwithstanding any loose opinion to the contrary 3 *Comm.* 427.

Lands given to alms and aliened, may be recovered by the donor. 13 *Ed. 1. c. 41*.

Lands, &c. may be given for the maintenance of houses of correction, or of the poor, *Stat. 35 Eliz. c. 7. § 27*. Commissioners to inquire of money given to poor prisoners, *Stats. 22 & 23 Car. 2. c. 20. § 11: 32 Geo. 2. c. 28. § 9, 10*. See tit. *Prisoners*.

Money given to put out apprentices, either by parishes or publick charities, to pay no duty, 8 *Ann. c. 9. § 40*. See title *Apprentices*.

See this subject treated at length under title *Mortmain*; and *Higbman's Law of Charitable Uses*.

CHARKS, Are pit-coal when *charied* or *charked*; so called in *Worcestershire*; as sea-coal thus prepared at *Newcastle* is called *coke*.

CHARRE OF LEAD. A quantity of lead consisting of thirty *pigs*, each pig containing six *stone* wanting two pounds, and every stone being twelve pounds. *Affix de ponderibus. Rob. 3. R. Scot. cap. 22*.

CHARTA, A word made use of not only for a *charter*, for the holding an estate; but also a statute. See *Magna Charta*.

CHARTE, A cart, chart, or plan which mariners use at sea, mentioned in *Stat. 14 Car. 2. cap. 33*.

CHARTEL, Fr. *cartel*.] A letter of defiance, or challenge to a single combat; in use heretofore to decide difficult controversies at law, which could not otherwise be determined. *Blount*—A *Cartel* is now used for the instrument or writing for settling the exchange of prisoners of war: and a *cartel-ship*, for the ship used on such occasion, which is privileged from capture.

CHARTER, Lat. *charta*, Fr. *chartres*, i. e. *instrumentum*] Is taken in our law for written evidence of things done between man and man whereof *Bracton lib. 2. cap. 26*, says thus, *Fiunt aliquando donationes in scriptis, sicut in chartis, ad perpetuam rei memoriam, propter brevitatem hominum vitam, &c.* And *Britton*, in his 39th chapter, divides *charters* into those of the king, and those of private persons. *Charters of the king* are those whereby the king passeth any grant to any person or body politick; as a *charter of exemption*, of privilege, &c.—See tit. *King*.

Charter of pardon, whereby a man is forgiven a felony, or other offence committed against the king's crown and

dignity; and of these there are several sorts. See title *Pardon*.

Charter of the forest, wherein the laws of the forest are comprised, such as the *charter of Canutus, &c. Kitch. 314: Fleta, lib. 3. c. 14*.

Charters of private persons are deeds and instruments for the conveyance of lands, &c. And the purchaser of lands shall have all the *charters*, deeds and evidences as incident to the same, and for the maintenance of his title. *Co. Lit. 6*. *Charters* belong to a feoffee, although they be not sold to him, where the feoffor is not bound to a general warranty of the land; for there they shall belong to the feoffor, if they be sealed deeds or wills in writing: but other *charters* go to the tertenant. *Moor. Ca. 687*. The *charters*, belonging to the feoffor in case of warranty the heir shall have, though he hath no land by descent, for the possibility of descent after. 1 *Rep. 1*. See tit. *Magna Charta*.

CHARTERER. In *Cheshire*, a freeholder is called by this name. *Sir P. Ley's Antiq. fol. 356*.

CHARTER GOVERNMENTS in AMERICA. See title *Plantations*.

CHARTER LAND, *terra per chartam*.] See title *Blackland*.

CHARTER-PARTY, Lat. *charta partita*, Fr. *chartre parti*, i. e. a deed or writing divided.] Is what among merchants and sea-faring men is commonly called a *pan of indentures*, containing the covenants and agreements made between them, touching their merchandize and maritime affairs. 2 *Inst. 673*. *Charter-parties* of affreightment settle agreements, as to the cargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement; and the master sometimes obliges himself, ship, tackle and furniture, for performance.

The Common law construes *charter-parties*, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those that merchandise by sea; but they must be regularly pleaded. In covenant by *charter-party*, that the ship should return to the river of *Thames*, by a certain time, *dangers of the sea excepted*, and after, in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreement; it was adjudged that this impediment was within the exception of the *charter-party*, which extends as well to any danger upon the sea by pirates and men of war, as dangers of the sea by ship-wreck, tempest, &c. *Stile 132: 2 Rol. Abr. 248*.

A ship is freighted at so much *per month* that she shall be out, covenanted to be paid after her arrival at the port of *London*; the ship is cast away coming up from the *Dorset*, but the lading is all preserved, the freight shall in this case be paid; for the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid, and the ship is intitled to wages, like a mariner that serves by the month, who if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Maritim. 260*. If a part-owner of a ship refuse to join with the other owners in setting out of the ship, he shall not be entitled to his share of the freight; but by the course of the Admiralty, the other owners ought to give security if the ship perish in the voyage, to make good to the owner standing out, his share of the ship, *Sir L. Jenkins*, in a case of this nature,

nature, certified that by the Law Marine and course of the Admiralty, the plaintiff was to have no share of the freight; and that it was so in all places, for otherwise there would be no navigation. *Lex Mercat.* See titles *Admiralty, Freight, Insurance.*

CHARTIS REDDENDIS. An ancient writ which lay against one that had charters of feoffment entrusted to his keeping, and refused to deliver them. *Reg. Orig.* 159.

CHASE, Fr. *chasse*.] In its general signification is a great quantity of woody ground lying open, and privileged for wild beasts and wild fowl: and the beasts of *chase* properly extend to the buck, doe, fox, martin and roe, and in common and legal sense to all the beasts of the forest. *Co. Lit.* 233.

A *chase* differs from a park in that it is not inclosed; and also in that a man may have a *chase* in another man's ground, as well as in his own: being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. 2 *Comm.* 38.

But if one have a *chase* within a forest, and he kill or hunt any stag or red deer, or other beasts of the forest, he is fineable. 1 *Jones's Rep.* 278.

A *chase* is of a middle nature between a forest and a park, being commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat; though of a larger compass, and stored with greater diversity both of keepers, and wild beasts or game, than a park.

A *chase* differs from a forest in this, because it may be in the hands of a subject, which a forest in its proper and true nature cannot; and from a park, in that it is not inclosed, and hath a greater compass, and more variety of game, and officers likewise. *Compt.* in his *Jurisd.* fol. 148, says a forest cannot be in the hands of a subject, but it forthwith loseth its name, and becomes a *chase*: but fol. 197, he says, a subject may be lord and owner of a forest, which though it seems a contradiction, yet both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loseth the true property of a forest, because the courts called the justice-seat, swainmote, &c. do forthwith vanish, none being able to make a Lord Chief Justice in Eyre of the forest, but the King; yet it may be granted in so large a manner, as there may be attachment, swain mote, and a court equivalent to a justice-seat *Manwood, part 2 c. 3, 4.*

A forest and a *chase* may have different officers and laws: every forest is a *chase*, *Et quiddam amplius*; but any *chase* is not a forest. A *chase* is *ad communem legem*, and not to be guided by the forest laws; and it is the same of parks. 4 *Inst.* 314. A man may have a free *chase* as belonging to his manor in his own woods, as well as a warren and a park in his own grounds; for a *chase*, warren and park are collateral inheritances, and not issuing out of the soil; and therefore if a person hath a *chase* in other men's grounds, and after purchaseth the grounds, the *chase* remaineth. *Ibid.* 318. If a man have freehold in a free *chase*, he may cut his timber and wood growing upon it, without view or licence of any; though it is not so of a forest: but if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king; and so if a common per-

son hath a *chase* in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient thereof, and also browfewood, as hath been accustomed. 11 *Rep.* 22. And it has been adjudged, that within such *chase*, the owner of the soil by prescription may have common for his sheep, and warren for his conies, but he cannot surcharge with more than has been usual, nor make coney-burrows in other places than hath been used. *Ibid.* If a free *chase* be inclosed, it is said to be a good cause of seizure into the king's hands.

It is not lawful to make a *chase*, park or warren, without licence from the king under the broad seal. See titles *Forest, Game, Park.*

CHASOR, An hunting horse — *Debet int mibi unum chasorem, &c.* *Leg. Will.* 1. cap. 22. And in another chapter it is written *cacorem.*

CHASPELLAINE, A noble woman: *quasi castella domina.*

CHASTITY. The Roman law (*ff.* 48, 8, 1.) justifies homicide in defence of the chastity either of one's self or relations; and so also, according to *Selden* (*de Legib. Hebræor.* l. 4 c. 3.) stood the law in the Jewish republick. The English law likewise justifies a woman, killing one who attempts to ravish her. (*Bac. Elem.* 34: 1 *Hrwk.* P. C. 71.) So the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 *Hal.* P. C. 485, 6.

And without doubt the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle, that runs through our own and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 *Comm.* 181.—See title *Murder, Adultery.*

CHATTELS, or CATALS, *catalla*] All goods moveable and immoveable, except such as are in nature of freehold, or parcel of it. The *Nomans* call moveable goods only, *chattels*; but this word by the common law extends to all moveable and immoveable goods. and the *Civilians* denominate not only what we call *chattels*, but also land, *bona*. But no estate of inheritance or freehold, can be termed in our law goods and chattels; though a lease for years may pass as goods.

Chattels are either *personal* or *real*. *personal*, as gold, silver, plate, jewels, household stuff, goods and wares in a shop, corn sown on the ground, carts, ploughs, coaches, saddles, &c. Cattle, &c. as horses, oxen, kine, bullocks, sheep, pigs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c. and these are called *personal* in two respects, one because they belong immediately to the person of a man; and the other, for that being any way injuriously withheld from us, we have no means to recover them but by *personal* action.

Chattels-real, saith *Coke*, (1 *Inst.* 118) are such as concern or favour of the realty; as terms for years of land, the next presentation to a church, estates by *assent* *merchant*, *statute staple*, *elegerit*, or the like. And these are called *real* chattels, as being interests issuing out of, or annexed to real estates, of which they have one quality, *viz.* *immobility*, which denominates them *real*, but want the other, *viz.* a sufficient, legal, indeterminate

terminate duration; and this want it is that constitutes them *chattels*. The utmost period for which they can last; is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life. 2 *Comm.* 386.

But deeds relating to a freehold, obligations, &c. which are things in action, are not reckoned under goods and *chattels*; though if writings are pawned, they may be *chattels*; and money hath been accounted not to be goods or *chattels*; nor are hawks or hounds, such being *feræ nature*. 8 *Rep.* 33: *Ten. de Ley* 103: *Kitch.* 32.

A collar of SS. garter of gold, buttons, &c. belonging to the dress of a knight of the garter, are not jewels to pass by that name in personal estate, but ensigns of honour. *Dyer* 59. As to devises of chattels with remainder over. See title *Devise*.

Chattels personal are, immediately upon the death of the testator, in the *actual possession of the executor*, as the law will adjudge, though they are at never so great a distance from him; *chattels real*, as leases for years of houses, lands, &c. are not in the possession of the executor till he makes an *entry*, or hath recovered the same; except in case of a lease for years of tithes, where no entry can be made. 1 *Nelf. Abr.* 437.

Leases for years, though for a thousand years, leases at will, estates of tenants by *elegit*, &c. are *chattels*, and shall go to the executor: all obligations, bills, statutes, recognisances and judgments, shall be as a *chattel* in the executors, &c. *Bro. Obl.* 18: *F. N. B.* 120.

But if one be seised of land in fee on which trees and grass grow, the heir shall have these, and not the executor; for they are not *chattels* till they are cut and severed, but parcel of the inheritance. 4 *Rep.* 63: *Dyer* 273. The game of a park with the park, fish in the pond, and doves in the house with the house, go to the heir, &c. and are not *chattels*: though if pigeons, or deer, are tame, or kept alive in a room; or if fish be in a trunk, &c. they go to the executors as *chattels*. *Noy* 124: 11 *Rep.* 50: *Keilw.* 88—See titles *Heir*, *Executor*.

An owner of *chattels* is said to be *possessed* of them; as of freehold the term is, that a person is *seised* of the same.

CHAUD-MEDLEY, See title *Chance-Medley*.

CHAUMPERT, A kind of tenure mentioned *Pat.* 35 *Ed.* 3. To the hospital of *Bowes*, in the isle of *Guernsey*. *Blount*.

CHAUNTER, A singer in a cathedral. See *Chanter*.

CHAUNTRY-RENTS, Are rents paid to the crown by the servants or purchasers of *chauntry-lands*. See *Stat.* 22 *Ch.* 2 *c.* 6.

CHEATS, Are deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Hawk. P. C. c.* 71.

1 Changing corn by a miller, and returning bad corn in the stead, is punishable by indictment, being an offence against the publick. 1 *Seff. Ca.* 217.—So to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. 6 *Mod.* 42.—So if an indentured apprentice enters for a soldier, and having received the bounty, is discharged on his master's demanding him, he may be indicted. 1 *Hawk. P. C. c.* 71. § 3. n.—But selling beer short of the just and due measure, is not indictable as a cheat. 1 *Will.* 301: *Say.* 146: 1 *Black. Rep.* 274.—Nor selling gum of one denomination for that of another. *Sayer.* 205.—Nor selling wrought gold, as and for gold of the true standard; the offender not being a goldsmith. *Corw.* 323.

The distinction laid down as proper to be attended to in all cases of the kind, is this.—That in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is not indictable; but the party is left to his civil remedy for redress of the injury done him: but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Burr.* 1125.

By *Stat.* 33 *H.* 8. *cap.* 1. *sect.* 2, If any person falsely and deceitfully get into his hands or possession any money or other things of any other persons by colour of any false token, &c. being convicted he shall have such punishment by imprisonment, setting upon the pillory, or by any corporal pain (except pains of death) as shall be adjudged by the persons before whom he shall be convicted.

Lord Coke observes hereupon, that for this offence the offender cannot be *fined*, but *corporal pain* only inflicted. 3 *Inst.* 133.—But in 1 *Hawk. P. C. c.* 71. § 6, it is said that a person has been fined 500*l.* for this offence.

In indictments on this *stat.* the false token made use of must be set forth. *Sta.* 1127.—A counterfeit pass has been held such. *Dalt.* 91.—or a pretended power to discharge soldiers. 1 *Latch.* 202.

By *Stat.* 30 *Geo.* 2. *c.* 24, Persons convicted of obtaining money or goods by false pretences, or of sending threatening letters in order to extort money or goods, may be punished by fine and imprisonment, or by pillory, whipping, or transportation.—In indictment on this *stat.* it must appear what the false pretences were. 2 *Term Rep.* 581.

As there are frauds which may be relieved civilly, and not punished criminally, (with the complaints whereof the courts of equity do generally abound), so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor goes about the town, and pretending to be of age, defrauds many persons, by taking credit for a considerable quantity of goods, and then insisting on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100: 1 *Hawk. P. C. c.* 71. § 6. n.

CHECK-ROLL, A roll or book containing the names of such as are attendants on, and in pay to the king or other great personages, as their household servants. *Stat.* 19 *Car.* 2. *cap.* 1. It is otherwise called the *chequer roll*, and seems to take its etymology from the *Exchequer*. *Stat.* 14 *Hen.* 8. *c.* 13.

CHELINDRA, A sort of ship. *Mat. Paris*, anno 1238.

CHELSEA HOSPITAL, See title *Soldiers*.

CHELSEA WATER-WORKS, See *Stat. 7 Jac. 1.* c. 9.

CHESTER See generally title *County-Palatine*.—Where felony, &c. is committed by any inhabitant of the Palatine of *Chester*, in another county, process shall be made to the *exigent* where the offence was done, and if the offender then fly into the county of *Chester*, the outlawry shall be certified to the officers there. 1 *H. 4.* c. 18. The sessions for the county palatine of *Chester*, is to be kept twice in the year, at *Michaelmas* and *Easter*: and justices of peace, &c. in *Chester* shall be nominated by the Lord Chancellor. *Stats. 32 H. 8.* c. 43: 33 *H. 8.* c. 13. Recognizances of statutes-merchant may be acknowledged, and fines levied before the mayor of *Chester*, &c. for lands lying there. 2 & 3 *Ed. 6.* c. 31. But no writ of protection shall be granted in the county palatine.

CHEVAGE, *chevageum*, from the Fr. *chef*, *caput*.] A tribute or sum of money formerly paid by such as held lands in villenage to their lords in acknowledgment, and was a kind of head or poll money. Of which *Bracton*, lib. 1. cap. 10, says thus; *Chevageum dicitur recognitio in signum subjectionis & dominii de capite suo*. *Lambard* writes this word *chevage*; but it is more properly *chusage*: and anciently the *Jews*, whilst they were admitted to live in *England*, paid *chevage* or poll money to the king, as appears by *Pat. 8 Ed. 1.* par. 1. It seems also to be used for a sum of money, yearly given to a man of power for his protection, as a chief lord or leader: but Lord *Coke* says, that in this signification it is a great misprision for a subject to take sums of money, or other gifts yearly of any, in name of *chevage*, because they take upon them to be their chief heads or leaders, *Co. Lit.* 140. *Spelman* in *v. Chevageum* says, it is a duty paid in *Hales*, *profructibus manandis*.

CHEVANTIA, A loan or advance of money upon credit; Fr. *chevance*. Goods, *Stock. Mon. Angl. tom. 1.* pag. 69.

CHEVERIL, *chevenillus*.] A young cock, or cockling. *Pat. 15 H. 3.*

CHEVISANCE, from the Fr. *chevis*, i. e. *Fleur à chef* or *quelque chose*, to come to the head or end of a business.] An agreement or composition made; an end or order let down between a creditor or debtor; or sometimes an indirect gain in point of usury, &c. In some ancient statutes it is often mentioned, and seems commonly used for an unlawful bargain or contract. In the *Stat. 13 Ed. 1.* c. 7, (See title *Bankrupts*.) it is used simply, in the sense explained by *Duglesne*, for making *Contracts*.

CHEVITIÆ, and CHEVISCÆ, Heads of ploughed lands. *Mon. Angl. tom. 2. f. 116.*

CHIEF-RENTS, The rents of freeholders of manors often so called, i. e. *reditus capitales*.—They are also denominated *quit-rent*, *quiti reditus*; because thereby the tenant goes quit and free of all other services. 2 *Comm.* 42. See tit. *Rents*.

CHIEF PLEDGE, See title *Huddborough*.

CHIEF (TENANTS in). Tenants in *capite*, holding immediately under the king, in right of his crown and dignity. See titles *Capite*, *Tenure*.

CHILDREN, As to devises to, See title *Devise*: See also titles *Descend*, *Heir*, *Limitation*, *Poor*, *Posthumous Child*, &c.

VOL. I.

CHILDWIT, *Sax.*] A fine or penalty of a bond-woman unlawfully begotten with child. *Cow I* says, it signifieth a power to take a fine of your bond-woman gotten with child without your consent: and within the manor of *Writtle in Com. Essex*, every reputed father of a base child pays to the lord for a fine 3s. 4d. where it seems to extend as well to free as bond-women; and the custom is there called *childwit* to this day. See title *Bastard*.

CHIMIN, Fr. *chemin*; *via*.] In law phrase is a way; which is of two sorts; the King's highway, and a private way.

The King's Highway, (*chiminus regius*) is that in which the King's subjects and all others under his protection, have free liberty to pass; though the property of the soil where the way lies, belongs to some private person.

A private way is that in which one man or more have liberty to pass, through the ground of another, by prescription or charter; and this is divided into *chimin in gro* and *chimin appendant*.

Chimin in gro is where a person holds a way principally and solely in itself.

Chimin appendant is that way which a man hath as appurtenant to some other thing: as if he rent a close or pasture, with covenant for ingress and egress through some other ground in which otherwise he might not pass. *Kitch. 117*: *Co. Lit.* 56:—See titles *Highway*; *Trespas*; *Way*.

CHIMINAGE, (*chiminagium*). Toll due by custom for having a way through a forest; and in ancient records it is sometimes called *pedagium*. *Crompt. Jur. fd. 189*: *Co. Lit.* 56: See *Chart. Forest. cap. 14*.

CHIMNEY-MONEY, Otherwise called *hearth-money*. A duty to the crown imposed by *Stat. 14 Car. 2.* cap. 2, of 2s. for every hearth in a house. Now long since repealed.

CHIMNEY-SWEEPERS. By *Stat. 28 Geo. 3.* c. 48, churchwardens and overseers with the consent of two justices may bind boys of eight years old or upwards; and who, themselves or their parents are chargeable to the parish, or who shall beg; or with the consent of their parents; to be apprentices to chimney sweepers until they are sixteen years old. §. 1.

The form of the indenture is settled by a schedule annexed to the statute.—In that the master covenants to find the boy with decent clothing—to permit him to attend public worship; and to observe the statute in the several particulars mentioned.—All other indentures and agreements are declared void; and any chimney sweeper keeping an apprentice under eight years old is to forfeit not more than 10*l.* nor less than 5*l.* for each. §. 4.

One justice is authorized to settle all complaints of ill usage by the masters, or ill behaviour in the boys. §. 6.

No Chimney-sweeper shall keep more than six apprentices at once; the master's name and place of abode are to be inscribed on a brass plate in the front of a leather cap to be provided by the master for each apprentice, to be worn by the boy when on duty. For every apprentice above six, and for neglecting to provide their caps the master is to forfeit not exceeding 10*l.* nor less than 5*l.* §. 7.

If the master shall mis-use or evil-treat his apprentice, or be guilty of the breach of any of the covenants in his indenture he shall forfeit, not more than 10*l.* nor less than 5*l.* §. 8.

The statute containing the foregoing and other humane regulations was obtained by the exertions of the benevolent Mr *Jonas Hanway*; to whom the Publick and the Poor are indebted for many laudable charities.

CHINA and JAPAN WARES. To what duties liable, &c. see *Stat. 7 Geo. 1. A. 1. c. 21.* and title *Navigation-Arts.*

CHIPP, CHEAP, CHIPPING, Signifies the place to be a market-town, as *Chippesham*, &c. *Blount.*

CHIPPINGAVELE, or *chippingavele*, toll for buying and selling.

CHIRCHGEMOT, CHIRGEMOT, KIRK MOTE.] *Chirgemot* (Sax.) *forum ecclesiasticum.*—*Leg. Hen. 1. c. 8. 4 Inst. 321.*—A Synod—It is used for a meeting in a church or vestry. *Blount.*

CHIROGRAPH, *chirographum*, or *scriptum chirographum.*] Any public instrument or gift of conveyance, attested by the subscription and crosses of witnesses, was in the time of the Saxons called *chirographum*; which being somewhat changed in form and manner by the Normans, was by them stiled *charta*: in following times, to prevent frauds and concealments, they made their deeds of mutual covenant in a *script* and *rescript*, or in a part and counter-part, and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied or cut asunder in an indented manner, the sheet or skin of parchment; which being delivered to the two parties concerned, were proved authentick by matching with and answering to one another: and when this prudent custom had for some time prevailed, then the word *chirographum* was appropriated to such bipartite writings or indentures.

Anciently when they made a *chirograph* or deed, which required a counter part, they ingrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word **CHIROGRAPH**; and then cut the parchment in two, sometimes even and sometimes with indenture, through the midst of the word: this was afterwards called *dividenda*, because the parchment was so divided or cut; and it is said the first use of these *chirographs* was in Henry the Third's time.

Chirograph was of old used for a fine; the manner of ingrossing whereof, and cutting the parchment in two pieces, is still observed in the *Chirographer's* office: but as to deeds, that was formerly called a *Chirograph*, which was subscribed by the proper hand writing of the vendor or debtor, and delivered to the vendee or creditor: and it differed from *syngraphus*, which was in this manner, viz. Both parties, as well the creditor as debtor, wrote their names and the sum of money borrowed, on paper, &c. and the word **SYNGRAPHUS** in capital letters in the middle thereof, which letters were cut in the middle, and one part given to each party, that upon comparing them (if any dispute should arise) they might put an end to the difference. The *chirographs* of deeds have sometimes concluded thus.—*hi in hujus rei testimonium huc scripto, in modum chirographi confecti, et utrimque sigilla nostra apposimus.* The *chirographs* were called *charte divise*, *scripta per chirographos divisa*, *charte per alphabetum divise*; as the *chirographs* of all fines are at this time. *Kennel's Antiq. 177: Mon. Angl. tom 2 p. 54.*

CHIROGRAPHICR OF FINES, *chirographus finium & concordiarum*, of the Greek *Χειρόγραφον*, a compound of *Χειρ*, manus a hand, and *γράφω* scribo, I write; A writing

of a man's hand.] That Officer in the *Common Pleas* who ingrosseth fines, acknowledged in that court into a perpetual record, after they are examined and passed in the other offices, and that writes and delivers the indentures of them to the party: and this officer makes out two indentures, one for the buyer, another for the seller; and also makes one other indented piece, containing the effect of the fine, which he delivers to the *custos breviarum*, which is called the *foot of the fine*. The *chirographer* likewise, or his deputy, proclaims all the fines in the court every term, according to the statute, and endorses the proclamations upon the back side of the foot thereof; and always keeps the writ of covenant, and note of the fine: the *chirographer* shall take but 4 s. fee for a fine, on pain to forfeit his office, &c. *Stats. 2 H. 4. c. 8: 23 Eliz. c. 3. 2 Inst. 468.*

CHIRURGEON. See *Surgeon.*

CHIVALRY, *servitium militare*, from the Fr. *chevalier.*] A tenure of lands by knights service; whereby the tenant was bound to perform service in war unto the king, or the mesne lord of whom he held by that tenure.—See title *Tenures.*

Chivalry was of two kinds, either *regal*, held only of the King, or *common*, held of a common person: that which might be held only of the King was called *Servitium* or *serjeantia*, and was again divided into *grand* and *petit serjeanty*; the *grand serjeanty* was where one held lands of the King by service, which he ought to do in his own person, as to bear the King's banner or spear, to lead his host, or to find a man at arms to fight, &c. *Petit serjeanty* was when a man held lands of the King to yield him annually some small thing towards his wars, as a sword, dagger, bow, &c.—See title *Serjeanty.*

Of the *Court of Chivalry* its power and jurisdiction, See post title *Court of Chivalry.*

CHOCOLATE, See *Coffee.*

CHOP-CHURCH, *ecclesiarum permutatio.*] Is a word mentioned in a statute of King *Hen. 6.* by the sense of which, it was in those days a kind of trade, and by the judges declared to be lawful: but *Brooke* in his Abridgment says, it was only *permissible* by law: it was without a doubt a nick-name given to those that used to change benefices; as to a *chop* and *change* is a common expression. *9 Hen. 6. cap. 65.* Vide *Littera missa omnibus episcopis*, &c. contra *Choppe-Churches*, anno 1391. *Spelm. de Con. vol. 2. p. 642.*

CHORAL, *choralis.*] Signifies any person that by virtue of any of the orders of the clergy, was in ancient time admitted to sit and serve God in the *choire*; *Dugdale* in his History of *St. Paul's* Church says, that there were formerly six *Picars Choral* belonging to that church.

CHOREPISCOPI, See *Suffragan.*

CHOSE, Fr. A thing.] Used in the common law with divers epithets; as *chose local*, *chose transitory*, and *chose in action*. *Chose local* is such a thing as is annexed to a place, as a mill, and the like: and *chose transitory*, is that thing which is moveable, and may be taken away, or carried from place to place: *chose in action* is a thing incorporeal, and only a right; as an annuity, obligation for debt, &c. And generally all cautes of suit for any debt, duty, or wrong, are to be accounted *chose in action*: and it seems *chose in action* may be also called *chose in jusse*, because it hath no real existence or being, nor can properly be said to be in our possession. *Bro. title Chose in Action: 1 Lil. Abr. 264.*

A person

CHOSE.

A person disposes me of land, or takes away my goods ; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action*: so a debt on an obligation, and power and right of action to sue for the same. 1 *Brownl.* 33. And a condition and power of re entry into land upon a feoffment, gift or grant, before the performance of the condition, is of the nature of a *chose in action*. *Co. Lit.* 214: 6 *Rep.* 50: *Dyer* 244. If one have an advowson, when the church becomes void, the presentation is but as a *chose in action*, and not grantable, but it is otherwise before the church is void. *Dyer* 296. Where a man hath a judgment against another for money, or a statute, these are *chofes in action*. An annuity in fee to a man and his heirs, is grantable over: but it has been held, that an annuity is a *chose in action*, and not grantable: 5 *Rep.* 89: *Fitz. Grant*, 45. A *chose in action* cannot be transferred over; nor is it devisable: nor can a *chose in action* be a satisfaction, as one bond cannot be pleaded to be given in satisfaction for another: but in equity *chofes in action* may be assignable; and the King's grant of a *chose in action* is good. *Co. Jac.* 170, 371: *Chanc. Rep.* 169.

Charters, where the owner of the land hath them in possession, are grantable: a possibility of an interest or estate in a term for years, is near to a *chose in action*, and therefore may not be granted; but a possibility, joined with an interest, may be a grantable chattel. *Co. Lit.* 265: 4 *Rep.* 66: *Moor Ca.* 1128. And this the law doth provide, to avoid multiplicity of suits, and the subversion of justice, which would follow if these things were grantable from one man to another. *Dyer* 30: *Plowd.* 185.

But by release *chofes in action* may be released and discharged for ever; but then it must be to parties and privies in the estate, &c. for no stranger may take advantage of *things in action*; save only in some special cases; *Co. Lit.* 214: *Yelv.* 9, 85.—See title *Assignment*.

CHRISM, A consecration of oil and balsam consecrated by the bishop, and used in the *Papish* ceremonies of baptism, confirmation, and sometimes ordination.

CHRISMALE, *Chrismal*, *chrifom*, the face-cloth, or piece of linen laid over the child's head at baptism, which in ancient times was a perquisite due to the parish priest. *Statut. Egid. Epif. Salisbur. An.* 1256.

CHRISMATIS DENARII, *Chrifom pence*, money paid to the diocesan, or his suffragan, by the parochial clergy, for the *chrifom* consecrated by them about *Easter*, for the holy uses of the year ensuing. This customary payment being made in *Lent* near *Easter*, was in some places called *Quadragesimals*, and in others *Paschals* and *Easter-pence*. The bishop's exaction of it was condemned by Pope Pius XI. for simony and extortion; and thereupon the custom was released by some of our English bishops.—See *Cartular. Mon. de Bernedy, MS. Cotton*.

CHRISTIANITATIS CURIA, The court christian, or ecclesiastical judicature, See *Court Christian*.

CHRISTIANITY. Of the punishment of offences against, See titles *Blasphemy*, *Heresy*, and also title *Religion*.

CHURCH.

ECCLESIA.—A Temple or building consecrated to the honour of God and religion, and anciently dedicated to some Saint, whose name it assumed; or it is an assembly of persons united by the profession of the same *Chris-*

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tian faith, met together for religious worship. A Church to be adjudged such in law must have administration of the sacraments and sepulture, annexed to it. If the king founds a church, he may exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject.

The manner of founding churches in ancient times was, after the founders had made their applications to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and let forth the church-yard where the church was to be built; and then the founders might proceed in the building of the church, and when the church was finished, the bishop was to consecrate it; and then, and not before, the sacraments were to be administered in it. *Stallingsfleet's Ecclesiast. Cases*. But by the common law and custom of this realm, any person who is a good christian, may build a church without licence from the bishop, so as it be not prejudicial to any ancient churches; though the law takes no notice of it as a church, till consecrated by the bishop, which is the reason why church and no church, &c. is to be tried and certified by the bishop. And in some cases, though a church has been consecrated, it must be consecrated again; as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed by fire, &c.

The ancient ceremonies in consecrating the ground on which the church was intended to be built, and of the church itself after it was built, were thus: when the materials were provided for building, the bishop came in his robes to the place, &c. and having prayed, he then perfumed the ground with incense, and the people sung a collect in praise of that saint to whom the church was dedicated; then the corner stone was brought to the bishop, which he crossed, and laid for the foundation: and a great feast was made on that day, or on the saint's day to which it was dedicated; but the form of consecration was left to the discretion of the bishop, as it is at this day.

A Church in general consists of three principal parts, that is, the belfrey or steeple, the body of the church with the isles, and the chancel: and not only the frechold of the whole church, but of the church-yard, are in the parson or rector; and the parson may have an action of trespass against any one that shall commit any trespass in the church or church-yard; as in the breaking of seats annexed to the church, or the windows, taking away the leads, or any of the materials of the church, cutting the trees in the church-yard, &c. But church-wardens may by custom have a fee for burying in the church; the church-yard is a common place of burial for all the parishioners. *Fent.* 274: *Keb.* 504, 523.—But see *Co. Jac.* 367: *Gibf.* 453: and post *Church-wardens*, III. 2.

And it seems that actions for taking away the seats must be brought in the name of the church-wardens, the parishioners being at the expence of them. *Rajm.* 246: 12 *Co.* 105: 3 *Com Dig.* title *Esglesi* (F. 3.)

If a man erect a pew in a church, or hang up a bell, &c. therein, they thereby become church goods, though not expressly given to the church; and he may not afterwards remove them. *Shaw. P. L.* 79. The parson only is to give licence to bury in the church; but for defacing a monument in a church, &c. the builder or heir of the deceased may have an action. *Co. Jac.* 367. And a man may be indicted for digging up the graves of persons buried, and taking away their burial dresses, &c.

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The property whereof remains in the party who was the owner when used, and it is said an offender was found guilty of felony in this case, but had his clergy. *Co. Lit.* 113.

Though the parson hath the freehold of the church and church-yard, he hath not the fee-simple, which is always in abeyance; but in some respects the parson hath a fee-simple qualified. *Lit.* 644, 645. The chancel of the church is to be repaired by the parson, unless there be a custom to the contrary; and for these repairs, the parson may cut down trees in the church-yard, but not otherwise. See *Stat.* 35 *Ed.* 1. *ft.* 2, *Ne Recton proflernat*, &c. The churchwardens are to see that the body of the church and steeple are in repair; but not any isle, &c. which any person claims by prescription, to him or his house: concerning which repairs the Canons require every person who hath authority to hold ecclesiastical visitation to view their churches within their jurisdictions once in three years, either in person, or cause it to be done; and they are to certify the defects to the ordinary, and the names of those who ought to repair them; and these repairs must be done by the churchwardens, at the charge of the parishioners. *Can.* 86: 1 *Mod.* 236. See post title *Church-wardens*, III. 2.

By the Common law, parishioners of every parish are bound to repair the church: but by the canon law, the parson is obliged to do it; and so it is in foreign countries. 1 *Salk.* 164. In London the parishioners repair both the church and the chancel. The Spiritual Court may compel the parishioners to repair the church, and excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved till the greater part agree to a tax, when the excommunication is to be taken off; but the Spiritual Court cannot assess them towards it. 1 *Mod.* 194: 1 *Ventr.* 367. For though this Court hath power to oblige the parishioners to repair by ecclesiastical censures; yet they cannot appoint in what sum, or set a rate, for that must be settled by the churchwardens, &c. 2 *Mod.* 8.

If a church be down, and the parish is increased, the greater part of the parish may raise a tax for the necessary enlarging it, as well as the repairing thereof, &c. 1 *Mod.* 237. But in some of our books it is said, that if a church falls down, the parishioners are not obliged to rebuild it; though they ought to keep it in due repair. 1 *Ventr.* 35.—On re-building of churches, it is now usual to apply for, and obtain *briefs*, on the petition of the parishioners, to collect the charitable contributions of well-disposed christians, to assist them in the expence. See post title *Church-wardens*, III. 2.

For church ornaments, utensils, &c. the charge is upon the personal estates of the parishioners; and for this reason persons must be charged for these, where they live: but though generally lands ought not to be taxed for ornaments, yet by special custom, both lands and houses may be liable to it. 2 *Inst.* 489: *Cro. Eliz.* 843: *Healey* 131. It has been resolved that no man shall be charged for his land to contribute to the church reckonings, if he doth nor reside in the same parish. *Moor* 554.

By *Stat.* 37 *H.* 8. c. 21, churches not above six pounds a year, in the King's books, by assent of the ordinary, patron and incumbent, may be united: and by *Stat.* 17 *Car.* 2. c. 3, in cities and corporations, &c. churches may be united by the bishop, patrons, and chief ma-

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gistrates, unless the income exceeds 100 *l.* per ann. and then the parishioners are to consent, &c. See tit. *Union*.

For completing of St. Paul's Church, and repairing Westminster Abbey, a duty of 2 *s.* per chaldron on coals was granted; and the church-yard is to be inclosed, and no persons build thereon, except for the use of the church. 1 *Ann.* *ft.* 2. c. 12.

Fifty new churches are to be built in or near London and Westminster, for the building whereof a like duty is granted upon coals, and commissioners appointed to purchase lands, ascertain bounds, &c. The rectors of which churches were to be appointed by the crown, and the first church-wardens and vestrymen, &c. to be elected by the commissioners. *Stat.* 9 *Ann.* cap. 22. and see *Stat.* 10 *Ann.* c. 11. A duty is also granted on coals imported into London, to be appropriated for maintaining of ministers for the fifty new churches. *Stat.* 1 *Geo.* 1. cap. 23.

No man shall cover his head in the church in time of divine service, except he have some infirmity, and then with a cap; and all persons are to kneel and stand, &c. as directed by the Common Prayer during service. *Can.* 18.

No ill language is to be used, or noise made in churches or church yards; and persons striking, or laying violent hands on others there, are to be excommunicated; and striking with a weapon, or drawing a weapon with intent to strike, shall lose one of their ears: and a man may not lawfully return blows in his own defence in these cases. *Stat.* 5 & 6 *Ed.* 6. cap. 4: 1 *Hawk.* P. C. c. 63. § 24, &c.

No fairs or markets shall be kept in church-yards. *Stat.* 13 *E.* 1. *ft.* 2. c. 6.

Any person may be indicted for indecent or irreverent behaviour in the church; and those that offend against the acts of uniformity, are punishable either by indictment upon the statute, or by the Ordinary, &c. See further titles *Churchwardens*; *Parsons*. And as to offences in not coming to church, See titles *Dissenters*, *Religion*.

CHURCHGEMOT. Vide *Chinchemot*.

CHURCH-WARDENS.

Anciently styled *Church-Reeves* or *Ecclesie Guardiani*.] Officers instituted to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the legal representatives of the body of the parish.

The office was originally confined to such matters only as concerned the Church, considered materially as an edifice, building, or place of public worship; and the duty of suppressing profaneness and immorality was intrusted to two persons annually chosen by the parishioners, as assistants to the church-wardens, who, from their power of inquiring into offences, detrimental to the interests of religion, and of presenting the offenders to the next provincial council, or episcopal synod, were called *quest-men* or *synods-men*, which last appellation has been converted into the name of *sides men*. But great part of the duty of these *testes synodales*, or ancillary officers, is now devolved upon the church-wardens; the sphere of whose duty has, since the establishment of the *Overseers of the poor*, been considerably enlarged; and is also diverted into various channels by many modern acts of parliament. See *Paroch. Antiq.* 649, for a more particular account of the origin and progress of these *Sides-men*.

Under

CHURCH-WARDENS I. II.

Under this head it will be proper to consider,

- I. 1. *Of the Election of Churchwardens*, 2. *Of Exemptions from being elected.*
- II. *Of their Interest in the Things belonging to the Church.*
- III. 1. *Of their Power*; and 2. *Duty.*
- IV. *Of their Accounts.*

I. They are generally chosen by the joint consent of the parishioners and minister; but *by custom*, (on which the right of choosing these officers entirely depends, 2 *Atk.* 650; 2 *Str.* 1246) the minister may choose one, and the parishioners another; or the parishioners alone may elect both, 1 *Vent.* 267. But where the custom of a parish does not take place, the election shall be according to the directions of the canons of the church: *Can.* 89, 90: which direct that all church-wardens or questmen in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another: and without such a joint or several choice, none shall take upon them to be church-wardens. *Gibf. Cod.* 241, 2: 1 *Str.* 145.

If the Parson or Vicar, who has, by custom, a right to choose *one* church-warden, be under sentence of *deprivation*, the right of choosing *both* reverts to the parishioners. *Canb.* 118.

The parson cannot intermeddle in the choice of that churchwarden which it is the right of the parishioners by custom to elect. 2 *Str.* 1045.—Under the word Parson a *Curate* is included. 2 *Str.* 1240.

In most of the parishes in *London*, the parishioners choose both church-wardens by custom; but in all parishes erected under *St 9 An. c. 22*, the canon shall take place; (unless the act, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both;) inasmuch as no custom can be pleaded in such new parishes. *Gibf.* 215. *Co. Lit.* 113: 1 *Ro. Abr.* 339: *Cro. Jac.* 532. 1 *Comm* 77.

In the election of church-wardens by the parishioners, the majority of those who meet at the *Vestry*, upon a written notice given for that purpose, shall bind the rest of the parish. *Lane* 21.

By custom also, the choice of church wardens may be in a *select vestry*, or a particular number of the parishioners, and not in the body of the parishioners at large. *Hard.* 370: 1 *Mod.* 181. See this Dict. title *Vestry*.

In some cases the lord of the manor precribeth for the appointment of church-wardens: and this shall not be tried in the Ecclesiastical Court, although it be a prescription of what appertains to a spiritual thing. *God.* 153: 2 *Inff.* 653.

The validity of the custom of choosing church-wardens is to be decided, like all other customs of the realm, by the courts of common law, and not by the spiritual Court. *Cro. Car.* 552: 6 *Mod* 89: 2 *Ld. Raym.* 1008. 3 *Salk.* 88: 1 *Bac. Ab.* 371.—So also the legitimacy of the votes given on the election is to be determined by the Common law. *Burr.* 1420.—But the Spiritual Court may become the means of trying the validity of the election by a return of 'not elected',—not duly elected, or any other return that answers the writ, and affords an opportunity of trying the right in an action for a false return. 1 *Ld.*

Raym. 138: *Str.* 610: 2 *Ld. Raym.* 1379, 1405: 2 *Salk.* 433: 5 *Mod.* 325: *Comp.* 413.

The parishioners are also sole judges of what description of persons they think proper to choose as church-wardens; the Spiritual Court therefore cannot in any case controul or examine into the propriety of the election. 1 *Salk.* 166: See also the authorities immediately preceding.—And the parishioners may, for misbehaviour, remove them. 13 *Co. 70: Com. Dig.* 3, tit. *Esglise* (F. 1).—An indictment also lies against them for corruption and extortion in their office. 1 *Sid.* 307.

The court of King's Bench will not grant a *mandamus* to the church-wardens, to call a vestry to elect their successors. *Str.* 686. *Sed vid. Str.* 51.—Nor will the Court grant a *quo warranto* to try the validity of an election to the office. 4 *Term Rep.* 382.

They are sworn into their offices by the Archdeacon or Ordinary of the diocese, and if he refuse, a *mandamus* shall issue to compel him. *Cro. Car.* 551: 5 *Com Dig.* tit. *Mandamus* (A.) and the authorities there cited, and without *fec.* 1 *Salk.* 330. But the oath must be general, 'to execute their duty truly and faithfully'—*Hard.* 364: and under *Stats.* 4 *Jac.* 1. c. 5: 1 *Jac.* 1. c. 9: & 21 *Jac.* 1. c. 7, to execute the laws against drunkenness. See *post* III. 2.

If a church-warden properly appointed, refuse to take the oath, he may be excommunicated. *Gibf. Cod.* 961: 1 *Mod.* 194. and he must not execute the office till he is sworn. *Gibf.* 243: *Shaw. P. L.* 70.

2. All *peers* of the realm, by reason of their dignity, are exempted from the office. *Gibf.* 215. So are all *clergymen*, by reason of their order. 6 *Mod.* 140: 2 *Str.* 1107: 1 *Ld. Raym.* 265.—*Members of Parliament* by reason of their privilege. *Gibf. Cod.* 215 —*Practising Barristers*—and such only, as it seems.—*Attornies. Com. Dig.* tit. *Attorney* (B. 16.) *Clerks in Court.* 1 *Ro. Rep.* 368, but see *Mar.* 30 —*Physicians, Surgeons, Apothecaries, Aldermen, Dissenters, Dissenting Teachers, Prosecutors of Felons, Militia-men.*—See tit. *Constable*, II. 2.

No person living out of the parish, although he occupies lands within the parish, may be chosen church-warden; because he cannot take notice of absences from church, nor disorders in it, for the due presenting of them. *Gibf.* 215.

II. *Church-Wardens* are a corporation by custom, to sue and be sued for the goods of the church; and they may purchase goods, but not lands, except it be in *London*, by custom *Jones* 439: *Cro. Car.* 532, 552: 4 *Vin.* 525. n: 1 *Ld. Raym.* 337. *Co. Lit.* 3.

In the city of *London*, by special custom, the church-wardens, with the minister, make a corporation for lands as well as goods; and may as such, hold, purchase and take lands for the use of the church, &c. And there is also a custom in *London*, that the minister is there excused from repairing the chancel of the church. 2 *Cro.* 325. *Co. Lit.* 3: 1 *Rel. Ab.* 330. Churchwardens may have appeal of robbery for stealing the goods of the church. 1 *Rel. Ab.* 393: *Cro. Eliz.* 179.—And they may also purchase goods for the use of the parish. *Mar.* 22, 67: *Cro. Car.* 552: 3 *Bull.* 264: *Yelv.* 173 —They may also take money or things (by legacy, gift, &c.) for the benefit of the church 2 *P. Wms.* 125. And they may dispose of the goods of the church, with the consent of the parishioners. 1 *Ro. Ab.* 393: 1 *Vent.* 89: *Cro. Jac.* 234: 4 *Vin.* 526.

But

CHURCH-WARDENS III.

But the *churchwardens* (except in *London*) have no right to, or interest in the freehold and inheritance of the church, which alone belongs to the parson or incumbent. *Comp. Incumb.* 381: 1 *Bac. Abr.* 372: 1 *Vent.* 127: 4 *Vin.* 527.

They may bring an appeal of robbery for goods of the church feloniously stolen—*T. B.* vol. 11. p. 27.—and ejectment for land leased to them for years. *Runnington's Ejectments* 59: 3 *Com. Dig. Esgliffe* (F. 3)

If they waste the goods of the church, the new *churchwardens* may have actions against them, or call them to account; though the parishioners cannot have an action against them for wasting the church goods, for they must make new *churchwardens*, who must prosecute the former, *Esc.* 1 *Dan v. Abr.* 788: 2 *Cro.* 145: *Bio. Account* 1.

They have a certain *special* property in the organ, bells, parish-books, bible, chalice, surplice, &c. belonging to the church; of which they have the *custody* on behalf of the parish, whose property they really are; for the taking away, or for any damage done any of these, the churchwardens may bring an action at law, and therefore the parson cannot sue for them in the Spiritual Court. 1 *Bac. Abr.* 372: 1 *Ro. Rep.* 255.—See *Cro. Eliz.* 179: 1 *Vent.* 89: 7 *Mod.* 116.

But they have not, *virtute officii*, the custody of the title deeds of the advowson, though they are kept in a chest in the church. 4 *Term Rep.* 351.

III. 1. Church-wardens have power and authority throughout the parish, though it extends into different hundreds and counties; being, though temporal officers, employed in ecclesiastical affairs, and must therefore follow the ecclesiastical division of the kingdom. *Shaw. P. L.* 86.

They have, with the consent of the minister, the placing the parishioners in the seats of the body of the church, appointing gallery-keepers, &c. reserving to the Ordinary a power to correct the same: and in *London*, the *churchwardens* have this authority in themselves.

Particular persons may *prescribe* to have a *seat*, as belonging to them by reason of their estates, as being an ancient messuage, &c. and the seats having been constantly repaired by them: also one may *prescribe* to any *use* in the church, to *sit*, and to *bury* there, *always repairing the same.* 3 *Inst.* 202: *Cro. Jac.* 366. If the Ordinary displaces a person claiming a seat in a church by prescription, a prohibition shall be granted, *Esc.* 12 *Rep.* 106. The parson impropriate has a right to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy's Rep.*

Besides their ordinary power, the *churchwardens* have the care of the benefice during its vacancy: and as soon as there is any avoidance, they are to apply to the Chancellor of the diocese for a sequestration; which being granted, they are to manage all the profits and expences of the benefice for him that succeeds, plough and sow his glebes, gather in tithes, thrash out and sell corn, repair houses, &c. and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. 2 *Inst.* 489: *Shaw. P. L.* 99: *Stat.* 13 & 14 *Car.* 2. c. 12.

The *churchwardens* have not originally power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, to a *vestry*,

who are to meet for that purpose; and, when they are assembled, a rate made by the majority present shall bind the whole parish, although the *churchwardens* voted against it. *Comp. Incumb.* 389: 1 *Vent.* 367: 1 *Bac. Abr.* 373: 3 *Term Rep.* 592.

But if the *churchwardens* give the parishioners due notice, that they intend to meet for the purpose of making a rate to repair the church, and the parishioners refuse to come, or being assembled, refuse to make any rate, they may make one without their concurrence; for they are liable to be punished in the ecclesiastical courts for not repairing the church, *Degge* 172: 1 *Vent.* 367: 1 *Mod.* 79, 194, 237:—See further on this subject, title *Vestry*.

A taxation by a pound-rate is the most equitable way, which if refused to be paid, should be proceeded for in the Ecclesiastical Court; and *Quakers* are subject to such church rate, recoverable as their tithes, *Wood's Inst.* b. 1. c. 7: *Gibb.* 219: *Degge* 171.

2. Their Duty is extensive and various; the heads of it are therefore here ranged alphabetically.

Apprentices.—See this Dict. tit. *Apprentices, Chimney-Sweepers.*

Bastards.—The church-wardens, are bound to provide for such for whose sustenance the parish have made no provision; and this without an order of justices. *Hays v. Bryant, Trin.* 29 *Geo.* 3. in *C. P.*

Belfry.—Church-wardens ought to keep the keys of, and take care the bells are not rung without proper cause. *Can.* 88.

Briefs.—Church-wardens are by *Stat.* 4 *An.* c. 14, to collect the charity-money upon *briefs*; which are letters-patent issuing out of Chancery, to re-build churches, restore loss by fire, &c. which are to be read in churches; and the sums collected, &c. to be indorsed on the briefs in words at length, and signed by the minister and *churchwardens*; after which they shall be delivered, with the money collected to the persons undertaking them, in a certain time, under the penalty of 20*l.* A register is to be kept of all money collected, &c. Also the undertakers in two months after the receipts of the money, and notice to sufferers, are to account before a Master in Chancery, appointed by the Lord Chancellor.

Burial.—The consent of the church-wardens must be had for burying a person in a different parish from that in which he dies.—It is their duty not to suffer suicides, or excommunicated persons to be buried in the church or church-yard, without licence from the bishop.—By *Stat.* 30 *Car.* 2. c. 3, they are to apply to the magistrates to convict offenders for not burying in woollen.—See also *post, Register.*

Butter and Cheese.—The penalties under *Stat.* 13 & 14 *Car.* 2. c. 26, for reforming abuses in, are payable to the church-wardens of the parish where the offence committed.

Chimney-Sweepers. See that title in this Dict.

Church.—Church-wardens or quest-men are to take care it be well aired, the windows glazed, the floors well paved, &c. If church-wardens erect or add a new gallery, &c. they must have the consent of the parishioners, and a licence of the Ordinary, but not for occasional repairs. 2 *Inst.* 489: 1 *Mod.* 273. See ante III. 1. They must also take care to have in the church a large bible, a book of common prayer, a book of homilies, a font of stone, a decent communion table; with bread and wine for the communion, a table-cloth, carpet, and flagon, plate,

CHURCH-WARDENS IV.

plate, and bowl of silver, gold or pewter. *Can. 20: Y. B. 8 H. 5. p. 4.: Doct. & Stud. 118: Deg. 151.*—Church-wardens also are to sign certificates of persons taking the sacrament, to qualify for offices. They are to see that the ten commandments are set up at the East end of the church, and other chosen sentences upon the walls, with a reading-desk and a pulpit, and a chest for alms, all at the charge of the parish. It is also the duty of church-wardens to prevent any irreverence or indecency from being committed in the church; and therefore they may pull off a person's hat in the church, or even turn him out if he attempts to disturb the congregation. The church being under the care of the church wardens, they may refuse to open it at the instance of any person, except the *parson*, or any one acting under him. *1 Sand. 13: 1 Lev. 196. 1 Sid. 301: 3 Salk. 37: 12 Mod. 433: Can. 85*—They are not to suffer any stranger to preach, unless he appears qualified, by producing a licence—and such preacher is to register his name, and the day when he preached, in a book. *Can. 50, 52.* The pulpit is exclusively the right of the parson of the parish, and the church wardens are punishable if they shut the door against him; and his consent is necessary to a stranger's preaching. *3 Salk. 87: 12 Mod. 433.* See further this Dictionary title *Church*.

Church yards—By the canons of the church it is ordained that the church wardens, or quest-men, shall take care that the church-yards be well and sufficiently repaired, sound, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges, unto whom the same, by law, appertaineth; they are also to see that the church be well kept and repaired: and by a constitution of *Archbishop Winchelsea*, this charge is to be at the expence of the parishioners. *2 Inst. 489* (But one who has land adjoining to the church-yard may by custom be bound to keep the fences in repair)—*Church-wardens* shall suffer no plays, feasts, banquets, suppers, church ales, drinkings, temporal courts or leets, lay-juries, musters, or any profane usage to be kept in the church or church yard.—Nor shall they suffer any idle persons to abide either in the church-yard or the church-porch during the time of divine service or preaching, but shall cause them to come in or to depart—So also, by the common law, church-wardens may justify the removal of tumultuous persons from the church-yard to prevent them from disturbing the congregation whilst the minister is performing the rites of burial. *1 Mod. 168*, and by the canon law may prevent an excommunicated person from even entering into the church-yard at any time or on any pretence.

Conventicles—*Church-wardens* are to levy the penalties by warrant of a justice, under *Stat. 22 Car. 2. c. 1.*

Corn—See *Stat. 22 Car. 2. c. 8.*

County Rate—See *Stat. 12 Geo. 2. c. 29.*

Drunkenness—*Church-wardens* are to receive the penalties under *Stat. 4 Geo. 1. c. 5. 21 Geo. 2. c. 7. and 1 Jac. 1. c. 9.* See this Dict. title *Constable*.

Fest days—See *Stat. 5 Eliz. c. 5.*

Fine—See this Dict. title *Fine*.

Game—*Church wardens* are to receive the penalties under *Stat. 1 Jac. 1. c. 27.*

Greenwich Hospital—*Church wardens* are to sign certificates of out-pensioners under *Stat. 3 Geo. 3. c. 16.*

Hawkers and Pedlars—*Church-wardens* are to apprehend; and receive the penalties under *Stat. 9 & 10 W. 3. c. 27: and 9 Geo. 2. c. 23.*

Militia—See the *Militia-Act* 26 Geo. 3. c. 107.

Non-conformists—*Churchwardens* to levy the penalty of 12*d.* on persons not coming to church each Sunday, under *Stat. 1 Eliz. c. 2.*

Parson—*Church wardens* are to observe whether he reads the thirty-nine articles twice a year, and the canons once in the year, preaches every Sunday good doctrine, reads the Common Prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, marries according to law, &c.

Parishioners; *Church-wardens* to see if they come to church, and duly attend the worship of God; if baptism be neglected; women not church'd; persons marrying in prohibited degrees, or without banns or licence; alma-houses or schools abused; legacies given to pious uses; &c. *Can. 117: Cro. Car. 291: 1 Vent. 114.*

Poor—*Church-wardens* are to act in conjunction with the overseers; every church-warden being an overseer, but not *à contrà*—See this Dict. title *Overseer, Poor*.

Presentments—*Church-wardens*, by their oaths, are to present, or certify to the bishop or his officers, all things presentable by the ecclesiastical law, which relate to the church, to the minister, and to the parishioners. The articles which are delivered to church-wardens for their guidance in this respect, are, for the most part, founded on the book of canons, and on rubrics of the common prayer. They are also bound by the *4 Jac. 1. c. 5.* to present tippling or drunkenness, and by *3 Jac. 1. c. 4.* recusants. They need not take a fresh oath upon each presentment they make, nor are they obliged to make presentments oftener than once a year; but they may do it as often as they please, except there is a custom in the parish to the contrary; and, upon default or neglect in the church wardens, the minister may present; but such presentment ought to be upon oath. *Can. 117: Cro. Car. 285, 291. 1 Vent. 86, 114. and see 1 Vent. 127: 1 Saund. 13. 1 Sid. 463.*

Rates—See ante III. 1.

Recusants—See *Presentments, Non-conformists*.

Registers—*Church wardens* shall provide a box wherein to keep the parish register, with three locks and three keys; two of the keys to be kept by them, and one by the minister: and every Sunday they shall see that the minister enter therein all the christenings, weddings, and burials that have happened the week before; and at the bottom of every page, they shall, with the minister, subscribe their names: and they shall, within a month after the twenty-fifth day of March, yearly, transmit to the bishop a copy thereof for the year before, subscribed as above. By *Stat. 23 Geo. 3. c. 67*, upon the entry of any burial, marriage, birth, or christening in the register of any parish, precinct, or place, a stamp duty of 3*d.* shall be paid; and therefore the church-wardens and overseers, or one of them, are directed to provide a book for this purpose, with proper stamps for each entry, and to pay for the same, and for the stamps contained therein, out of the rates under their management; and to receive back the monies which shall be so paid from the persons authorized to demand and receive the said duties.

Sunday—*Church-wardens* to levy penalties for profaning; under *Stats. 1 Car. 1. c. 1. and 29 Car. 2. c. 7.*

IV At the end of the year the *Church-wardens* are to yield just accounts to the minister and parishioners, and deliver

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deliver what remains in their hands to the parishioners, or to new *church-wardens*: in case they refuse, they may be presented at the next visitation, or the new officers may by process call them to account before the Ordinary, or sue them by writ of account at Common law. *Shaw. P. L.* 76: 12 *Mol.* 9: 1 *Buc. Abr.* 375: *Bio. Account* 71. But in laying out their money, they are punishable for fraud only, not indiscretion. *Gibb.* 196: 1 *Burn's Just.* 349: *Shaw. P. L.* 76. If their receipts fall short of their disbursements, the succeeding *church-wardens* may pay them the balance, and place it to their account. 1 *Roll. Abr.* 121: *Can.* 89, 109, &c. And the Court of Chancery on application will make an order for the purpose. 2 *Eq. Ab.* 303: *Pre. Ch.* 43, but see 4 *Vin.* (8vo) 529.

By the *Stat. 3 & 4 W. & M. cap. 11*, In all actions to be brought in the courts of *Westminster*, or at the assizes, for money mis-spent by *church-wardens*, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Church-wardens are comprehended within the purview of the *Stats. 7 Jac. 1. cap. 5*, and 21 *Jac. 1. cap. 12*, as to pleading the general issue to actions brought against them, and as to double costs when they have judgment.

But in an action on the case against a *church-warden* for a false and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. *Cro. Car.* 285, 467: 1 *Sid.* 463: 1 *Vent.* 86: 2 *Hazak. P. C.* 61: *Hardw.* 125.

The Spiritual Court can only order the *church-wardens'* accounts to be audited, but cannot make a rate to reimburse them, because they are not obliged to lay out money before they receive it. *Hardw.* 381: 2 *Str.* 974: *Cro. Car.* 285, 286.

But a custom that the church-wardens shall, before the end of their year, give notice to the parishioners to audit their accounts, and that a general rate shall be made, for the purpose of reimbursing them all money advanced, is good. 2 *Andr.* 32.

If there be a select committee or vestry elected by custom, and the church-wardens exhibit their accounts to such committee, who allow the same, this shall discharge them from being proceeded against in the Spiritual Court. 2 *Lutw.* 1027. So of allowance at a vestry in general. *Burb.* 247, 289: 1 *Vent.* 357: 1 *Sid.* 281: *Raim.* 4: 8: 2 *Barn. K. B.* 421: *Andr.* 11. And if the Spiritual Court take any step whatever after the accounts are delivered in, it is an excess of jurisdiction for which a prohibition will be granted, even after sentence. 3 *Term Rep.* 3.

Justices of peace have no jurisdiction over church-wardens with respect to their accounts as church-wardens. 1 *Keb.* 574: 4 *Vin.* (8vo) 532.

CHURCHESSET, or *churchset, churchset*.] A Saxon word used in *Domesday*, which is interpreted *quasi semina ecclesiae*, corn paid to the church. *Fleta* says, it signifies a certain measure of wheat, which in times past every man on St. Martin's day gave to holy church, as well in the times of the *Bishops* as of the *English*; yet many great persons, after coming of the *Roman*, gave that contribution according to the ancient law of *Moses*, in the name of *first fruits*; as in the writ of King *Cnutus* sent to the Pope

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is particularly contained, in which they call it *churchset*. *Selden's Hist. Tithe*, p. 216.

CHURCH-SCOT, Customary oblations paid to the parish-priest; from which duties the religious sometimes purchased an exemption for themselves and their tenants.

CHURLE, *ceorle, carl*. Was in the Saxon times a tenant at will, of free condition, who held some land of the *Thanes*, on condition of rents and services: which *ceorles* were of two sorts; one that hired the lord's tenementary estate, like our farmers; the other that tilled and manured the *demesnes*, (yielding work and not rent,) and were thereupon called his *sokmen* or *ploughmen*. *Spelm.*

CINQUE PORTS, *quinque portus*.] Those Havens that lie towards *France*, and therefore have been thought by our kings to be such as ought to be vigilantly guarded and preserved against invasion: in which respect they have an especial governor, called *Lord Warden of the Cinque Ports*, and divers privileges granted them, as a peculiar jurisdiction; their warden having not only the authority of an admiral amongst them, but sending out writs in his own name, &c. 4 *Inst.* 222.

Cambden says, that *Kent* is accounted the key of *England*; and that *William*, called *The Conqueror*, was the first that made a constable of *Dover Castle*, and warden of the *cinque ports*, which he did to bring that country under a stricter submission to his government; but King *John* was the first who granted the privileges to those ports, which they still enjoy: however, it was upon condition that they should provide a certain number of ships at their own charge for forty days, as often as the king should have occasion for them in the wars, he being then under a necessity of having a navy for passing into *Normandy*, to recover that dukedom which he had lost. And this service the *Barons of the Cinque Ports* acknowledged and performed, upon the king's summons, attended with their ships the time limited at their proper costs, and staying as long after as the king pleased at his own charge. *Sommer of Roman Ports in Kent*. See this *Dic. tit. Navy*.

The *Cinque Ports*, as we now account them are, *Dover, Sandwich, Romney, Winchelsea, and Rye*; and to these we may add *Hythe* and *Hastings*, which are reckoned as part or members of the *Cinque Ports*: though by the first institution it is said that *Winchelsea* and *Rye* were added as members, and that the others were the *Cinque Ports*: there are also several other towns adjoining that have the privileges of the ports. These *Cinque Ports* have certain franchises to hold pleas, &c. and the king's writs do not run there; but on a judgment in any of the king's courts, if the defendant hath no good, &c. except in the ports, the plaintiff may get the records certified into *Chancery*, and from thence sent by *mandamus* to the Lord Warden to make execution. 4 *Inst.* 231: 3 *Leon.* 3.

The constable of *Dover* castle is Lord Warden of the *Cinque Ports*. And there are several courts within the *Cinque Ports*; one before the constable, others within the ports themselves, before the mayors and jurats; another, which is called *curia quinque portuum apud Shepway*: there is likewise a court of *Chancery*, in the *Cinque Ports*, to decide matters of equity; but no original writs issue thence. 1 *Dawd. Abr.* 793. the jurisdiction of the *Cinque Ports* is general, extending to personal, real, and mix'd actions: and if any erroneous judgment is given in the *Cinque Ports* before any of the mayors and jurats,

error

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error lies according to the custom, by bill in nature of error, before the Lord Warden of the *Cinque Ports*, in his court of *Shipway*. And in these cases the mayor and jurors may be fined, and the mayor removed, &c. 4 *Inst.* 334: *Crompt. Jurisd.* 139.—and error lies from the court of *Shipway* to the court of K. B. *Jenk.* 71: 1 *Sid.* 356.

It has been observed that the *Cinque Ports* are not *jura regalia*, like counties palatine, but are parcel of the county of *Kent*: so that if a writ be brought against one for land within the *Cinque Ports*, and he appears and pleads to it, and judgment is given against him in the *Common Pleas*, this judgment shall bind him; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. *Wood's Inst.* 519.

The *Cinque Ports* cannot award process of outlawry. *Cro. Eliz.* 910. And a *quod minus* lies to the *Cinque Ports*. *ibid.* 911. If a man is imprisoned at *Dover* by the Lord Warden, an *habeas corpus* may be issued; for the privilege that the king's writ lies not there is intended between party and party, and there can be no such privilege against the king; and an *habeas corpus* is a prerogative writ, by which the king demands an account of the liberty of the subject. *Cro. Jac.* 543; 1 *Nelf. Abr.* 447.

Circuorari lies to the *Cinque Ports*, to remove indictments; and the jurisdiction that *brev. dom. regis non currit* is only in *civil causes* between party and party. 2 *Hawth.* P. C. c. 27. § 24.

CIRCA, A watch; from which *circulator*.

CIRCADA, A tribute anciently paid to the bishop or archdeacon for visiting the churches. *Du Fresne*.

CIRCEMOT, Vide *Churchgemot*.

CIRCUIITY OF ACTION, *circuitus actionis*.] A longer course of proceeding to recover a thing sued for than is needful: as if a person grant a rent-charge of 10 l. *per annum* out of his manor of B. and after the grantee disseiseth the grantor of the same manor, who brings an assize and recovers the land, and 20 l. damages, which being paid, the grantee brings his action for 10 l. of his rent due during the time of the disseisin, which he must have had if no disseisin had been: this is called *circuity of action* because as the grantor was to receive 20 l. damages, and pay 10 l. rent, he might have received but 10 l. only for damages, and the grantee might have kept the other 10 l. in his hands by way of retainer for his rent, and so saved his action, which appears to be needless. *Termes de Ley*. See title *Action*.

CIRCUITS, Certain divisions of the kingdom appointed for the Judges to go twice a year, for administering of justice, in the several counties. These circuits are made in the respective vacations, after *Hilary* and *Trinity* terms. See titles *Affise*, *Nisi Prius*.

The several counties of England are divided into six circuits, *viz.* 1. MIDLAND; containing the counties of *Northampton*, *Rutland*, *Lincoln*, *Nottingham*, *Derby*, *Leicester*, *Warwick*—2. NORFOLK; *Bucks.*, *Bedford*, *Huntingdon*, *Cambridge*, *Norfolk*, *Suffolk*—3. HOME; *Hertford*, *Essex*, *Kent*, *Sussex*, *Surry*—4. OXFORD; *Berks*, *Oxford*, *Hertford*, *Salop*, *Gloucester*, *Monmouth*, *Stafford*, *Worcester*—5. WESTERN; *Southampton*, *Wilts*, *Dorset*, *Cornwall*, *Devon*, *Somerset*—6. NORTHERN; *York*, *Durham*, *Northumberland*, *Cumberland*, *Westmorland*, *Lancashire*.

CIRCUMSPECTE AGA'IS, Is the title of a statute made anno 13 Ed. 1. *Stat.* 4, relating to prohibitions, prescribing certain cases to the judges, wherein the king's prohibition lies not. 2 *Inst.* 187. See title *Prohibition*.

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CITY.

CIRCUMSTANTIAL EVIDENCE. See title *Evidence*.

CIRCUMSTANTIBUS, By-standers; a word of art signifying the supplying or making up the number of jurors, if any impanelled appear not, or appearing are challenged by either party, by adding to them so many of those that are present, or *standing-by* (*talles de circumstantibus*) that are qualified as will serve the turn. See *Stat.* 35 H. 8. cap. 6. and *Stat.* 5. *Edw.* c. 25, for *Wales*. See also title *Jury*.

CITATION, *citatio*.] A summons to appear, applied particularly to process in the spiritual court. The ecclesiastical courts proceed according to the course of the civil and canon laws, by *citation*, *libet*, &c. A person is not generally to be cited to appear out of the diocese, or peculiar jurisdiction where he lives; unless it be by the archbishop, in default of the Ordinary; where the Ordinary is party to the suit, in cases of appeal, &c. and by law a defendant may be sued where he lives, though it is for subtracting tithes in another diocese, &c. 1 *Nelf.* 449. By the *Stat.* 23 Hen. 8. cap. 9, Every archbishop may cite any person dwelling in any bishop's diocese within his province for heresy, &c. if the bishop or other Ordinary consents; or if the bishop or Ordinary, or judge, do not do his duty in punishing the offence. Where persons are cited out of their diocese, and live out of the jurisdiction of the bishop, a *prohibition* or *consulation* may be granted: but where persons live in the diocese, if when they are cited they do not appear, they are to be excommunicated, &c. The above statute was made to maintain the jurisdiction of inferior dioceses; and if any person is cited out of the diocese, &c. where the civil or canon law doth not allow it, the party grieved shall have double damages. If one defame another within the peculiar of the archbishop, he may be punished there; although he dwell in any remote place out of the archbishop's peculiar. *Godb.* 190.—See title *Courts Ecclesiastical*.

CITY, *civitas*.] According to *Cowel* is a town corporate, which hath a bishop and cathedral church, which is called *civitas*, *oppidum*, and *urbs*; *civitas*, in regard it is governed by justice and order of magistracy; *oppidum*, for that it contains a great number of inhabitants; and *urbs*, because it is in due form begirt about with walls. But *Crompton*, in his *Juridictions*, where he reckons up the cities, leaveth out *Ely*, although it hath a bishop and cathedral church: and puts in *Westminster*, though it hath not at present a bishop: and Sir *Edward Coke* makes *Cambridge* a city; yet there is no mention that it was ever an episcopal see. Indeed it appears by the *Stat.* 35 H. 8. cap. 10, that there was a bishop of *Westminster*; see tit. *Bishops*; since which in *Stat.* 17 *Edw.* cap. 5, it is termed a city or borough: and notwithstanding what *Coke* observes of *Cambridge*, in the *Stat.* 11 H. 7. c. 4, *Cambridge* is called only a town.

Kingdoms have been said to contain as many cities as they have sees of archbishops and bishops: but according to *Blount*, *City* is a word which hath obtained since the Conquest; for in the time of the Saxons there were no cities, but all great towns were called *burghs*, and even *London* was then styled *London-Bourge*; as the capital of Scotland is now called *Edinburgh*. And long after the conquest the word *city* is used promiscuously with the word *burgh*, as in the charter of *Leicester* it is called both *civitas* and *burgus*; which shews that those writers were mistaken, that tell us every city was or is a bishop's see. And tho'

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CITY.

the word *city* signifies with us such a town corporate as hath usually a bishop and cathedral church; yet it is not always so.

A City, says *Blackstone*, is a town incorporated, which is or hath been the see of a bishop; and though the bishoprick be dissolved, as at *Westminster*, yet still it remaineth a city. 1 *Comm.* 114.

It appears, however, that *Westminster* retained the name of city, not because it had been a bishop's see, but because it was expressly created such, in the letters-patent by King H. VIII. erecting it into a bishoprick—See *Burnet's Reform. Ap. ix.* There was a similar clause in favour of the other five new created cities, *Chester, Peterborough, Oxford, Gloucester and Bristol*, the charter for *Christ* is in *Gib. Cod.* 1449; and that for *Oxford* in 14 *Rym. Fœd.* 754. Lord *Coke* seems anxious to rank *Cambridge* among the cities. Mr. *Woddeson* late Vinerian professor (see his lectures i. 302,) has produced a decisive authority that cities and bishops' sees had not originally any necessary connection with each other. It is that of *Ingulpbus*, who relates that at the great council assembled in 1072, to settle the claim of precedence between the two archbishops, it was decreed that bishops' sees should be transferred from towns to cities.

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect; it is certainly a strong confirmation of the above authority that the same distinction is not paid to bishops' sees in *Ireland*.

Mr. *Hargrave* in his notes to 1 *Inst.* 110. proves that although *Westminster* is a city and has sent citizens to parliament from the time of *Ed. VI.* it never was incorporated; and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the King could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation—1 *Comm. edit.* 1793. in n—See also title *Parliament, Bishops, Borough, &c.*

CITIZENS of London, See title *London*.

CIVIL LAW, Is defined to be that law which every particular nation, commonwealth or city, has established peculiarly for itself: *jus civile est, quod quisque populus sibi constituit.* *Just. Inst.* Now more properly distinguished by the name of *municipal law*: the term Civil Law being chiefly applied to that which the old *Romans* used, compiled from the Laws of Nature and of Nations. The *Roman* law was founded first, upon the regal constitutions of their ancient kings; next upon the twelve tables of the *Decemviri*; then upon the laws or statutes enacted by the Senate or People; the edicts of the *Prætor* and the *Responsa Prudentum*, or opinions of learned lawyers; and lastly, upon the imperial decrees or constitutions of successive Emperors.—These had by degrees grown to an enormous bulk; but the inconvenience arising therefrom was in part remedied, by the collections of three private lawyers, *Gregorius, Hermogenes* and *Papinian*; and afterwards by the Emperor *Theodosius* the younger, by whose orders a Code was compiled A. D. 438, being a methodical collection of all the imperial constitutions then in force: which *Theodosian Code* was the only book of civil law received as authentick in the Western part of Europe, 'till many centuries after—For *Justinian* commanded only in the Eastern remains of the Empire; and

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it was under his auspices that the present body of Civil laws was compiled and finished by *Trebonian*, about the year 533.

This consists of,—1. The *Institutes*; which contain the elements or first principles of the *Roman* Law in 4 books.—2. The *Digests* or *Pandects* in 50 books; containing the opinions and writings of eminent lawyers, digested in a systematical method.—3. A *New code* or collection of imperial constitutions in 12 books; the lapse of a century having rendered the former code of *Theodosius* imperfect.—4. The *Novels* or new constitutions posterior in time to the other books, and amounting to a supplement to the code containing new decrees of successive Emperors, as new questions happened to arise.—These form the body of the *Roman* law or *Corpus Juris Civilis*, as published about the time of *Justinian*; which however soon fell into neglect and oblivion till about the year 1130, when a copy of the *Digests* was found at *Amalfi* in *Italy*; which accident, concurring with the policy of the *Roman* ecclesiastics, suddenly gave a new vogue and authority to the Civil law, and introduced it into several nations. 1 *Comm.* 80, 81.

The *Digest* or *Pandects*, was collected from the works and commentaries of the ancient lawyers, some whereof lived before the coming of our Saviour: The whole Digest is divided into seven parts: the first part contains the elements of the law, as what is justice, right, &c. The second part treats of judges and judgments: The third part of personal action, &c. The fourth part of contracts, pawns and pledges: The fifth part of wills, testaments, &c. The sixth part of the possession of goods: The seventh part of obligations, crimes, punishments, &c. The *Institutes* contain a system of the whole body of law, and are an epitome of the Digest divided into four books; but sometimes they correct the Digest: they are called *Institutes*, because they are for instruction, and shew an easy way to the obtaining a knowledge of the *Civil law*: but they are not so distinct and comprehensive as they might be, nor so useful at this time as they were at first. The *Novels* or *Authenticks* were published at several times without any method: they are termed *Novels* as they are new laws, and *Authenticks*, being authentically translated from the *Greek* into the *Latin* tongue; and the whole volume is divided into nine Collations, Constitutions or sections; and they again into 168 Novels, which also are distributed into certain chapters: the first collation relates to heirs, executors, &c. The second, the state of the church: the third is against bawds: the fourth concerns marriages, &c. The fifth forbids the alienation of the possessions of the church: the sixth shews the legitimacy of children, &c. The seventh determines who shall be witnesses: the eighth ordains wills to be good, though imperfect, &c. And the ninth contains matter of succession in goods, &c. *Di. A.*

To those tomes of the *Civil law* we may add the *Book of Feuds*, which contains the customs and services that the subject or vassal oweth to his prince or lord, for such lands or fees as he holdeth of him. The *Constitutions of the Emperor*, were either by a *rescript*, which was the letter of the Emperor in answer to particular persons who enquired the law of him; or by *edict*, which the Emperor established of his own accord, that it might be generally observed by every subject; or by *decree*, which the Emperor pronounced between plaintiff and defendant, upon hearing

hearing a particular cause. The power of issuing forth rescripts, edicts and decrees, was given to the prince by the *lex regia*, wherein the people of Rome wholly submitted themselves to the government of one person, viz. Julius Cæsar, after the defeat of Pompey, &c. And by this submission the prince could not only make laws, but was esteemed above all coercive power of them. *Diſt.*

How far the Civil law is adopted and of force in this kingdom. See title *Canon Law*.

Before the Reformation, decrees were as frequent in the *Canon law* as in the *Civil law*—Many were graduates in *utroque jure* or *utriusque juris*.] U. D. or *juris utriusque doctor*, is still common in Foreign Universities. But Henry VIII, in the 27th year of his reign when he had renounced the authority of the Pope, issued a mandate to the University of Cambridge, to prohibit lectures and the granting degrees in Canon law in that University. *Stat. Acad. p. 137*.—It is probable that at the same time Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England. 1 *Comm.* 392. in n.

CIVIL LIST. See title *King*.

TO CLACK WOOL, Is to cut off the sheep's mark, which makes it weigh lighter; as to *force wool*, signifies to clip off the upper and hairy part thereof; and to *band* it, is to cut the head and neck from the rest of the fleece. *Stat. 8 H. 6. cap. 22*.

CLADES, *Clida, clea, cleia*, from the Brit. *clie*, and the Irish *clia*.] A wattle or hurdle; and a hurdle for penning or folding of sheep is still in some counties of England called a *clay*. *Parsch. Antiq. p. 575*.

CLARENDON, *Constitutions* of: certain constitutions, made in the reign of Hen. II. A. D. 1164, in a great council held at Clarendon, whereby the King checked the power of the Pope, and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction. 4 *Comm.* 422.

CLARETUM, A liquor made of wine and honey, clarified or made clear by decoction, &c. which the Germans, French, and English, called *bippocras*: and it was from this, the red wines of France were called *claret*.—Guald. *Camb. apud Wharton. Ang. Sax. Par. 2. p. 480*.

CLAIM, *clameum*.] A challenge of interest in any thing that is in the possession of another, or at least out of a man's own possession, as *claim* by charter, by descent, &c.

In *Plow. Com. 359 (a)*, Dyer C. J. is said to have defined *claim* to be, a challenge of the ownership or property that one hath not in possession, but which is detained from him by wrong.

CLAIM may be either verbal, where one doth by words *claim* and challenge the thing that is so out of his possession: or it is by an action brought, &c. and sometimes it relates to lands, and sometimes to goods and chattels. *Lit. Sect. 420*. Where any thing is wrongfully detained from a person, this *claim* is to be made; and the party making it, may thereby avoid descents of lands, disseisins, &c. and preserve his title, which otherwise would be in danger of being lost. *Co. Lit. 250*. A man who hath present right or title to enter, must make a *claim*; and in case of reversions, &c. one may make a *claim* where he hath right, but cannot enter on the lands: when a person dares not make an entry on land, for fear of being beaten or other injury, he may approach

as near as he can to the land, and *claim* the same; and that shall be sufficient to vest the seisin in him. 1 *Inst. 450*. See title *Entry*.

If nothing doth hinder a man, having a right to land, from entering or making his *claim*; there he must do so, before he shall be said to be in possession of it, or can grant it over to another: but where the party who hath right, is in possession already, and where an entry or *claim* cannot be made, it is otherwise. 1 *Rep. 157*. A *claim* will devert an estate out of another, when the party must enter into some part of the land; but if it be only to bring him into possession, he may do it in view. By *claim* of lands in most cases is intended a *claim* with an entry into part of the lands, or by a near approach to it. *Co. Lit. 252, 254*: *Poph. 67*. One in reversion after an estate for years, or after a statute-merchant, staple, or *elegit*, may enter and make a *claim* to prevent a descent, or avoid a collateral warranty. And *claim* of a remainder by force of a condition must be upon the land, or it will not be sufficient. *Co. Lit. 202*.

If a man seised of lands in right of his wife, make a feoffment in fee on condition, and the husband dieth, and then the condition is broken, and the heir enters; in this case the wife need not *claim* to get possession of her estate, for the law doth vest it in her without any *claim*. *Co. Lit. 202*: 8 *Rep. 43*.

The *claim* of the particular tenant, shall be good for him in reversion or remainder; and of him in reversion, &c. for particular tenant: so *claim* of a copyholder, will be good for the lord, &c. But if tenant for years, in a court of record *claim* the fee of his land, it is a forfeiture of his estate. *Plowd. 359*: *Co. Lit. 251*. A *claim* may be made by the party himself; and sometimes by his servants or deputy: and a guardian in socage, &c. may make a *claim*, or enter, in the name of the infant that hath right, without any commandment. *Co. Lit. 245*.

Claim or entry should be made as soon as may be; and by the Common law it is to be within a year and a day after the disseisin, &c. and if the party who hath unjustly gained the estate, do afterwards occupy the land, in some cases an assize, trespass or forcible entry may be had against him. *Lit. Sect. 426, 430*.

If a fine is levied of lands, strangers to it are to enter and make a *claim* within five years, or be barred: infants after their age, feme coverts after the death of their husbands, &c. have the like time, by *Stat. 1 R. 3. cap. 7*. See title *Fines*.

CONTINUAL CLAIM, is where a man hath right and title to enter into any lands or tenements, whereof another is seised in fee, or in fee tail; if he who hath title to enter makes *continual claim* to the lands or tenements before the dying seised of him, who holdeth the tenements, then though such tenant die thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. So, (*Si come*) in case a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although the disseisor dieth seised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent. *Litt. § 414*.

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But such claim must always be made within the year and the day before the death of the person holding the land; for if such tenant do not die seised within a year and a day, after such claim made, and yet he that hath right dares not enter, he must make another claim, within the year and the day after the first claim, and so *toties quoties*, that he may be sure his claim shall always have been made within a year and a day before the death of the tenant; and hence it seems it is called *Continual Claim*.—See further title *Entry*; as also title *Descent*.

By *Stat. 32 H. 8. c. 43*, Five years must elapse without entry or continual claim, in order that a descent on the disseisor's death should take away the entry of the disseisee, or his heir; but after the five years, the disseisee must make continual claim as before the statute. And by *Stat. 4 An. c. 16. § 16*, no claim (or entry) shall be of effect to avoid a fine, unless an action shall be commenced thereon within a year, and prosecuted with effect. See titles *Fine*, *Entry*, *Disseisin*, &c.—And for further particulars, See 1 *Inst.* 150. and *n.*

CLAIM OF LIBERTY, A suit or petition to the king in the court of *Exchequer*, to have liberties and franchises confirmed there by the king's Attorney General. *Co. Ent.* 93.

CLAMEA ADMITTENDA IN ITINERE PER ATTORNATUM. An ancient writ by which the king commanded the justices in eyre to admit a person's claim by attorney who was employed in the king's service, and could not come in his own person. *Reg. Orig.* 19.

CLAP-BOARD, Is a board cut in order to make casks or vessels; which shall contain three feet and two inches at least in length: and for every six ton of beer exported, the same cask, or as good, or 200 of *clap-boards* is to be imported. See title *Navigation Acts*.

CLARIGARIUS ARMORUM, An herald at arms. *Blount*.

CLARIO, A trumpet. *Knighton, anno 1346*.

CLASSIARIUS, A seaman, or soldier serving at sea. *Chart. Carol. 5. Imperator. Thomæ Comit. Surr. dat. in urbe Londoniensi, 8 Junii 1522*.

CLAUD, *Brit.*] A ditch: *Clauders*, to enclose, or turn open fields into inclosures. *Paroch. Antiq.* 236.

CLAVES INSULÆ, A term used in the *Ile of Man*, where all ambiguous and weighty cases are referred to twelve persons, whom they call *claves insule*, i. e. the keys of the island.

CLAVIA, In the inquisition of Serjeanties in the 12th and 13th years of King John. within the counties of *Essex* and *Hertford*; *Boydin Aylet tenet quatuor lib. terræ in Bradwell, per manum Willielmi de dono per serjeantiam clavie*, viz. By the serjeanty of the club or mace. *Brady's Append. Introduc. to Eng. Hist.* 22.

CLAVIGERATUS, A treasurer of a church. *Mon. Angl. tom. 1. p. 184*.

CLAUSE ROLLS, *rotuli clausi*.] Contain all such matters of record as were committed to close writs: these rolls are preserved in the *Tower*.

CLAUSURA, Brushwood for hedges and fences. *Paroch. Antiq.* 247.

CLAUSUM FREGIT, See titles *Captas*, *Common Pleas*.

CLAUSUM PASCHÆ, *Stat. Westm. 1. In crastino clausi Paschæ*, or *In crastino octavis Paschæ*, which is all one, that is the morrow of the *uras* (or eight days) of

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Easter. 2 Inst. 157. *Clausum Paschæ*, i. e. *Dominica in albis*; sic dictum, quod Pascha claudat. *Blount*.—The end of *Easter*.—the Sunday after *Easter-Day*.

CLAUSURA HEYÆ, The enclosure of a hedge. *Rot. Plac. in itinere apud Cestriam, ann. 14 H. 7*.

CLAWA, A close, or small measure of land. *Mon. Angl. tom. 2. pag. 250*.

CLEPTOR, A rogue or thief. *Hoveden anno 946*.

CLERGY.

Clerus.] Signifies the assembly or body of clerks or ecclesiasticks, being taken for the whole number of those who are *de clero Domini*, of our Lord's lot or share, as the tribe of *Levi* was in *Judæa*, and are separate from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the Christian religion.

The *Clergy* in general, were heretofore divided into *regular* and *secular*: those being *regular* which lived under certain rules, being of some religious order, and were called men of religion, or *The Religious*, such as all Abbots, Priors, Monks, &c. The *secular* were those that lived not under any certain rules of the religious orders; as Bishops, Deans, Parsons, &c.—Now, the word *Clergy* comprehends all persons in *boly orders*, and in ecclesiastical offices, viz. *Archbishops, Bishops, Deans and Chapters, Archdeacons, Rural Deans, Parsons*, (who are either *Rectors*, or *Vicars*) and *Curates*,—to which may be added *Parish Clerks*, who formerly frequently were, and yet sometimes are, in orders.—As to the law more peculiarly respecting each of these, See the several titles, particularly title *Parson*.

This venerable body of men have several privileges allowed them by our municipal laws, and had formerly much greater, which were abridged at the time of the reformation, on account of the ill use which the Popish clergy had endeavoured to make of them: for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. The personal exemptions however for the most part continue, a clergyman cannot be compelled to serve on a jury, nor to appear at a *Court Lect*, or view of frankpledge, which almost every other person is obliged to do. 2 *Inst.* 4. (See title *Court Lect*). But if a layman is summoned on a jury, and before the trial takes orders, he shall, notwithstanding, appear and be sworn. 4 *Leon.* 190. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function. *Finch. L.* 88. During his attendance on divine service he is privileged from arrests in civil suits; for a reasonable time, *cundo, redeundo & morando*, to perform service. *Stats. 50 E. 3. c. 5. 1 R. 2. c. 16. 12 Co. 100*.—In cases of felony he shall have benefit of his clergy, without being branded; and may likewise have it more than once. See post, *Clergy, benefit of*.—Clergymen also have certain disabilities, it is doubted how far they are capable of sitting as members of the House of Commons. See post, title *Parliament*.—By *Stat. 21 H. 8. c. 13*, the Clergy are not (in general) allowed to take any lands or teneaments to farm, on pain of 10*l.* per month, and total avoidance of the lease; unless where they have not sufficient glebe, and the land is taken for the necessary expenses of their household. *Stat. § 8*.—Nor, on like penalty

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malty to keep any tail-house, or brew-house.—Nor may they engage in any trade, or sell merchandize, on forfeiture of treble value. But see title *Bankrupt*.

By the statute called *Articuli Cleri*, 9 E. 2. c. 3. If any person lay violent hands on a clerk, the amends for the peace broken (1) shall be before the king (that is by indictment,) and the assailant may (2) also be sued before the bishop, that excommunication or bodily penance may be imposed; which if the offender will redeem by money, it may (3) be sued for before the bishop. See 4 *Comm.* 217.

Although the *Clergy* claimed an exemption from all secular jurisdiction, yet *Mat. Paris* tells us, that soon after *William the First* had conquered *Harold*, he subjected the bishopricks and abbeyes who held *per baroniam*, that they should be no longer free from military service; and for that purpose he in an arbitrary manner registered how many soldiers every bishoprick and abbey should provide, and send to him and his successors in time of war; and having placed these registers of ecclesiastical servitude in his treasury, those who were aggrieved, departed out of the realm: but the *clergy* were not, till then, exempted from all secular service; because by the laws of King *Edgar* they were bound to obey the secular magistrate in three cases, *viz.* Upon any expedition to the wars, and to contribute to the building and repairing of bridges, and of castles for the defence of the kingdom. It is probable that by expedition to the wars, it was not at that time intended they should personally serve, but contribute towards the charge: one they must do, as appears by the petition to the king, anno 1267. *viz.* *Ut omnes clerici tenentes per baroniam vel feudum laicum, personaliter armati procederent contra regis adversarios, vel tantum ser. itum in expeditione regis invenirent, quantum pertineret ad tantam terram vel tenementum.* But their answer was, that they ought not to fight with the military bat with the spiritual sword, that is with prayers and tears; that they were to maintain peace and not war, and that their baronies were founded on charity; for which reason they ought not to perform any military service. *Blount.*

That the *Clergy* had greater privileges and exemptions at common law than the *laity* is certain; for they are confirmed to them by *Magna Charta*, and other ancient statutes; but these privileges are in a great measure lost, the *clergy* being included under general words in later statutes; so that *clergymen* are liable to all public charges imposed by act of parliament, where they are not particularly excepted as above stated. Their bodies are not to be taken upon statutes-merchant or staple, &c. for the writ to take the body of the consor is *si laicus sit*; and if the sheriff or any other officer arrest a *clergyman* upon any such process, it is said an action of false imprisonment lies against him that does it, or the *clergyman* arrested may have a *superfedeas* out of *Chancery*. 2 *Inst.* 4.

In action of trespass, account, &c. against a person in holy orders, wherein process of *caus* lies, if the sheriff return that the defendant is *clericus beneficiatus nullam habens laicam feudum ubi summoneri potest*; in this case the plaintiff cannot have a *caus* to arrest his body; but the writ ought to issue to the bishop, to compel him to appear, &c. But on execution had against such *clergymen*, a sequestration shall be had of the profits of his benefice. 2 *Inst.* 4: *Dege* 157.

The foregoing are all the privileges remaining on civil accounts: though by the common law, they were to be free from the payment of tolls, in all fairs, and markets, as well for all the goods gotten upon their church livings, as for all goods and merchandises by them bought to be spent upon their rectories; and they had several other exemptions, &c.

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This being, as *Blackstone* observes, a title of no small curiosity as well as use; the learned commentator's chapter on that subject, (4 *Comm.* 365,) is here abridged; with such additions thereto as seemed requisite; in which enquiry is made,

- I. Into its Original; and various Changes.
- II. To whom it is now to be allowed.
- III. In what Cases.
- IV. The Consequences of allowing it.

I. *CLERGY*, the *privilegium clericale*, or in common speech *The Benefit of Clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the Popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the Church were principally of two kinds: 1. Exemption of places, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the persons of clergymen from criminal process before the secular judge, in a few particular cases; which was the true original and meaning of the *privilegium clericale*.

In *England* however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy: *Keilw.* 180: See *Stat. Westm.* 1. 3 E. 1. c. 2: and therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was not universally allowed. And in those particular cases, the use was for the bishop or Ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty; (2 *Hal. P. C.* 377;) till at length it was finally settled, in the reign of *Henry VI.* that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinatory plea; or, after conviction, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession, or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitus et consuetudinem clericalem*. 2 *Hal. P. C.* 372: *M. Paris.* A. D. 1259. But in process of time, a much wider and more comprehensive criterion was established: every one that could read, (a mark of great learning in those days of ignorance and superstition,) being accounted a clerk, or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, be-

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gan to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by *Stat. 4 Hen. 7. c. 13*, a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the *Stat. directs*, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the *Stats. 28 Hen. 8. c. 1*, and *32 Hen. 8. c. 3*; but it is held, (*Hob. 294*; *2 Hal. P. C. 375*.) to have been virtually restored by *st. 1 Edw. 6. c. 12*: a high statute also enacts that Lords of Parliament, and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand) for all offences then clergyable to commoners; and also for the crimes of house breaking, highway-robbery, horse-stealing, and robbing of churches.

After this burning, the laity, and before it, the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the Ordinary, to be dealt with, according to the ecclesiastical canons. Whereupon the Ordinary proceeded to make a purgation of the offender by a new canonical trial, by the oath of the offender and that of twelve compurgators, although he had been previously convicted by his country, or perhaps by his own confession. *Staunf. P. C. 138 b*. See also *3 P. Wms. 447*; *Hob. 289, 291*.

But this purgation opening a door to a scandalous profligation of oaths, and other abuses, It was enacted by *Stat. 18 Eliz. c. 7*, that for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the Ordinary as formerly; but, upon such allowance, and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century, unaltered; except only that the *Stat. 21 Jac. 1. c. 6*, allowed, that women convicted of *simple larcenies*, under the value of 10*s*. should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, whipped, put in the stocks, or imprisoned for any time not exceeding a year. And a similar indulgence by *Stats. 3 & 4 W. & M. c. 9*: *4 & 5 W. & M. c. 24*, was extended to women guilty of any *clergyable felony* whatsoever; who were allowed to claim the benefit of the statute once, in like manner as Men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning

in the hand was changed by *Stat. 10 & 11 W. 3. c. 23*, into burning in the left cheek, near the nose; but this provision was repealed by *Stat. 5 Ann. c. 6*; and till that period, all women, all peers of parliament, and peeresses, and all male commoners who could read were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female upon branding; and peers and peeresses without branding; for the first offence; yet all liable (except peers and peeresses,) at the discretion of the judge, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

But by the said *Stat. 5 Ann. c. 6*, it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read. And it was further enacted by the same statute, that when any person is convicted of any *theft or larceny*, and burnt in the hand for the same, according to the ancient law, he shall also at the discretion of the judge, be committed to the house of correction, or public work-house, to be there kept to hard labour for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And by *Stats. 4 Geo. 1. c. 11*: *6 Geo. 1. c. 23*, when any persons shall be convicted of any *larceny* either *grand* or *petit*, or any felonious stealing or taking of money or goods, either from the person, or the house of another, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to burning in the hand, or whipping, the court may instead thereof, direct such offenders to be transported; and by the *Stat. 19 Geo. 3. c. 74*, offenders liable to transportation, may in lieu thereof be employed, if males, (except in the case of petty larceny) in hard labour, for the benefit of some publick navigation, and in all cases might be confined to hard labour in certain penitentiary houses, then in contemplation to be erected; but this latter plan of the penitentiary houses was never carried into execution. See further titles *Felons, Transportation. 2 Hawk. P. C. c. 58. § 10*.

By the same *Stat. 19 Geo. 3. c. 74*, instead of burning in the hand, the Court in all clergyable felonies may impose a pecuniary fine, or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; and in the latter case, certain provisions are added to prevent collusion or abuse. The offender so fined or whipped, to be equally liable to subsequent detainer or imprisonment.

II. 1. ALL Clerks in orders, are without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege, or benefit of clergy, and immediately discharged; and this as often as they offend. *2 Hal. P. C. 375*.

2. All Lords of Parliament, and peers of the realm, having place and voice in parliament, by *Stat. 1 E. 6. c. 12*; (which is likewise held to extend to peeresses; *Duchess of Kingston's case, 11 State Tr. 198*;) shall be discharged in all clergyable, and other felonies, provided for by the act, without any burning in the hand, or

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or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convicted; but this only for the first offence.

3. All the *Commons* of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies, within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering the discretionary imprisonment before stated; or in case of larceny, upon being transported for seven years, if the court shall think proper.

It is a privilege peculiar only to the *Clergy*, that sentence of death can never be passed upon them for any number of *man slaughters*, *bigamies*, *simple larcenies*, or other *clergyable* offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death, upon a second conviction of a *clergyable* offence. Thus if a layman has once been convicted of manslaughter, upon production of the conviction, he may afterwards suffer death for bigamy, or any other *clergyable* felony; which would not therefore be a capital crime to another person not so circumstanced. See *post* as to the *Counter-plea*.

It has been said that *Jews*, and other infidels and heretics, were not capable of the benefit of clergy, till after the *Stat. 5 An. c. 6*; as being under a legal incapacity for orders. 2 *Hal. P. C.* 373; 2 *Harw. P. C. c.* 33. § 5: *Fost* 306. But it does not seem that this was ever ruled for law, since the re-introduction of the *Jews* into England, in the time of the usurpation by *Cromwell*. For if that were the case, the *Jews* are still in the same predicament; which every day's experience contradicts: the *Stat of An.* having made no alteration in this respect, it only dispensing with the necessity of reading. 4 *Comm.* 373.

But a person having once had benefit of clergy, shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof, according to the following statutes. 2 *H. H.* 373.

By *Stat. 34 & 35 H. 8. cap. 14*. The Clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the King's Bench in forty days: and the clerk of the crown, when the judges of assize, or justices of the peace write to him for the names of such persons, shall certify the same, with the causes of the conviction or attainder.

Another method is given by the *Stat. 3 W. & M. c. 9. s. 7*; which enacts, that the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to clergy under that act shall be convicted, shall at the request of the prosecutor, or any other on the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of *clergy*, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence.

Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of *clergy*. 2 *H. H.* 373.

Against the defendant's prayer of clergy, the prosecutor may file a COUNTER-PLEA; alledging some fact,

which in law deprives the defendant of the privilege he claims.

It is a good *counter-plea* to the prayer of clergy, that the offender is not entitled to the benefit of the statute, because he was before convicted of an offence, and thereupon prayed the benefit of the statute, which was allowed to him; alledging the truth of the fact and praying the judgment of the court, that he may die according to law; which fact is to be tried by the record in pursuance of the *Stat. 34 & 35 H. 8. c. 14*, above stated. *Staunf.* 135.—Divers other *counter-pleas* also, by which an offender may be deprived of clergy, may be framed from a consideration of the persons to whom it is allowed or denied by the common law; and of the circumstances under which that allowance or denial of it has been placed by divers statutes. *Ib.* 138.

The use of this *counter-plea* however, had long become obsolete, and out of practice; no traces of it appearing in any of the books since *Staunford's* time; who was Chief Justice of *K. B.* temp. *Eliz.* But the daring practices of some money-coiners occasioned its revival; and in the case of *R. v. Marston Rabbitt*, and *Mary Child*, convicted for coining at the Old Bailey, in September sessions 1783, before *Alburtis J.* a *counter-plea* of record was filed on the part of the prosecution; alledging that the convicts had been before allowed the benefit of the statute, &c. And they were thereby ousted of their clergy. *Leach's Harw. P. C. ii. c. 33. § 19. n.*

III. Privilege of *Clergy* was not indulged at common law, either in high treason, or in petit larceny, nor in any mere misdemeanors; and therefore it may be laid down for a rule, that it was only allowable in petit treasons, and capital felonies: which for the most part became legally entitled to this indulgence by the *Stat. de Clero*, 25 *E. 3. st. 3. c. 4*, which provides, "that clerks convicted for treasons or felonies, touching other persons, than the king himself, shall have the privilege of Holy Church." But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *infidatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country; (2 *Hal. P. C.* 333; but in these two cases it was expressly remedied by *Stat. 4 H. 4. c. 2*, as to clerks only;) and *combustio domorum*, or arson, the burning of houses. 1 *Hal. P. C.* 346: all which are a kind of hostile acts, and in some degree border on treason. And further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament.

All the statutes for excluding clergy, are in fact nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that was exerted before the *privilegium clericale* was at all indulged; and so tender is the law of inflicting capital punishment, in the first instance, for any inferior felony, that notwithstanding, by the *marine law*, as declared in *Stat. 28 H. 8. c. 15*, benefit of clergy is not allowed in any case whatever; yet when offences are committed within the Admiralty jurisdiction, which would be *clergyable* if committed by land, the constant course is to acquit and discharge the prisoner. *Moor* 756: *Fost* 288.

As there is no necessity that the Ordinary should demand the benefit of the clergy for a clerk; so neither is there

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there any that the prisoner himself should demand it, where it sufficiently appears to the court that he hath a right to it, in respect of his being in orders, &c. In which case, if the prisoner does not demand it, it is left to the discretion of the judge, either to allow, or not allow it him. 2 Hawk. P. C. c. 33. § 112.

Clergy may be demanded after judgment given against a person, whether of death, &c. and even under the gallows, if there be a proper judge there, who has power to allow it. 2 Hawk. P. C. c. 33. § 111.

To conclude this head of inquiry, it may be observed.—
1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament. 2 Hal. P. C. 330.—
2. That where clergy is taken away from the principal, it is not of course taken away from the accessory; unless he be also particularly included in the words of the statute. 2 Hawk. P. C. c. 33. § 26. And where clergy is taken away expressly by any statute, the offence must be laid in the indictment to be against that very statute, and the words of it, or the offender shall have his clergy. Kel. 104 H. P. C. 231.—
3. That when the benefit of clergy is taken away from the offence (as in case of murder, robbery, rape, &c.) a principal in the second degree, being present aiding and abetting the crime, is excluded from his clergy equally with him that is principal in the first degree: but.—
4. That where it is only taken away from the person committing the offence, (as in the case of stabbing, or larceny in a dwelling house, or privately stealing from the person,) his aiders and abettors are not excluded; as such statutes are to be taken literally. 1 Hal. P. C. 529: Foster 356, 7.

IV. The consequences are such as affect the present interest and future credit and capacity of the party, as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

1. By this conviction, the offender forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender. 2 Hal. P. C. 388.—
2. After conviction, and till he receives the judgment of the law by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon. 3 P. Wms. 487.—
3. After burning, or its substitute, or pardon, he is discharged for ever of that, and all other clergyable felonies before committed; but not of felonies, from which benefit of clergy is excluded; and this by Stat. 8 Eliz. c. 4. and 18 Eliz. c. 7.—
4. By the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted. 2 Hal. P. C. 389: 5 Rep. 110.—
5. What is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. 2 Hal. P. C. 389, 390.

It is holden, that after a man is admitted to his clergy, he is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 Hawk. P. C. c. 33. § 132.

CLERK.

As to what felonies are *within*, and what *without* clergy. See title *Felons*, and more particularly the Index to 1 Hawk. P. C.

CLERICO ADMITTENDO, See *Admittendo Clerico*.

CLERICO INFRA SACROS ORDINES CONSTITUTO, NON ELIGENDO IN OFFICIUM, A writ directed to those who have thrust a bailiwick, or other office upon one in holy orders, charging them to release him. Reg. Orig. 143.

CLERICO CAPTO PER STATUTUM MERCATORUM, &c. A writ for the delivery of a clerk out of prison, who is taken and imprisoned upon the breach of a statute merchant. Reg. Orig. 147. See ante title *Clergy*.

CLERICO CONVICTO COMMISSO GAOLA IN DEFECTU ORDINARIJ DELIBERANDO, An ancient writ that lay for the delivery of a clerk to his ordinary, that was formerly convicted of felony, by reason his ordinary did not challenge him according to the privileges of clerks. Reg. Orig. 69. See ante title *Clergy*.

CLERK, *clericus*.] The law term for a clergyman, and by which all of them who have not taken a degree are designated in deeds, &c. In the most general signification, is one that belongs to the holy ministry of the church; under which, where the Canon law hath full power, are not only comprehended *sacerdotes* and *diaconi*, but also *subdiaconi*, *lectores*, *acolyti*, *exorciste* and *ostiani*: but the word has been anciently used for a secular priest; in opposition to a religious or regular. Paroch. Antiq. 171. And is said to be properly a minister or priest, one who is more peculiarly called *in forum Domini*. Blount.

CLERK, In another sense denotes a person who practises his pen in any court, or otherwise; of which clerks there are various kinds, in several offices, &c.—The Clergy, in the early ages, as they engrossed almost every other branch of learning, so were they peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the Conquest by William of Malmshury. The judges therefore were usually created out of the sacred order; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. 1 Comm. 17.

CLERK OF THE ACTS. An officer in the Navy Office, whose business it is to record all orders, contracts, bills, warrants, &c. transacted by the Lord High Admiral, or Lords Commissioners of the Admiralty, and Commissioners of the Navy. See Stat. 22 & 23 Car. 2. c. 11.

CLERK OF AFFIDAVITS, In the court of Chancery, is an officer that files all affidavits made use of in court.

CLERK OF THE ASSIZE, Is he that writes all things judicially done by the justices of assizes in their circuits. *Crompt. Jurisd.* 227. This officer is associated to the judge in commissions of assize, to take assizes, &c.—Clerk of the assize shall not be counsel with any person on the circuit. Stat. 33 Hen. 8. c. 24. § 5.—To certify the names of felons convicted. See title *Clergy, benefit of*, II.—How punished for concealing, &c. any indictment, recognizance, fine or forfeiture. Stat. 22 & 23 C. 2. c. 22. § 9. 3 Geo. 1. c. 15. § 12.—See title *Escheat, Sheriff*—To take but 2 s. for drawing an indictment, and nothing if defective. 10 & 11 W. 3. c. 23. §§ 7, 8.—Fineable for falsely recording appearances of persons returned on a jury. 3 Geo. 2. c. 25. § 3. See title *Jury*.

CLERK—OF THE BAILS—HANAPER

CLERK OF THE BAILS, An officer belonging to the court of *King's Bench*. He files the bail pieces taken in that court, and attends for that purpose.

CLERK OF THE CHEQUE, An officer in the King's court, so called because he hath the *check* and controlment of the yeomen of the guard, and all other ordinary yeomen belonging either to the King, Queen or Prince; giving leave, or allowing their absence in attendance, or diminishing their wages for the same: he also by himself or deputy takes the view of those that are to watch in the court, and hath the setting of the watch. See *Stat.* 33 H. 8. c. 12. Also there is an officer of the same name in the King's dock yards at *Plymouth, Deptford, Woolwich, Chatham, &c.*

CLERK CONTROLLER OF THE KING'S HOUSE, Whereof there are two: An officer in the King's court, that hath authority to allow or disallow charges and demands of Pursuivants, Messengers of the Green Cloth, &c. He hath likewise the oversight of all defects and mis-carriages of any of the inferior officers: and hath a right to sit in the counting-house, with the superior officers, viz. the Lord Steward, Treasurer, Controller, and Cofferer of the Household, for correcting any disorders. See *Stat.* 33 H. 8. c. 12.

CLERK OF THE CROWN, *clericus coronæ*] An officer in the King's Bench, whose function is to frame, read and record all indictments against offenders there arraigned or indicted of any public crime. And when divers persons are jointly indicted, the Clerk of the crown shall take but one fee, viz. 2 s. for them all *Stat.* 2 H. 4. c. 10. He is otherwise termed Clerk of the Crown office, and exhibits informations, by order of the court, for divers offences. See title *Information*.

CLERK OF THE CROWN IN CHANCERY, An officer in that court who continually attends the Lord Chancellor in person or by deputy: he writes and prepares for the Great Seal, special matters of State by commission, or the like, either immediately from his majesty's orders, or by order of his council, as well ordinary as extraordinary, viz. commissions of lieutenancy, of justices of assize, *oyer and terminer*, gaol delivery, and of the peace, with their writs of association, &c. Also all general pardons, at the King's coronation; or in parliament, where he sits in the Lords' house in parliament time; and into his office the writs of parliament, with the names of knights and burgesses elected thereupon, are to be returned and filed. He hath likewise the making out of all special pardons: and writs of execution upon bonds of statute-staple forfeited; which was annexed to this office in the reign of Queen Mary, in consideration of his chargeable attendance.

CLERK OF THE DECLARATIONS, An officer of the court of *King's Bench*, that files all declarations in causes there depending, after they are ingrossed, &c.

CLERK OF THE DELIVERIES, An officer in the Tower of London, who exercises his office in taking of indentures for all stores, ammunition, &c. issued from thence.

CLERK OF THE ERRORS, *clericus errorum*.] In the court of *Commons Pleas*, transcribes and certifies into the King's Bench the tenor of the records of the cause or action upon which the writ of *error*, made by the cursitor, is brought there to be heard and determined. The Clerk of the Errors in the King's Bench, likewise transcribes and certi-

fies the records of causes, in that court, into the Exchequer, if the cause of action were by bill: if by original, the Lord Chief Justice certifies the record into the House of Peers in Parliament, by taking the transcript from the Clerk of the Errors, and delivering it to the Lord Chancellor, there to be determined, according to the *Stats.* 27 Eliz. c. 8, and 31 Eliz. c. 1. The Clerk of the errors in the Exchequer also transcribes the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer Chamber, to be given by the justices of C. B. and Barons there. *Stats.* 16 Car. 2 c. 2. 20 Car. 2. c. 4. See title *Error*.

CLERK OF THE ESSOINS, An officer belonging to the Court of Common Pleas, who keeps the *essoin rolls*; and the *essoin roll* is a record of that court: he has the providing of parchment, and cutting it out into *rolls*, marking the numbers thereon; and the delivery out of all the rolls to every officer of the court; the receiving of them again when they are written, and the binding and making up the whole bundles of every term: which he doth as servant of the Chief Justice. The Chief Justice of C. B. is at the charge of the parchment of all the rolls, for which he is allowed; as is also the Chief Justice of B. R. besides the penny for the seal of every writ of privilege and outlawry, the seventh penny taken for the seal of every writ in court under the green wax, or petit seal; the said Lord Chief Justices having annexed to their offices or places, the custody of the said seals belonging to each court.

CLERK OF THE ESTREATS, *clericus extraforum*.] A clerk or officer belonging to the Exchequer, who every Term receives the *estreats* out of the Lord Treasurer's Remembrancer's Office, and writes them out to be levied for the King: and he makes schedules of such sums *estreated* as are to be discharged. See title *Estreat*.

CLERK OF THE HANAPER, or HAMPER, An officer in Chancery, whose office is to receive all the money due to the King, for the seals of charters, patents, commissions and writs; as also fees due to the officers for enrolling and examining the same. He is obliged to attendance on the Lord Chancellor daily in the term time, and at all times of sealing, having with him leather bags, wherein are put all charters, &c. After they are sealed, those bags, being sealed up with the Lord Chancellor's private seal, are delivered to the Controller of the Hanaper, who, upon receipt of them, enters the effect of them in a book, &c. This *hanaper* represents what the Romans termed *fiscum*, which contained the Emperor's treasure; and the Exchequer was anciently so called, because *in eo reconderentur hanapi & scutæ cæteraque vasa quæ in censum & tributum persolvi solebant*; or it may be for that the yearly tribute which princes received was in hampers or large vessels full of money. There being an arrear of 10,590 l. 12 s. 11 d. of several ancient fees and salaries, &c. payable out of this office; and there being a remainder of 13,698 l. 1 s. 11 d. of the six penny stamp duty on writs-granted for relief of the suitors of the court of Chancery; it was enacted by the *Stat.* 23 G. 2. c. 25, that thenceout the 10,590 l. 12 s. 11 d. should be paid to the creditors of this office. That the said duty should be made perpetual; and thereout 3000 l. per annum should be paid to the Clerk of the Hanaper, that the residue of the 13,698 l. 1 s. 11 d. should be laid out in government securities, and

CLERK—OF INROLLMENTS—OF PEACE.

the interest paid to the *Clerk of the Hanaper*, who should pay 1,20*l.* to the *Master of the Rolls*. And that in case the revenue of this office be augmented, should be more than sufficient to pay all fees, salaries, &c. the clerk should account for the surplus.

CLERK OF THE INROLLMENTS. An officer of the *Common Pleas*, that inrolls and exemplifies all fines and recoveries, and returns writs of entry, summons and seisin, &c.

CLERK OF THE JURIES, *clericus juratorum*] An officer belonging to the court of *Common Pleas*, who makes out the writs of *habeas corpus* and *distringas*, for the appearance of juries; either in that court, or at the assizes, after the jury or panel is returned upon the *venire facias*: he also enters into the rolls the awarding of these writs; and makes all the continuances, from the going out of the *habeas corpus* until the verdict is given.

CLERK OF THE MARKET, *clericus mercati hospitii regis*] Is an officer of the King's house, to whom it belongs to take charge of the King's measures, and keep the standards of them, which are examples of all measures throughout the land; as of ells, yards, quarts, gallons, &c. And of weights, bushels, &c. And to see that all weights and measures in every place be answerable to the said standard: as to which office see *Fleta*, lib. 2. cap. 8. 9, 10, &c. Touching this officer's duty, there are also divers statutes, as 13 R. 2. cap. 4; and 16 R. 2. c. 3; by which every clerk of the market is to have weights and measures with him when he makes assay of weights, &c. mark'd according to the standard; and to seal weights and measures, under penalties.

The Stat. 16 Car. 1. c. 19, enacts, That clerks of the market of the King's or Prince's household, shall only execute their offices within the verge; and head officers are to act in corporations, &c. The clerks of markets have generally power to hold a court, to which end they may issue out process to sheriffs and bailiffs to bring a jury before them; and give a charge, take presentments of such as keep or use false weights and measures; and may set a fine upon the offenders, &c. 4 Inst. 274. But if they take any other fee or reward than what is allowed by statute, &c. or impose any fines without legal trial; or otherwise misdemean themselves, they shall forfeit 5*l.* for the first offence, 10*l.* for the second, and 20*l.* for the third offence, on conviction before a justice of peace, &c. The court of the *Clerk of the market* is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *Ple percurie* is to determine all disputes relating to private or civil property. It is the most inferior court of criminal jurisdiction in the kingdom. 4 Comm 275. See also Stat. 22 C. 2. c. 8: 23 C. 2. c. 12, and title *Weights and Measures*.

CLERK MARSHAL OF THE KING'S HOUSE, An officer that attends the *Marshal* in his court, and records all his proceedings.

CLERK OF THE NICHILS, OR NIBILS, *clericus nihilorum*.] An officer of the court of *Exchequer*, who makes a roll of all such sums as are *nibiled* by the sheriffs upon their estreats of green wax; and delivers the same into the Remembrancer's Office, to have execution done upon it for the king. See Stat. 5 R. 2. c. 13.—*Nibils* are issues by way of fine or amercement.

CLERK OF THE ORDINANCE, An officer in the *Tower*, who registers all orders touching the King's ordinance.

CLERK OF THE OUTLAWRIES, *clericus utlagatiarum*.] An officer belonging to the court of *Common Pleas*, being the servant or deputy to the King's Attorney General, for making out writs of *capias utlagatum*, after outlawry; the King's Attorney's name being to every one of those writs.

CLERK OF THE PAPER OFFICE, An officer in the court of *King's Bench*, that makes up the paper-books of special pleadings and demurrers in that court.

CLERK OF THE PAPERS, An officer in the *Common Pleas*; who hath the custody of the papers of the warden of the *Fleet*, enters commitments and discharges of prisoners, delivers out day-rules, &c.

CLERK OF A PARISH, See title *Parish Clerk*.

CLERK OF THE PARLIAMENT ROLLS, *clericus rotulorum parliamenti*.] An officer who records all things done in the high court of *parliament*, and ingrosseth them in parchment rolls, for their better preservation to posterity: of these officers there are two, one in the Lords' House, and another in the House of Commons.

CLERK OF THE PATENTS, Or of the letters patent under the Great Seal of *England*; an office erected 18 Jac. 1.

CLERK OF THE PEACE, *Clericus pacis*.] An officer belonging to the sessions of the peace: his duty is to read indictments, inrol the proceedings, and draw the process; he keeps the counter-part of the indenture of armour; records the proclamation of rates for servants wages; has the custody of the register-book of licences given to badgers of corn; of persons licensed to kill game, &c. And he registers the estates of papists and others not taking the oaths. Also he certifies into the *King's Bench* transcripts of indictments, outlawries, attainders and convictions, had before the justices of peace, within the time limited. See title *Clergy*, benefit of.—And as to his duty respecting *Estreats*, see title *Estreats*.

The *Custos Rotulorum* of the county hath the appointment of the clerk of the peace, who may execute his office by deputy, to be approved of by the *Custos Rotulorum* to hold the office during good behaviour, See Stat. 37 H. 8. c. 1: 1 W. & M. c. 21.

The following is the form of the oath prescribed by Stat. 1 W. & M. c. 21, to be taken by the clerk of the peace in open sessions before he enters on his office.

I C.P. do swear, that I have not [paid] nor will pay any sum or sums of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee or profit, directly or indirectly, to any person or persons whomsoever for [my] nomination and appointment.

So help me God.

He is also to take the oaths of allegiance, supremacy and abjuration, and perform such requisites as other persons who qualify for offices.

By Stat. 22 Geo. 2. c. 46. § 14, No Clerk of the peace, or his deputy, shall act as solicitor, attorney or agent at the sessions where he acts as clerk or deputy, on penalty of 50*l.* with treble costs.

Burn in his *Justice*, title *Clerk of the Peace*, hints how necessary it is that all his fees should be regulated.

CLERK—OF PEACE—OF WAR

If a Clerk-of-the-peace misdemean himself, the justices of peace in quarter sessions have power to discharge him; and the *Custos Rotularum* is to chuse another, resident in the county, or on his default the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given by each party, and disability to enjoy their respective offices, &c. *Stat. 1 W. & M. sess. 1, c. 21.*

CLERK OF THE PELL, *clericus pellis*] A clerk belonging to the *Exchequer*, whose office is to enter every teller's bill into a parchment roll or skin, called *pellis receptorum*, and also to make another roll of payments, which is termed *pellis exituum*; wherein he sets down by what warrant the money was paid; mentioned in the *Stat. 22 & 33 Car. 2 c. 22.*

CLERK OF THE PETTY BAG, *clericus parva bagæ*.] An officer of the court of *Chancery*. There are three of these officers, of whom the Master of the Rolls is the chief. Their office is to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, &c. all *congéd d'elres* for bishops, the summons of the nobility, and burgessees to parliament; commissions directed to knights and others of every shire, for assising subsidies and taxes: all offices found *post mortem* are brought to the clerks of the petty bag to be filed; and by them are entered all *pleadings* of the *Chancery* concerning the validity of patents or other things which pass the Great Seal, they also make forth *liberates* upon extents of statutes-staple, and recovery of recognizances forfeited, and all *elegits* upon them; and all suits for or against any privileged person are prosecuted in their office, &c.

CLERK OF THE PIPE, *clericus pipæ*.] An officer in the *Exchequer* who having the accounts of debts due to the King, delivered and drawn out of the Remembrancer's Offices, charges them down in the great roll, and is called *Clerk of the pipe* from the shape of that roll, which is put together like a *pipe* he also writes out warrants to the sheriff to levy the said debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treasurer's Remembrancer, to write estreats against their lands. The ancient revenue of the crown stands in charge to him, and he sees the same answered by the farmers and sheriffs: he makes a charge to all sheriffs of their summons of the *pipe*, and green wax, and takes care it be answered on their accounts. And he hath the drawing and ingrossing of all leases of the king's lands; having a *secondary* and several clerks under him. In the reign of King Hen. VI. this officer was called *Ingrossator magni rotuli*. See *Stat. 33 Hen. 8. c. 22.*

CLERK OF THE PLEAS, *clericus placitorum*] An officer in the court of *Exchequer*, in whose office all the officers of the court, upon special privilege belonging unto them, ought to sue or be sued in any action, &c. The *clerk of the pleas* has under him a great many clerks, who are attorneys in all suits commenced or depending in the Court of *Exchequer*.

CLERKS OF THE PRIVY SEAL, *clericus privati sigilli*.] These are four of the officers which attend the Lord *Privy Seal*: or if there be no Lord *Privy Seal*, the Principal Secretary of State; writing and making out all things that are sent by warrant from the Signet to the *Privy Seal*, and which are to be passed to the Great Seal: also they make out *privy seals*, upon a special occasion of his Majesty's

affairs, for loan of money, and the like. He that is now called *Lord Privy Seal*, seems to have been in ancient times called *Clerk of the privy seal*; but notwithstanding to have been reckoned in the number of the great officers of the realm. *Stat. 12 R. 2. c. 11: 27 H. 8. c. 11.*

CLERK OF THE REMEMBRANCE. An officer in the *Exchequer*, who is to sit against the Clerk of the pipe, to see the discharges made in the pipe, &c. *Stat. 37 Ed. 3. c. 4.* The Clerk of the pipe and Remembrancer, shall be sworn to make a schedule of persons discharged in their offices. *Stat. 5 Ric. 2. §. 1. c. 15.*

CLERK OF THE ROLLS, An officer of the *Chancery*, that makes search for, and copies deeds, offices, &c.

CLERK OF THE RULES, In the court of King's Bench, is he who draws up and enters all the rules and orders made in court: and gives rules of course on divers writs: this officer is mentioned in *Stat. 22 & 23 Car. 2. c. 22.*

CLERK OF THE SEWERS, An officer belonging to the commissioners of *sewers*, who writes and records their proceedings, which they transact by virtue of their commissions, and the authority given them by *Stat. 13 Eliz. c. 9.* See title *Sewers*.

CLERK OF THE SIGNET, *clericus signeti*.] An officer continually attendant on his Majesty's Principal Secretary, who hath the custody of the *privy signet*, as well for sealing his Majesty's private letters, as such grants as pass the King's hand by bill signed: and of these clerks or officers there are four that attend in their course, and have their diet at the Secretary's table. The fees of the *clerk of the signet*, and *privy seal*, are limited particularly by statute, with a penalty annexed for taking any thing more. See *27 H. 8. c. 11.*

CLERK OF THE KING'S SILVER, *clericus argenti regis*.] An officer belonging to the court of *Common Pleas*, to whom every fine is brought after it hath passed the office of the *custos breviarum*, and by whom the effect of the writ of covenant is entered into a paper-book; according to which all the fines of that term are recorded in the rolls of the court. After the King's silver is entered, it is accounted a fine in law, and not before. See title *Fine*.

CLERK OF THE SUPERSEDEASES, An officer belonging to the court of *Common Pleas*, who makes out writs of *superseadeas*, upon a defendant's appearing to the *exigent* on an outlawry, whereby the sheriff is forbidden to return the *exigent*. See title *Outlawry*.

CLERK OF THE TREASURY, *clericus thesaurarii*.] An officer of the *Common Pleas*, who hath the charge of keeping the records of the court, and makes out all the records of *Nisi prius*; also he makes all exemplifications of records being in the *Treasury*; and he hath the fees due for all searches. He is the servant of the Chief Justice, and removeable at pleasure; whereas all other officers of the court are for life: there is a *Secondary*, or *Under clerk of the Treasury*, for assistance, who hath some fees and allowances: and likewise an *under-keeper*, that always keeps one key of the *Treasury* door, and the chief *clerk of the secondary*, another; so that the one cannot come in without the other.

CLERK OF THE KING'S GREAT WARDROBE, An officer of the King's household, that keeps an account or inventory of all things belonging to the royal wardrobe. *Stat. 1 E. 4. c. 1.*

CLERK OF THE WARRANTS, *clericus warrantorum*.] An officer belonging to the *Common Pleas* Court, who enters

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all warrants of attorney for plaintiffs and defendants in suits; and inrolls deeds of indentures of bargain and sale, which are acknowledged in the court or before any judges but of the court. And it is his office to estreat into the Exchequer all issues, fines and amerciaments, which grow due to the King in that court, for which he hath a standing fee or allowance.

CLERONIMUS, An heir. *Mon. Angl. tom. 3. p. 129.*

CLIPPING the Coin, See title *Coin; Money; Treason.*

CLITONES, The eldest, and all the sons of Kings. See the charter of King *Æthelred: Mat. Paris pag. 158: Selden's notes upon Eadmeus.*

CLIVE, CLIFF. The names of places beginning or ending with these words, signify a rock, from the old *Saxon.*

CLOCKS AND WATCHES Dial-plates and cases not to be exported without the movement. *St. 9 & 10 W. 3. c. 28. sect. 2.*—Makers shall engrave their names on clocks and watches. *St. 9 & 10 W. 3. c. 28. sect. 2.*—Penalties on workmen, &c. imbezilling materials of clocks and watches, *St. 27 Geo. 2. c. 7.* See title *Manufacturers.*

CLOERE, A prison or dungeon; it is conjectured to be of *British* original: the dungeon or inner prison of *Wallingford* castle, temp. *H. 2.* was called *cloere brien*, i. e. *carcer brieni*, &c. Hence seems to come the Lat. *cloaca*, which was anciently the closest ward or nastiest part of the prison: the old *cloacerius* is interpreted *carceris custos*: and the present *cloacerius*, or keeper of a *sakes*, is an office in some religious houses abroad, imposed on an offending brother, or by him chosen as an exercise of humility and mortification. *Coael.*

CLOSE ROLLS AND CLOSE WRITS, Grants of lands, &c. from the Crown, are contained in charters or letters *patent*, that is open letters, *litteras patentis*, so called because they are not sealed up, but exposed to open view, with the Great Seal pendant at the bottom, and are usually addressed by the King to all his subjects at large. And therein they differ from other letters of the King, sealed also with his Great Seal, but directed to particular persons, and for particular purposes, which therefore, not being fit for public inspection, are closed up and sealed on the outside, and are thereupon called *writs close*, *litteræ clausæ*; and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*. *2 Comm. 346.*

CLOSH, Was an unlawful game forbidden by *Stat. 17 Ed. 4. c. 3*, and *33 H. 8. c. 9*. It is said to have been the same with our *nine-pins*; and is called *clash-ayles* by *St. 33 H. 8. c. 9*. At this time it is allowed, and called *bawles*, or *kittles*. See title *Gaming*.

CLOTH, No cloth made beyond sea shall be brought into the king's dominions, on pain of forfeiting the same, and the importers to be farther punished. *Stat. 12 Ed. 3. c. 3.*—See titles *Manufacturers; Wool*.

CLOTHIERS, Are to make broad cloths of certain lengths and breadths, within the lists; and shall cause their marks to be woven in the cloths, and set a seal of lead thereunto, shewing the true length thereof. *Stat. 4 Ed. 4. c. 1: 27 H. 8. c. 12.*—Exposing to sale faulty cloths, are liable to forfeit the same and clothiers shall not make use of flocks or other deceitful stuff, in making of broad cloth, under the penalty of *5 l.* *Stat. 5 & 6 Ed. 6. c. 6.*—Justices of peace are to appoint searchers of cloth yearly, who have power to enter the houses of

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clothiers; and persons opposing them shall forfeit *10 l.* *Stat. 39 Eliz. c. 20: 4 Jac. 1. c. 2: 21 Jac. 1. c. 18.* All cloth shall be measured at the fulling mill; by the master of the mill; who shall make oath before a justice for true measuring; and the millman is to fix a seal of lead to cloths, containing the length and breadth, which shall be a rule of payment for the buyer, &c. *Stat. 10 An. c. 16.*—By *Stat. 1 Geo. 1. c. 15*, Broad cloths must be put into water for proof, and be measured by two indifferent persons chosen by the buyer and seller, &c. And clothiers selling cloths before sealed, or not containing the quantity mentioned in the seals, incur a forfeiture of the sixth part of the value. Persons taking off, or counterfeiting seals, forfeit *20 l.* By *Stat. 12 Geo. 1. c. 34*, if any weavers of cloth enter into any combination for advancing their wages, or lessening their usual hours of work, or depart before the end of their terms agreed, return any work unfinished, &c. they shall be committed by two justices of peace to the house of correction for three months: and clothiers are to pay their work-people their full wages agreed, in money, under the penalty of *10 l.* &c.—Inspectors of mills and tenter-grounds to examine and seal cloths, are to be appointed by justices of peace in sessions; and mill-men sending clothiers any cloths before inspected, forfeit *40 s.* The inspectors to be paid by the clothiers *2 d.* per cloth. *Stat. 13 Geo. 1. c. 23.*—If any cloth remaining on the tenters, be stolen in the night, and the same is found upon any person, on a justice's warrant to search, such offender shall forfeit treble value, leviable by distress, &c. or be committed to gaol for three months; but for a second offence he shall suffer six month's imprisonment; and for the third offence be transported as a felon, &c. *Stat. 15 Geo. 2. cap. 27.*—See title *Drapery*; and more particularly titles *Manufacturers, Servants, Wool*.

CLOVE, The two and-thirtieth part of a weigh of cheese, i. e. eight pounds. *Stat. 9 H. 6. c. 8.*

CLOUGH, A word made use of for a valley, in *Domesday* book. But among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight. *Lex Mercat.*

CLUNCH. In *Staffordshire*, upon sinking of a coal-mine, near the surface they meet with earth and stone, then with a substance called *blue clunch*, and after that they come to coal.

CLUTA, Fr. *clous*.] Shoes, clouded shoes; and most commonly horse-shoes: it also signifies the streaks of iron with which cart-wheels are bound. *Consuetud. Dom. de Farend. MS. fol. 16.* Hence *clutarium*, or *cluarium*, a forge where the *clous* or iron shoes are made. *Mon. Angl. tom. 2. pag. 598.*

CLYPEUS, A shield—Metaphorically one of a noble family *Clypei prostrati*, a noble family extinct. *Mat. Paris 463.*

COACH, *curius*.] A convenience well known. For the regulating of hackney coaches and chairs in *London*, there are several statutes, viz. *9 An. c. 23*, made perpetual by *3 Geo. 1. c. 7*, and enlarged as to the number of coaches, by *11 Geo. 3. c. 24*; so as to make the whole number, to be licensed, *1000*, and enlarged also as to chairs, by *10 An. c. 19*, and *12 Geo. 1. c. 12*, making the whole number of those *400*.

The other statutes now in force are, *12 An. st. 1. c. 14: 1 Geo. 1. c. 57: 30 Geo. 2. c. 22: (See Caris) 4 Geo. 3. c. 36:*

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c. 36: 7 Geo. 3. c. 44: 10 Geo. 3. c. 44: 21 Geo. 3. c. 24 and 28: 12 Geo. 3. c. 49: 24 Geo. 3. ft. 2. c. 27: 26 Geo. 3. c. 72: 32 Geo. 3. c. 47.

The following is a general abstract of the united effect of these several acts.

Five Commissioners are appointed to license and regulate them. And the proprietor of each coach pays 10s. per week every month. Each coach is to be numbered on both sides, not to be altered, on penalty of 5*l*. A like penalty on driving or letting to hire a coach without licence.—Mourning coaches and hearses are within the act.—The horses must be 14 hands high.—Coachmen compellable to go in the day ten miles, but after dark two miles and a half on turnpike roads.—To have check strings, on penalty of 5*s*.—The rates are as follows, (December 1793.)

By way { For one mile and quarter, or less 1*s*. 0*d*.
From that to two miles - 1 6

And then 6*d*. for each additional half-mile entered upon.
By time { Three quarters of an hour, or less 1*s*. 0*d*.
Between that and an hour - 1 6
One hour and twenty minutes 2 0

And then 6*d*. for each additional twenty minutes entered upon.

For a day of twelve hours 14*s*. 6*d*. and 6*d*. for each twenty minutes over.

A coachman refusing to go, or exacting more than his fare, to forfeit from 10*s*. to 3*l*; and by misbehaviour or impudence, incurs the same penalty, and his licence may be revoked, or he committed to the house of correction. Persons refusing to pay the fare, or defacing the coach, may be compelled by a justice to make satisfaction. There are several usual stands, but a coach may stand in any street thirty feet wide, at the road, (except *St. James's Street* and *Pall mall*).—The penalties are recoverable before the aldermen of the city, and justices of peace, as well as before the Commissioners.

STAGE COACHES, By *Stats.* 28 Geo. 3. c. 57, and 30 Geo. 3. c. 36, Drivers of stage coaches are not to admit more than one outside passenger on the box, and four on the roof of the coach, on penalty of 5*s*. for each passenger, at every turnpike gate.—Some other wholesome regulations are also made by these acts, but which like other good laws are seldom enforced.

As to the liability of masters, &c. of coaches as common carriers. See title *Carrier*.

DUTIES. By *Stat.* 25 Geo. 3. c. 47, there shall be paid for every four wheeled coach, landau, &c. kept for private use, or to let to hire, (except hackney coaches) a tax of 7*l*. per an. (and by 29 Geo. 3. c. 49, 20*s*. more,) in the whole 8*l*. for the first carriage.—9*l*. for the second, by 29 Geo. 3. c. 43.—And where three or more are kept, 8*l*. for the first, and 10*l*. for all others. And by said *Stat.* 25 Geo. 3. c. 47, for every two or three-wheeled carriage 3*l*. 10*s*. per annum.

COACH MAKERS, The wares of coachmakers shall be searched, by persons appointed by the saddlers' company. *Stat.* 1 Jac. 1. c. 22.—By *Stats.* 25 Geo. 3. c. 49: 27 Geo. 3. c. 13, Every maker of coaches, chariots, chaises, &c. must take out annual licences from the *Excise* office, and to pay a duty of 20*s*. for every four-wheeled carriage, and 10*s*. for every two-wheeled carriage, built by them for sale.

COALS.

COADJUTOR, *Lat.*] A fellow-helper or assistant, particularly applied to one appointed to assist a Bishop, being grown old and infirm, so as not to be able to perform his duty.

COAL-MINES, Maliciously setting fire to coal-mines, or to any delph of coal, is felony, 10 Geo. 2. c. 32. *sec. 6*. See title *Black-Act, Felony*.

COALS. By *Stats.* 7 E. 6. c. 7: 16 & 17 Car. 2. c. 2; [made perpetual by 7 & 8 W. 3. c. 36. § 2.] and 17 Geo. 2. c. 35, The sack of coals is to contain four bushels of clean coals: and sea coals brought into the river *Thames*, and sold, shall be after the rate of thirty-six bushels to the chaldron: and one hundred and twelve punds the hundred, &c. The Lord Mayor and Court of Aldermen in *London*, and justices of the peace of the several counties, or three of them, are empowered to set the price of all coals to be sold by retail; and if any person shall refuse to sell for such prices, they may appoint officers to enter any wharfs or places where coals are kept, and cause the coals to be sold at the prices appointed. The *Stat.* 12 An. ft. 2. c. 17, regulates the contents of the coal bushel, which is to hold one *Winchester* bushel, and one quart of water. By *Stats.* 9 H. 5. ft. 1. c. 10: 30 Car. 2. c. 8: 6 & 7 Will. 3. c. 10: 11 Geo. 2. c. 15: 15 Geo. 3. c. 27: and 31 Geo. 3. c. 36, Commissioners are ordained for the measuring and marking of keels, and boats, &c. for carrying coals; and vessels carrying coals before measured and marked, shall be forfeited, &c. For the duties and draw-backs on coals and culm, see *Stat.* 9 & 10 W. 3. c. 13: 9 An. cc. 6, 22, 28: 8 Geo. 1. c. 14: 14 Geo. 2. c. 41: 22 Geo. 2. c. 37: 31 Geo. 2. c. 15: 33 Geo. 2. c. 15: and 27 Geo. 3. c. 32.

For the duty on coals in *London*, See *Stats.* 9 An. c. 28: and 5 Geo. 1. c. 9; the duties payable under which, of 3*s* per chaldron, are made perpetual by *Stat.* 6 Geo. 1. c. 4. and 1 Geo. 2. ft. 2. c. 8.—See also *Stat.* 27 Geo. 3. c. 13, as to the 1*s*. duty under *Stat.* 19 Car. 2. c. 3. § 36.

By *Stat.* 6 & 7 W. 3. c. 18, one mariner is allowed to each 50 ton of shipping employed in the coal trade in time of war, protected from being impressed.

By *Stat.* 9 An. c. 28, Contracts between coal-owners and masters of ships, &c. for restraining the buying of coals are void; and the parties to forfeit 100*l*. And selling coals for other sorts than they are, shall forfeit 50*l*. Not above fifty laden colliers are to continue in the port of *Newcastle*, &c. And work-people in the mines there shall not be employed who are hired by others, under the penalty of 5*l*.

By *Stat.* 3 Geo. 2. c. 26, containing several regulations as to lightermen and coal buyers, and explained by ft. 11 Geo. 2. c. 15, Coal-sacks shall be sealed and marked at *Guildhall*, &c. on pain of 20*s*. Also sellers of coals are to keep a lawful bushel, and put three bushels to each sack, which bushel and other measures shall be edged with iron, and sealed; and using others, or altering them, incurs a forfeiture of 50*l*. &c. The penalties above 5*l*. recoverable by action of debt, &c. and under that sum before justices of peace.

By *Stat.* 4 Geo. 2. c. 30, Owners or masters of ships shall not enhance the price of coals in the river of *Thames*, by keeping of turn in delivering of coals there, under the penalty of 100*l*. &c.

Stat. 13 Geo. 2. c. 21, Inflicts penalty of treble damages on persons damaging or destroying coal-works.

See

COALS.

See the *Stat. 6 Geo. 3. c. 22*, now in force, as to the loading coal ships, at *Newcastle and Sunderland* in turn, according to lists to be made there.

By the *Stat. 7 Geo. 3. c. 23*, (in force by *17 Geo. 3. c. 13*, till the 1st of June, 1798,) *The Land Coal Meter's Office* for *London*, and between the *Tower* and *Lincolns-Inn*, is established and regulated. And the duty of that officer, and the labouring coal-meters in measuring coals is ascertained. And by *Stat. 26 Geo. 3. c. 83*, further regulations are made as to the Coal meters sacks, which when sealed are to be four feet four inches long, and twenty-six inches broad. Penalties are imposed on the labouring meters and drivers for misbehaviour, and the mode of re-measurement settled, if required by the consumer.

By *Stat. 26 Geo. 3. c. 14*, A Land Coal Meter's Office is appointed for the parishes of *Putney, Wandsworth, Battersea, Lambeth, Rotherhithe*, and several parishes in *Southwark*, to continue for twenty-one years. And by *c. 108*, of the said session, a like office is appointed for the city and liberty of *Westminster*, till *June 1795*. The regulations of former acts are adopted and modified by these latter, according to their several districts.

Stat. 28 Geo. 3. c. 53, was passed to indemnify the *London* coal buyers against certain penalties, which they had literally incurred under *Stats. 9 An. c. 28*, and *3 Geo. 2. c. 26*, and also for the purpose of putting an end to the *Society* at the Coal Exchange, formed to regulate (i. e. to monopolize) the trade; subjecting all persons, above five, in number entering into covenant or partnerships, to punishment by indictment or information in *B. R.*

COAT-ARMOUR, *Coats of arms* were not introduced into seals, nor indeed into any other use, till about the reign of *Richard the First*, who brought them from the *Crossade* in the *Holy Land*; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. *2 Comm. 306*.

It is the business of the *Court military*, or the *Court of Chivalry*, according to *Sir Matthew Hale*, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the king's patent or act of parliament, (which cannot be over-ruled by this court,) have not already determined it. *3 Comm. 105*.

COCHERINGS, An exaction or tribute in *Ireland*, now reduced to chief rents. See *Bonaght*.

COCHINEAL, The importation of cochineal from ports in *Spain* declared lawful. *Stat. 6 An. c. 33*. Any persons may import cochineal into this kingdom, in ships belonging to *Great Britain*, or other country in amity, from any place whatsoever, by *Stat. 7 Geo. 2. cap. 18*. See title *Navigation Acts*.

COCKET, *cockettum*.] A seal belonging to the king's custom house: or rather a scroll of parchment sealed, and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are customed; which parchment is otherwise called *litteræ de cocketto*, or *litteræ testamentales de cocketto*. *Stat. 1 Hen. 6. c. 15*; *Reg. Orig. 179, 192*.—See also *Mad. Exc. vol. 1. c. 18*. The word *cockettum* or *cocker*, is also taken for the custom-house or office where goods to be transported were first entered, and paid their custom, and had a *cocker* or certificate of

COFFEE.

discharge: and *cocketta lana* is wool duly entered and cocketted, or authorized to be transported. *Mem. in Scac. 23 Ed. 1*.

Cocket is likewise used for a sort of measure, *Fleta, lib. 2. cap. 9*. *Panis vero integer quadrantalibus frumenti ponderabit unum cocket & dimidium*: and it is made use of for a distinction of bread, in the statute of bread and ale, *51 H. 3. stat. 1. ord. pro pistor*: where mention is made of *wastel bread*, *cocket bread*, *bread of trect*, and *bread of common wheat*; the *wastel bread* being what we now call the *finest bread*, or *French bread*; the *cocket bread* the second sort of *white bread*; *bread of trect*, and of common wheat, brown, or *boufchoid bread*, &c. See *Bread*.

COCKSETUS, A boatman, *cockswain* or *coxon*. *Corvel*.
COCULA, A cogue, or little drinking cup, in form of a small boat, used especially at sea, and still retained in a cogue [cag or kegue] of brandy. These drinking cups are also used in taverns to drink new sherry, and other white wines which look foul in a glass.

CODICIL, *codicillus*, from *codex*, a book, a writing.] A schedule or supplement to a will, where any thing is omitted which the testator would add, or where he would explain, alter or retract what he hath done. See titles *Will, De. iſe*.

COFFEE, TEA, CHOCOLATE, and COCOA NUTS.

The duties on these articles form a branch of the public revenue, under the head of *Customs* and *Excise*; and like all other subjects of those jurisdictions, are liable to a variety of penal regulations by acts of parliament, necessary to prevent the numerous frauds and evasions daily endeavoured to be practised, to the impoverishment of Government, and the injury of the fair trader. See titles *Excise, Customs*, and also title *Navigation Acts*.—The following general features are all which the compass of this Dictionary allows to be noticed.

By *Stat. 27 Geo. 3. c. 13*, all former custom and excise duties are repealed; and new duties, (less than the former ones) imposed.—The sales of tea at the *East-India* house are regulated by *Stats. 18 Geo. 2. c. 26*; *13 Geo. 3. c. 44*; by the latter of which re-exportation by the Company to *America* is allowed.—By *Stat. 10 Geo. 1. c. 10*, *chocolate* and *cocoa paste* are prohibited to be imported.—And *cocoa nut shells* without the nuts, by *Stat. 4 Geo. 2. c. 14*. § 12.—The importation of coffee must be in bags, &c. containing 1 cwt. each at least.—The entry and warehousing, removing, and re-exportation of *tea, coffee* and *cocoa nuts*, is regulated by *Stats. 10 Geo. 1. c. 10*; *11 Geo. 1. c. 30*; *5 Geo. 3. c. 43*; *21 Geo. 3. c. 55*; *22 Geo. 3. c. 68*; *23 Geo. 3. c. 70*; *27 Geo. 3. c. 13*.—By *Stats. 15 Geo. 2. c. 11*; *20 Geo. 3. c. 35*, retail dealers must take out an annual licence.—And all houses for manufacturing and sale, must be entered at the Excise Office; See *Stats. 10 Geo. 1. c. 10*; *18 Geo. 2. c. 26*; *12 Geo. 3. c. 46*.—And the houses of all dealers to be marked, “*Dealer in Coffee, Tea, &c.*” *Stat. 19 Geo. 3. c. 69*.—Under the said *Stat. 10 Geo. 1. c. 10*; and *Stat. 11 Geo. 1. c. 30*, officers may enter houses to search if goods are concealed; but in this case, if an officer by a false or mistaken suggestion obtains a search-warrant (as it is called) from the Commissioners, he is personally answerable in an action of trespass, if no goods are found. *Boscock v. Saunders, Bl. Rep. 912*.

To prevent frauds in manufacturing these articles, the *Stats. 10 Geo. 1. c. 10*; *11 Geo. 1. c. 30*, make divers provisions as to coffee.—*Stats. 11 Geo. 1. c. 30*:
4 Geo.

4 Geo. 2. c. 14; 17 Geo. 3. c. 29, as to *tenants*. Stat. 10 Geo. 1. c. 10; 32 Geo. 2. c. 10. 11 Geo. 1. c. 10, as to *tenants*; the making of which latter for private families, is also regulated by Stat. 10 Geo. 1. c. 10 § 23, 24, 25.

The Stat. 9 Geo. 2. c. 35 § 20, prohibits the retailing tea without a permit; or by pedlars even with one. And by Stat. 12 Geo. 1. c. 28, dealers in *cocoa nuts*, must not sell less than 28 lb at a time.

COFFRA, A coffer, chest, or trunk. *Munimenta Hospitalis SS. Trinit. de Pontefracti*, MS. fol. 40.

COFFERER OF THE KING'S HOUSEHOLD, Is a principal officer of the King's house, next under the Controller, who, in the counting house, and elsewhere, hath a special charge and oversight of other officers of the household, to all which he pays their wages: this officer passes his accounts in the Exchequer. See Stat. 39 Edw. 1. c. 7.

COGGLE, A small fishing boat, upon the coasts of *Yorkshire*: and *cogs*, (*cogones*) are a kind of little ships, or vessels, used in the rivers *Ouse* and *Humber*. Stat. 23 H. 8. c. 18.—See *Mat. Paris*, anno 1066. And hence the *cogmen*, boatmen or seamen, who after shipwreck or losses by sea, travelled and wandered about to defraud the people by begging and stealing, till they were restrained by divers good laws. *Du Fresne*.

COGNATI, Relations by the mother, as the *agnati* are relations by the father.

COGNATIONE, A writ of Cousenage. See *Cousenage*.

COGNISANCE, or cognizance, Fr. *connaissance*, Lat. *cognitio*.] Is used diversely in our law: sometimes for an acknowledgment of a *fine*. See title *Fine*. In replevin, *connaissance*, or *conscience*, is the answer given by a defendant, who hath acted as *bailliff*, &c. to another, in making a distress. See titles *Distress*, *Replevin*.

The most usual sense in which this term is now used, is relative to the claim of *Cognizance of Pleas*. This is a privilege granted by the King to a city or town, to hold plea of all contracts, &c. within the liberty of the franchise; and when any man is impleaded for such matters in the courts of *Westminster*, the mayor, &c. of such franchise may ask cognizance of the plea, and demand that it shall be determined before them: but if the courts at *Westminster* are possessed of the plea before cognizance be demanded, it is then too late. *Terms de Ley*. See Stat. 9 H. 4. c. 5: 8 H. 6. c. 26: 3 Comm. 298: 4 Comm. 277.

Cognizance of Pleas extends not to assises; and when granted, the original shall not be removed: it lies not in *quare impedit*, for they cannot write to the bishop, nor of a plea out of the county court, which cannot award a return, &c. *Jenk. Cent.* 31, 34. This cognizance shall be demanded the first day: and if the defendant in a plea of land counterpleads the franchise, and the tenant joins with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate. *Ibid.* 18.

There are three sorts of inferior jurisdictions, one whereof is *tenere placita*, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the King's courts, if he will. The second is *conscience of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it. The third sort is

an *exempt jurisdiction*, as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of the court of K. B. if there be a court within that city which can hold plea of the cause, and no body can take advantage of this privilege but a defendant; for if he will bring *replevin*, that will remove the cause, but he may waive it if he will, so that the privilege is only for his benefit. 3 Salk. 79, 80. pl. 4: *Hill. 1 An. B. R. Crooke v. Smith*.

King Hen. VIII. by letters patent of the 14th of his reign, and confirmed by parliament, granted to the University of Oxford *conscience of pleas*, in which a scholar or servant of a college should be party, *ita quod iudicium de utroque banco se non intromittant*. An attorney of C. B. sued a scholar, in C. B. for battery. By the court, this general grant does not extend to take away the special privilege of any court without special words. *Lit. Rep.* 304. Mich. 5 C. B. Oxford (University's) case.

If a scholar of Oxford or Cambridge be sued in Chancery for a special performance of a contract to lease lands in *Middlesex*, the University shall not have conscience, because they cannot sequester the lands. *Gibb. Hist. of C. P.* 194. cites 2 Vent. 363.

Conscience must be demanded before an imparlance, and the same term the writ is returnable, after the defendant appears; because, till he appears there is no cause in court, otherwise there would be a delay of justice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, since when the conscience is allowed, the franchise prefixes a day to both parties to appear before them: and it is the lord's laches if he does not come soon enough not to delay the parties. *Gibb. Hist. of C. P.* 196.

Conscience was granted to the University of Oxford, (no cause being shewn to the contrary), in *Easter Term*, 9 Geo. 2. in the case of *Woodcocke and Brooke*. *Hardw.* 241.—See further under title *Comits of the University*.

Cognizance also signifies the badge of a waterman or servant, which is usually the giver's *crest*, whereby he is known to belong to this or that nobleman or gentleman. *Dist.*

COGNISOR AND COGNISEE. *Cognisor*, is he that passeth or acknowledgeth a fine of land, or tenements to another; and *cognisee* is he to whom the fine of the said lands, &c. is acknowledged. Stat. 32 H. 8. c. 5.

COGNITIONES, Ensigns and arms, or a military coat painted with arms. *Mat. Paris* 1250.

COGNITIONIBUS MITTENDIS, A writ to one of the King's justices of the *Common Pleas*, or other that hath power to take a fine, who having taken the fine defers to certify it, commanding him to certify it *Regi Orig.* 68.

COGNOVIT ACTIONEM, Is where a defendant acknowledges or confesses the plaintiff's cause against him to be just and true; and, before or after issue, suffers judgment to be entered against him without trial. And here the confession generally extends no further than to what is contained in the declaration; but if the defendant will confess more, he may. 1 *Rel.* 929: *Hob.* 178.

COGWARE, Is said to be a sort of coarse clothes, made in divers parts of *England*, of which mention is made in the Stat. 13 R. 2. cap. 10.

COHUAGIUM, A tribute paid by those who met promiscuously in the market or fair; *cobua* signifying a promiscuous multitude of men in a fair or market.—*Quieti ab omni thelonia passagio, pontagio, cohuagio, pallagio, &c.* Du Cange.

COIF, coifa.] A title given to Serjeants at law; who are called *Serjeants of the coif*, from the lawn *coif* they wear on their heads under their caps, when they are created. The use of it was anciently to cover *tonsuram clericalem*, otherwise called *corona clericalis*; because the crown of the head was close shaved, and a border of hair left round the lower part, which made it look like a crown. *Blount*. See title *Clerk*.

COIN, *cuna pecunia*.] Seems to come from the Fr. *coin*, i. e. *angulus*, a corner, whence it has been held, that the ancientest sort of *coin* was square with corners, and not round as it now is; it is any sort of money coined. *Crompt. Jurisd.* 220. *Coin* is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom: and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his *coin*. But the *coin* of one king is not current in the kingdom of another, unless it be at great loss; though our king by his prerogative may make any foreign *coin* lawful money of England at his pleasure, by proclamation. *Terms de Ley*. If a man binds himself by bond to pay one hundred pounds of lawful money of Great Britain, and the person bound, the obligor, pays the obligee the money in French, Spanish, or other *coin*, made current either by act of parliament, or the king's proclamation, the obligation will be well performed. *Co. Lit.* 207. But it is said a payment in farthings, is not a good payment. 2 *Inst.* 517. See *post*.

When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril after his allowance; and he shall not then take exception to it as bad, notwithstanding he presently reviews it. *Terms de Ley*.

Of Offences relating to the Coin.

Two offences respecting the *coin*, are made *treason* by the statute 25 E. III. c. 2: These are the actual counterfeiting the gold and silver coin of this Kingdom; or the importing such counterfeit money with an intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose.

By *Stat.* 1 Mar. 2. c. 6, if any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the Crown; such offence shall be deemed *high-treason*. And by *Stat.* 1 & 2 P. & M. c. 11, if any person do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money, referred to in these statutes, must be such as is absolutely current here, in all payments, by the King's proclamation; of which there is none at present, *Portugal money* being only taken by consent, as approaching the nearest to our standard, and falling in well enough with our de-

visions of money into pounds and shillings: therefore to counterfeit that is not high treason, but another inferior offence.

Clipping or defacing the genuine coin was not hitherto included in these statutes; but by *Stat.* 5 Eliz. c. 11, clipping, washing, rounding, or filing for wicked gains' sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by *Stat.* 18 Eliz. c. 1, the same species of offence is described in other more general words; viz. impairing, diminishing, falsifying, scaling, and lightening, are made liable to the same penalties.

By *Stat.* 8 & 9 W. 3. c. 26, (made perpetual by 7 Ann. c. 25,) whoever, without proper authority, shall knowingly, make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the King's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason; which is much the severest branch of the coinage law. The statute farther enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint: or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within three months after the commission of the offence: except those for making or mending any coining tool or instrument, or for the making letters on money round the edges; which are directed to be commenced within six months after the offence committed. See *Stat.* 7 Ann. c. 25.

And, lastly, by *Stat.* 15 & 16 Geo. 2. c. 28, if any person colours or alters any shilling or six-pence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea: or any half-penny or farthing to make them respectively resemble a shilling or six-pence; this is also high treason; but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

Offences relating to the *coin*, not amounting to treason, and under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, here recited in the order of time.—By *Stat.* 27 E. 1. c. 3, none shall bring pollards, and crockards (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods.—By *Stat.* 9 E. 3. 2, no sterling money shall be melted down, upon pain of forfeiture thereof.—By *Stat.* 17 E. 3, none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and members of the persons importing, and the searchers permitting such importation.—By *Stat.* 3 H. 5. 1, to make, coin, buy, or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony: and knowingly to receive or pay them or blanks (*Stat.* 2 Hen. 6. c. 9.) incurs a forfeiture of an hundred shillings.—By *Stat.* 14 Eliz. c. 3, such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason.—By *Stat.* 13 & 14 Car. 2. c. 31, the offence of melting down any current silver money, shall be punished with forfeiture of

of the same, and affix the double value; and the offender if a freeman, or any town, shall be disfranchised; if not, shall suffer six months' imprisonment.—By *Stat. 6 & 7 W. 3. c. 17*, if any person buys or sells, or knowingly has in his custody, any clippings or shavings of the coin, he shall forfeit the same and £50; one moiety to the king, and the other to the informer; and he is branded in the cheek with the letter B. [But see *note on Clergy*.]—By *Stat. 13 & 14 W. 3. c. 26*, no person shall blanch, or whiten, copper for sale (which makes it resemble silver), nor buy or sell or offer for sale any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but beneath the standard; nor shall any person receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of its baseness, and a fraudulent design) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered (by *Stat. 9 & 10 W. 3. c. 21*; *13 Geo. 3. c. 71*; and *14 Geo. 3. c. 70*.) to perform at his own hazard; and all such persons so blanching, selling, &c. shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed.

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by *Stat. 15 & 16 Geo. 2. c. 28*, that if any person shall utter or tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more: for the second offence shall be imprisoned two years, and find sureties for two years longer; and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money; and shall for the first offence be imprisoned one year, and find sureties for his good behaviour two years longer; and for the second be guilty of felony without benefit of clergy. By the same statute it is also enacted that if any person counterfeits the copper coin, he shall suffer two years' imprisonment, and find sureties for two years more. By *Stat. 11 Geo. 3. c. 40*, persons counterfeiting copper halfpence or farthings, with their abettors; or buying, selling, receiving or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of; shall be guilty of single felony. And by a temporary *Stat. (14 Geo. III. c. 42)*, if any quantity of money exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited, in equal moieties, to the crown and prosecutor.

The Coining of money is in all States the act of the Sovereign Power: that its value may be known on inspection. And with regard to coinage in general, there are three things to be considered therein; the materials,

the impression, and the denomination. With regard to the materials, Sir Matthew Hale lays it down (*1 Hal. P. C. 577*) that the money of England must either be of gold or silver; and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by Charles II: and ordered by proclamation to be current in all payments, under the value of six pence, and no otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it, as has been already noticed. And as to the silver coin, it was enacted by *Stat. 13 Geo. 3. c. 42*, that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law for more than its value by weight, at the rate of 5 s. 2 d. an ounce. This was a clause in a temporary act, which was continued till 1783, since which time it does not appear to have been revived.

As to the Impression, the stamping thereof is the unquestionable prerogative of the Crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes (*1 Hal. P. C. 191*), this was usually done by special grant from the king, or by prescription which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the Exchequer.

The Denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard and called sterling or sterling metal; a name for which there are various reasons given, but none of them entirely satisfactory. See *Spelm. Gloss. 203*. *Dugdale 3, 165*. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlings* or *Kasterlings*, as those Saxons were anciently called, who inhabited that district of Germany, now occupied by the *Hans towns* and their appendages; the earliest traders in modern Europe. Of this sterling or sterling metal all the coin of the kingdom must be made, by *Stat. 25 E. 3. c. 13*.—So that the King's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value. *2 Inst. 577*: though Sir Matthew Hale, (*1 Hal. P. C. 194*), appears to be of another opinion. The king may also by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. *1 H. P. C. 197*. But this it seems ought to be by comparison with the standard of our own coin, otherwise the consent of parliament will be necessary. The king may also at any time decay, or cry down any coin of the kingdom, and make it no longer current. *1 Hal. P. C. 197*.

This Standard hath been frequently varied in former times; but half for many years past been thus invariably settled. The pound Troy of gold, consisting of twenty-two carats (or 24th parts) fine, and two of alloy, is divided into forty-four guineas and an half of the present value

of 21 s. each. And the pound Troy of silver, consisting of eleven ounces, and two penny weights five, and eighteen penny-weights alloy, is divided into sixty two shillings. See *Fishes on English coins*.

In the 7th year of King William III. an act was made for selling in all the old coins of the kingdom, and to melt it down and re-coin it; the deficiencies whereof were to be made good at the public charge: and in every hundred pound coined, 40 l. was to be shillings, and 10 l. six-pences, under certain penalties.

Persons bringing plate to the Mint to be coined, were to have the same weight of money delivered out, as an encouragement: and receivers general of taxes, &c. were to receive money at a large rate per ounce. Our guineas have been raised and fallen, as money has been scarce or plenty, several times by statute; and anno 3 Geo. 1. guineas were valued at 21 s. at which they now pass.

A duty of 10 s. per ton was imposed on wine, beer, and brandy imported, called the *tonnage duty*, granted for the expence of the King's coinage, but not to exceed 3000 l. per ann. Stat. 18 Car. 2. cap. 5. This duty for coinage hath been continued and advanced, from time to time by divers statutes; and by Stat. 27 Geo. 2. c. 14 (explained by Stat. 27 Geo. 3. c. 23. § 64.) the Treasury is to apply 15,000 l. a-year to the expences of the mints in England and Scotland—Stat. 14 Geo. 3. c. 92, regulates the stamping of money weights, the fees for which are settled by Stat. 15 Geo. 3. c. 30, at 1 d. for every 12 weights.

COLIBERTS, coliberti. Were tenants in socage; and particularly such villeins as were manumitted or made freemen. *Domesday*. But they had not an absolute freedom; for though they were better than servants, yet they had superior lords to whom they paid certain duties, and in that respect they might be called servants, though they were of middle condition, between freemen and servants, — *Libertate carens colibertus dicitur esse*. Du Cange.

COLLATERAL, collateralis. From the Lat. *lateralis*, sideways, or that which hangeth by the side, not direct: as *collateral alliance* is that which is made over and above the deed itself: *collateral security*, is where a deed is made of other land, besides those granted by the deed of mortgage: and if a man covenants with another, and enters into bond for performance of his covenant, the bond is a *collateral assurance*; because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings, for a fair or market, in another person's ground, it is *collateral* to the ground. The private woods of a common person, within a forest, may not be cut down without the King's licence, it being a prerogative *collateral* to the soil. And to be subject to the feeding of the King's deer, is *collateral* to the soil of a forest. *Crompt. Jurisd.* 185; *Manswood*, p. 66.

COLLATERAL CONSANGUINITY, or KINDETH. *Collateral relations* agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend from each other. *Collateral kinsmen*, therefore, are such as lineally spring from one and the same ancestor, who is the *stirps* or root; the *stipes*, trunk, or common stock, from whence these relations are branched out. 2 *Comm.* 204, see title *Descent*.

COLLATERAL DESCENT, and COLLATERAL WARRANTY. See *Descent* and *Warranty*.

COLLATERAL ISSUE, Is where a criminal contest pleads any matter, allowed by law, in bar of execution,

as *pregnancy*, the King's pardon, an act of grace, or *attainder*, or *perpetuity*, &c. that he is not the same that was attained, &c. whereon issue is taken, which issue is to be tried, by a jury, *factum*.

COLLATIO BONGORUM. Is in law where a portion or money advanced by the father to a son or daughter, is brought into *benefit* in order to have an equal distributory share of his personal estate at his death, according to the intent of the Stat. 25 Ed. 3. c. 10: *Abbr. Cas. Ed. 2. 254. See titles Fideicommissum, Entailment*.

COLLATION to a BENEFICE, collatio beneficii. Signifies the bestowing of a *benefice* by the bishop, when he hath right of patronage. See title *Advowson*.

COLLATIONE FACTA UNI POST MORTEM ALTERIUS. A writ directed to the Justices of the Common Pleas, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the King; who died during the suit between the King and the bishop's clerk: for judgment once passed for the King's clerk, and he dying before admittance, the King may bestow his presentation on another. *Reg. Orig.* 31.

COLLATIONE HEREDITATII. A writ whereby the King conferred the keeping of an *hermitage* upon a clerk. *Reg. Orig.* 303, 308.

COLLATION OF SEALS. This was when upon the same label, one seal was set on the back or reverse of the other.

COLLATIVE ADVOWSONS, See title *Advowson*.

COLLECTORS of money due to the King. *Stat.* 20 Car. 2. See *Receivers*.

COLLEGE, collegium. A particular corporation, company or society of men, having certain privileges founded by the King's licence: and for Colleges in reputation, see 4 *Rep.* 106. 108.

The establishment of Colleges or Universities, is a remarkable era in literary history. The schools in Cathedrals and Monasteries confined themselves chiefly to the teaching of grammar. There were only one or two masters employed in that office. But in colleges, professors were appointed to teach all the different parts of science. The first obscure mention of academical degrees in the University of Paris, (from which the other Universities in Europe have borrowed most of their customs and institutions), occurs. A. D. 1215. Vide *Rohert's Hist. Emp. C. P.* 10. 323.

See the power of visitors of Colleges well explained in Dr. Walker's case. *Hardw.* 212. See further titles *Corporations, Leases, Universities*.

COLLEGIATE CHURCH, Is that which consists of a Dean and secular canons; or more largely, it is a church built and endowed for a society, or body corporate, of a dean or other president, and secular priests, as canons or prebendaries in the said church. There were many of these societies distinguished from the religious or regulars, before the reformation; and some are established at this time; as *Westminster, Windsor, Winchester, Southwell, Manchester*, &c. See title *Chapter; Dean*.

COLLIGENDUM BONA DEFUNCTI, (Letters ad.) In defect of representatives and creditors to administer to an intestate, &c. the Ordinary may commit administration to such discreet person as he approves of, or grant him these letters, to collect the goods of the deceased, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and

to do other acts for the benefit of such as are entitled to the property of the deceased. 2 *Comm.* 505. See title *Barren*.

COLLOQUIUM, a colloquium. A talking together, or affirming of a thing, laid in declamation for words in actions of *lander*, &c. *Mod. Caf.* 223; *Gooden* 90.

COLLUSION, collusio. Is a deceitful agreement or contract between two or more persons; for the one to bring an action against the other, in some evil purpose, as to defraud a third person of his right, &c. This *collusio* is either apparent, when it shows itself on the face of the act; or, which is more common, it is secret, where done in the dark, or covered over with a show of honesty. And it is a thing the law abhors; wherefore, when found, it makes void all things dependant upon the same, though otherwise in themselves good. *Co. Lit.* 109, 360; *Mund.* 54. *Collusio* may sometimes be tried in the same action wherein the covin is, and sometimes in another action, as for lands aliened in mortmain by a *quale jus*; and where it is apparent there needs no proof of it; but when it is secret, it must be proved by witnesses, and found by a jury like other matters of fact. 9 *Rep.* 33. The statute of *Westm.* 2. 23 *Ed.* 1. c. 33, gives the writ *quale jus*, and inquiry in these cases: and there are several other statutes relating to deeds, made by *collusio* and fraud. The cases particularly mentioned by the statute of *Westm.* 2. are of *quare impedit*, *assise*, &c. which one corporation brings against another, with intent to recover the land or advowson, for which the writ is brought, held in mortmain, &c. See title *Fraud*.

COLONIES, See title Plantation.

COLONUS, An husbandman or villager, who was bound to pay yearly a certain tribute; or at certain times in the year to plough some part of the lord's land; and from hence comes the word *clown*.

COLOUR, color. Signifies a probable plea, but which is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore *colour* ought to be matter in law, or doubtful to the jury.

It is a rule in pleading, that no man be allowed to plead, specially, such a plea as amounts only to the general issue; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if a defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be that he claims by feoffment with livery from A. by force of which he entered on the lands in question, he cannot plead this by itself, as this plea amounts to no more than the general issue. But he may allege this specially, provided he goes farther, and says, that the plaintiff claiming by colour of a prior deed of feoffment, without livery, entered, upon whom he entered: and may then refer himself to the judgment of the court, which of the two titles is the best in point of law. *Dodder & Stud.* 2. c. 53.

Every colour ought to have these qualities following: 1. It is to be doubtful to the *lay gens*, as in case of a deed of feoffment pleaded, and it is a doubt whether the land passeth by the feoffment, without livery, or not. 2. Colour ought to have continuance, though it wants effect. 3. It

should be both *color*, that if it were effectual, would maintain the nature of the action; as in assise, so give colour of freehold, &c. 20 *Rep.* 88, 90 & 91. Colour must be such a thing, which is a good colour of title, and yet is not any title, *Co. Jur.* 122. If a man justifies his entry for such a cause as binds the plaintiff or his heirs for ever, he shall not give any colour: but if he pleads a defect in his title, he may give colour, because this binds the plaintiff, and not the right; so that when the matter of the plea bars the plaintiff of his right, no colour must be given. When the defendant entitles himself by the plaintiff, where a person pleads to the writ, or to the action of the writ, he who justifies for either, or where the defendant justifies as servant in all these cases no colour ought to be given. 10 *Rep.* 92; *Lutw.* 1343. Where the defendant doth not make a special title to himself, or any other, he ought to give colour to the plaintiff. *Co. Lit.* 76. In trespass for taking and carrying away twenty loads of wood, &c. the defendant says, that A. B. was possessed of them, *ut de bonis propriis*, and that the plaintiff claiming them by colour of a deed *aliter* made, took them, and the defendant repook them; and adjudged, that the colour given to the plaintiff, makes a good title to him, and confelleth the interest in him. 1 *Lit. Abr.* 275.

COLOUR or OFFICE, color officii. Is when an act is evilly done by the countenance of an office; and always taken in the worst sense, being grounded upon corruption, to which the office is as a shadow and colour. *Plowd. Comment.* 64. See *Bribery*; *Extortion*.

COLPICES, culpicium, colpeius. Young poles, which being cut down, make leavers or litters; and in *Warwickshire* they are called *colpices* to this day. *Blount*.

COLPO, A small wax candle, a copo de cere. *Hoveden* says, that when the King of Scots came to the *English* Court, as long as he said there, he had every day, *De liberatione triginta sol. Et duodecim vassillos dominicos, Et quadraginta grossas longos colpones de dominica candela regis.* &c. anno 1194.

COMBARONES, The fellow barons, or commonalty of the Cinque Ports. *Placit. temp. Ed. 1. & Ed. 2.* But the title of barons of the Cinque Ports is now given to their representatives in parliament; and the word *combaron* is used for a fellow member, the baron and his *combaron*. See title *Parliament*.

COMBATERRÆ, From Sax. *cumbe*, Brit. *lum*, Eng. *comb*. A valley or low piece of ground or place between two hills; which is still so called in *Devonshire* and *Cornwall*: hence many villages in other parts of *England* have their names of *comb*, as *Wickcomb*, &c. from their situation. *Kemmet's Gloss.*

COMBAT, TRIAL BY, See Battle.

COMBINATIONS to do unlawful acts, are punishable before the unlawful act is executed; this is to prevent the consequence of combinations, and conspiracies, &c. 9 *Rep.* 57. See titles *Confederacy*, *Conspiracy*.

COMBUSTIO PECUNIÆ, The ancient way of trying mixt and corrupt money, by melting it down upon payments into the Exchequer. In the time of King Henry II. a constitution was made, called the *trial by combustion*; the practice of which differed little or nothing from the present method of assaying silver. But whether this examination of money by combustion, was to reduce an equation of money only of sterling, viz. a due proportion of allay with copper; or to reduce it to a fine pure silver without allay, doth

not appear. On making the constitution for trial, it was considered, that though the money did answer *numera et pondere*, it might be defective in value; because mixed with copper or brass, &c. *Vide Lownes's Essay upon Coins*, p. 5. See title *Coin*.

COMITATUS. A county. *Irgulphus* tells us, That *Kingland* was first divided into counties by King *Alfred*; and counties into hundred, and these again into tithings; and *Fertessue* writes, that *regnum Anglie per comitatus et regnum Francie per ballivatus distinguitur*. It is also taken for a territory or jurisdiction of a particular place, as in *Mat. Paris. anno 1234* and divers old charters. See titles *County*, *Sheriff*.

According to Lord *Lutheham*, in his *History of Hen. II. lib. 2. fo. 217*, (a) h county was anciently an earldom, so that, previous to the reign of King *Stephen*, there were not any titular earls, nor more earls than counties, though there might be fewer. As to the divisions of counties into hundreds and tithings, see *Ld. Lit. l. 2. fo. 259* Alto see *Bract. l. 3. c. 10*.

COMITATUS COMMISSO. Is a writ of commission whereby a sheriff is authorized to take upon him the charge of the county. *Reg. Orig. 295*.

COMITATUS ET CASTRO COMMISSO. A writ by which the charge of a county, together with the keeping of a castle, is committed to the sheriff. *Reg. Orig. 295*.

COMITIVA. A companion or fellow traveller; it is mentioned in *Brompton, Regn. H. 2*. And sometimes it signifies a troop or company of robbers: as in *Walsingham, anno 1366*.

COMMANDERY, *præceptoria*.] Was any manor or chief messuage, with lands and tenements thereto appertaining, which belonged to the priory of *St. Job*, of *Jerusalem* in *England*; and he who had the government of such a manor or house was stiled the *commander*; who could not dispose of it but to the use of the priory, only taking thence his own sustenance, according to his degree. *New Eagle* in *Lincolnshire* was and still is called the *Commandery of Eagle*, and did anciently belong to the said priory of *St. Job*: So *Selbach* in *Pembrokeshire*, and *Shingay* in *Cambridgeshire*, were *commanderies* in the time of the knights templars, says *Camden*: and these in many places of *England* are termed *Temples*, because they formerly belonged to the said templars. See *Stat. 26 H. 8. c. 2*. The manors and lands belonging to the priory of *St. Job* of *Jerusalem*, were given to King *Hen. VIII* by *Stat. 32 Hen. 8. c. 20*; about the time of the dissolution of abbies and monasteries: so that the name only of *commanderies* remains, the power being long since extinct.

COMMANDMENT, *præceptum*.] Is diversely taken; as the *commandment of the King*, when upon his own motion he had cast any man into prison. *Commandment of the justices*, absolute or ordinary; absolute, where upon their own authority they commit a person for contempt, &c. to prison, as a punishment; ordinary is when they commit one rather for safe custody, than for any punishment: and a man committed upon such an ordinary *commandment* is releasable. *Strouds. P. C. 72, 73*. Persons committed to prison by the special *command* of the King, were not formerly bailable by the court of *King's Bench*; but at this day the law is otherwise. 2 *Hawk. P. C. c. 15. § 36*. See title *Bail*.

In another sense of this word, magistrates may command others to assist them in the execution of their offices, for the doing of justice; and so may a justice of peace to suppress riots, apprehend felons; an officer to keep the King's peace, &c. *Bro. 3*. A master may command his servant to drive another man's cattle out of his ground, to enter into lands, seize goods, distrain for rent, or do other things; if the thing be not a trespass to others. *Fitz. lib. 1*. The commandment of a thing is good, where he that commands hath power to do it: and a verbal command in most cases is sufficient; unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. *Bro. 288*: *Dyer 202*.

Commandment is also used for the offence of him that willet another man to transgress the law, or do any thing contrary to it; and in the most common signification, it is taken where one willet another to do an unlawful act, as murder, theft, or the like: which the civilians called *mandatum*. *Bract. lib. 3. c. 19*. See title *Accessory*.

In forcible entries, &c. an infant or some covert may be guilty in respect of actual violence done by them in person; though not in regard to what shall be done by others at their command, because all such commands of theirs are void. *Co. Lit. 357*. 1 *Hawk. P. C. c. 64. § 35*. See title *Infant*. In trespass, &c. the master shall be charged criminally for the act of the servant, done by his command; but servants shall not be excused for committing any crime, when they act by command of their masters, who have no authority over them to give such command. *Dott. & Stud. c. 42*. *H. P. C. 66*: *Kel. 13*. And if a master commands his servant to distrain, and he abuse the distress, the servant shall answer it to the party injured, &c. *Kitch. 372*. See title *Servant*.

COMMARCHIO. The confines of the land; from whence probably comes the word *marches* — *Imprimis ut nosse et landimeris, commarchionibus*. *Du Cange*.

COMMENDAM, *eccl'ia commendata, vel eccl'ia ecclesie alicui commissa*.] Is the holding of a benefice or church-living, which being void, is commended to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor: and he to whom the church is commended, hath the profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing deposited in his hands in trust, who hath nothing but the custody of it, which may be revoked. When a parson is made bishop, there is a cession or voidance of his benefice, by the promotion; but if the King by special dispensation gives him power to retain his benefice, notwithstanding his promotion; he shall continue parson, and is said to hold it in *Commendam*. *Hob. 144*: *Latch. 236*. As the King is the means of avoidances on promotions to dignities, and the presentations whereon belong to him he often on the creation of bishops grants them licences to hold their benefices in *commendam*; but this is usually where the bishopricks are small, for the better support of the dignity of the bishop promoted: and it must be always before consecration; for afterwards it comes too late, because the benefice is then absolutely void. — A *commendam*, founded on the statute 25 *H. 8. c. 21*, is a dispensation from the supreme power, to hold or take an ecclesiastical living contra *ius positum*: and there are several sorts of *commendans*; as a *commendam semicbris*, which is for the benefit of

of the church without any regard to the *commendatory*, being only a provisional act of the Ordinary, for supplying the vacation of *six months*, in which time the patron is to present his clerk, and is but a sequestration of the cure and fruits until such time as the clerk is presented: a *commendam retinere*, which is for a bishop to retain benefices, on his preferment; and these *commendams* are granted on the King's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A *commendam recipere* is to take a benefice *de novo* in the bishop's own gift, or in the gift of some other patron, whose consent must be obtained. *Dyer*, 228: *3 Lev.* 381. *Hob.* 143: *Danv.* 79.

A *commendam* may be temporary for six or twelve months; two or three years, &c. or it may be perpetual, *i. e.* for life, when it is equal to a presentation, without institution or induction. But all dispensations beyond six months were only permissive at first, and granted to persons of merit: the *commendam retinere* is for one or two years, &c. and sometimes for three or six years, and doth not alter the estate which the incumbent had before, a *commendam retinere*, as long as the *commendatary* should live and continue bishop, hath been held good. *Vaugh.* 18

The *commendam recipere* must be for life, as other parsons and vicars enjoy their benefices; and as a patron cannot present to a full church, so neither can a *commendam recipere* be made to a church that is then full. *Shoep.* 414. A benefice cannot be *commended* by parts, any more than it may be presented unto by parts; as that one shall have the glebe, another the tithes, &c. Nor can a *commendatary* have a *juris utrum*, or take to him and his successors, sue or be sued, in a writ of annuity, &c. But a *commendatary in perpetuum* may be admitted to do it. 11 H 4.

These *commendams* are now in fact seldom or never granted to any but bishops; and in that case the bishop is made *Commendatary* of the benefice while he continues bishop of such diocese. as the object is to make an addition to a small bishoprick. and it would be unreasonable to grant it to a bishop for life, who might afterwards be translated to one of the richest sees—See the case of *Commendam*, *Hob.* 140: and *Collier's Eccl. Hist.* 2 710.

COMMENDATARY, *commendatarius*.] He that holdeth a church living or preferment in *commendam*.

COMMENDATORY LETTERS, Are such as are written by one bishop to another in behalf of any of the clergy, or others of his diocese, travelling thither, that they may be received among the faithful: or that the clerk may be promoted; or necessities administered to others, &c. several forms of these letters may be seen in our historians, as in *Bede*, lib. 2 c. 18.

COMMENDATUS, One that lives under the protection of a great man. *Spelm.*—*Commendati homines* were persons who by voluntary homage put themselves under the protection of any superior lord. for ancient homage was either *predial*, due for some tenure; or personal, which was by compulsion, as a sign of necessary subjection; or voluntary, with a desire of protection: and those, who by voluntary homage put themselves under the protection of any men of power, were sometimes called *homines ejus commendati*: and sometimes only *commendati*, as often occurs in *Domesday*. *Commendati dimidi* were those who de-

pended on two several lords, and paid one half of their homage to each: and *sub-commendati* were like under-tenants, under the command of persons that were dependants themselves on a superior lord: also there were *dimidi sub-commendati*, who bore a double relation to such depending lords. *Domesday*. This phrase seems to be still in use, in the usual compliment, *Commend me to such a friend*, &c. which is to let him know, *I am his humble servant*, *Spelm.* of Feuds, cap. 20

COMMERCE, *commercium*.] Traffick, trade or merchandize in buying and selling of goods.

There is a distinction between *commerce* and *trade*; the former relates to our dealings with foreign nations, or our colonies, &c. abroad; the other to our mutual traffick and dealings among ourselves at home.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffick and merchandize. neither can they have a proper authority for this purpose: for as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other.—For this reason the affairs of commerce are regulated by a law of their own, called the Law-merchant or *Lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries. See further title *Marchant*. See also title *Bill of Exchange*.

COMMISSARY, *commissarius*.] A title in the ecclesiastical law, belonging to one that exerciseth spiritual-jurisdiction, in places of a diocese which are so far from the episcopal city, that the chancellor cannot call the people to the bishop's principal consistory court, without then too great inconvenience. His commissary was ordained to supply the bishop's jurisdiction and office in the out-places of the diocese; or in such places as are peculiar to the bishop, and exempted from the jurisdiction of the archdeacon for where, either by prescription or composition, Archdeacons have jurisdiction within their arch-deaconries, as in most places they have, this *commissary* is superfluous and oftentimes vexatious, and ought not to be; yet in such cases, a *commissary* is sometimes appointed by the bishop, he taking prelation money of the archdeacon yearly *pro exteriori jurisdictione*, as it is ordinarily called. But this is held to be a wrong to archdeacon and the poorer sort of people. *Convel's Interp.* 4 Inst. 338.

There are also *commissaries* in time of war. Persons sent abroad to take care of the supply and distribution of provisions for the army.

COMMISSION, *commissio*.] The warrant or letters-patent, which all persons exercising jurisdiction either ordinary or extraordinary, have to authorize them to hear or determine any cause or action: as the *commission* of the Judges, &c. *Commissio* is with us as much as *a legato* with the civilians and this word is sometimes extended farther than to matters of judgment; as the *commission of purveyance*, &c. *Commissions* of inquiry shall be made to the justices of one bench or the other, &c. and to do lawful things, are grantable in many cases also most of the great officers, judicial and ministerial, of the realm, are made by *commission*. And by such *commissions*, treasons, felonies, and other offences, may be heard and determined, by this means likewise, oaths, cognitions of fines.

Shes, and answers, are taken, witnesses examined, offices found, &c. *Bro. Ab. 12. Rep. 39*—See *Stat. 42 E. 3. c. 4.* And most of these commissions are appointed by the King under the Great Seal of England: but a commission granted under the Great Seal may be determined by a Privy Seal; and by granting another new commission to do the same thing, the former commission determines; and on the death or demise of the King, the commissions of judges and officers generally cease. *Bro. Commis. 2 Dyer 289.* There was formerly a High-Commission Court founded on 1 *Edw. c. 1*, but it was abolished by *Stat. 16 Car. 1. c. 11*; and 13 *Car. 2. c. 2.* Of commissions divers may be seen in the table of the *Register of Writs*. See also *Stat. 4 Hen. 4. c. 9*; 7 *Hen. 4. c. 11*; 6 *An. c. 7*. By which last act, § 27, it is provided that no greater number of commissioners shall be made for the execution of any office than had been previously usual.

COMMISSION OF ANTICIPATION Was a commission under the Great Seal to collect a tax or subsidy before the day. 15 *H. 8.*

COMMISSION OF ARREST, See title *Militia*.

COMMISSION OF ASSOCIATION. A commission to associate two or more learned persons with the justices in the several circuits and counties of *Warr.*, &c. See title *Affice, Circuit*.

COMMISSION OF BANKRUPT, See title *Bankrupt*.

COMMISSION OF CHARITABLE USES, Goes out of the Chancery to the bishop and others, where lands given to charitable uses are misemployed, or there is any fraud or disputes concerning them, to enquire of and redress the abuse, &c. *Stat. 43 Eliz. c. 4.*—See titles *Charitable Uses*; *Mortmain*.

COMMISSION OF DELEGATES. Is a commission under the Great Seal to certain persons, usually two or three temporal lords, as many bishops, and two judges of the law, to sit upon an appeal to the King in the court of Chancery, where any sentence is given in any ecclesiastical cause by the archbishop. *Stat. 25 H. 8. c. 19.* Now generally three of the common law judges, and two Civilians, sit as delegates.

COMMISSION TO ENQUIRE OF FAULTS AGAINST THE LAW, Was an ancient commission set forth on extraordinary occasions and corruptions.

COMMISSIONS OF THE PEACE, See title *Justices of Peace*.

COMMISSION OF LUNACY, A commission out of Chancery to enquire whether a person represented to be a lunatick be so or not; that if lunatick, the King may have the care of his estate, &c. See title *Lunatick*.

COMMISSION OF REBELLION, Otherwise called a writ of rebellion, issues when a man after proclamation made by the sheriff, upon a process out of the Chancery, on pain of his allegiance, to present himself to the court by a day assigned, makes default in his appearance: and this commission is directed to certain persons, to the end they, three, two, or one of them apprehend the party, or cause him to be apprehended as a rebel and contemner of the king's laws, wheresoever found within the kingdom, and bring or cause him to be brought to the court on a day therein assigned: this writ or commission goes forth after an attachment returned, *non est inventus, Et. Termin de Ley*.—See title *Attachment, Chancery*.

COMMISSION OF SEWERS, Is directed to certain persons to see drains and ditches well kept and maintained in the marshy and fenny parts of England, for the better

conveyance of the water into the sea, and preserving the grafs upon the land. *Stat. 23 H. 8. c. 51*; 23 *Eliz. c. 9.* See title *Sewers*.

COMMISSION OF TREATY WITH FOREIGN PRINCES, Is where leagues and treaties are made and transacted between states and kingdoms, by their ambassadors and ministers, for the mutual advantage of the kingdoms in alliance.

COMMISSION TO TAKE UP MEN FOR WAR, Was a commission to press or force men into the king's service. This power of impressing has been heretofore doubted, but the legality of it is now fully established. *Vide Eyst. Rep. 154*; 1 *Comm. 419*; *Broadfoot's case, Comb. 245*; *Tubbi's case, Comp. 517*.—See titles *Martinet, Navy*.

COMMISSIONER, *commissarius*.] He that hath a commission, letters patent, or other lawful warrant to examine any matters, or to execute any public office, &c. And some commissioners are to hear and determine offences, without any return made of their proceedings; and others to inquire and examine, and certify what is found. *Stat. 4 Hen. 4. c. 9.* Commissioners, by the common law, must pursue the authority of the commission, and perform the effect thereof; and they are to observe the antient rules of the courts whence they come; and if they do any thing for which they have not authority, it will be void. 2 *Co. Rep. 25*; *Co. Lit. 157.* The office of commissioners is to do what they are commanded; and it is necessarily implied, that they may do that also, without which what is commanded cannot be done: their authority, when appointed by any statute law, must be used as the statutes prescribe. 12 *Rep. 32.* If a commission is given to commissioners to execute a thing against law, they are not bound to accept or obey it: commissioners not receiving a commission may be discharged, upon oath before the Barons of the Exchequer, &c. and the king by *superfideas* out of Chancery, may discharge commissioners. Besides commissioners relating to judicial proceedings; there are Commissioners of the Treasury, of the Customs, wine-licences, alienations, &c. of which there are an infinite number.

COMMITTEE, Are those to whom the consideration or ordering of any matter is referred, by some court, or by consent of parties to whom it belongs: as in parliament, a bill either consented to and passed, or denied, or neither, but being referred to the consideration of certain persons appointed by the House farther to examine it, they are thereupon called a committee. And when a parliament is called, and the speaker and members have taken the oaths, and the standing orders of the House are read, committees are appointed to sit on certain days, viz. the committee of privileges, of religion, of grievances, of courts of justice, and of trade; which are the standing committees. But though they are appointed by every new parliament, they do not all of them act, only the committee of privileges; and this being not of the whole House, is first called in the Speaker's chamber, from whence it is adjourned into the House, every one of the House having a vote therein, though not named, which makes the same usually very numerous: and any member may be present at any select committee; but is not to vote unless he be named. The chairman of the grand committee, who is always some leading member, sits in the clerk's place at the table, and writes the votes for and against the matter referred to them; and if the num-

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him be equal, he has a casting voice, otherwise he hath no vote in the committee; and after the chairman hath put the question for reporting to the House, if that be carried, he leaves the chair, and the Speaker being called to his chair, (who quits it in the beginning, and the mace is laid under the table) he is to go down to the bar, and to bring up his report to the table. After a bill is read a second time in the House of Commons, the question is put, whether it shall be committed to a committee of the whole house, or a private committee; and the committees meet in the Speaker's chamber, and report their opinion of the bill with the amendments, &c. And if there be any exceptions against the amendments reported, the bill may be recommitted, eight persons make a committee, which may be adjourned by five, *See Lex Constitutionis* 147, 150.—See title *Parliament*.

There is a Committee of the King, mentioned in *West's Symb. tit. Chancery, sect. 144*. And this hath been used, though improperly, for the widow of the king's tenant being dead, who is called the committee of the King, that is, one committed by the ancient law of the land to the king's care and protection. *Kitch. fol. 160*.

The Committee of a lunatick, idiot, &c. is the person to whom the care and custody of such lunatick is committed by the Court of Chancery. See title *Lunatick*.

Most Corporations have their committees of select members to perform the general routine of business. See title *Corporation*.

COMMITMENT.

The sending of a person to prison, by warrant or order, who hath been guilty of any crime.

Anciently more felons were committed to gaol without a mittimus in writing, than were with it; such were commitments by watchmen, constables, &c. See *1 H. H. 610*.—But now since the *Habeas-corpus* act, a commitment in writing seems more necessary than formerly; otherwise a prisoner may be admitted to bail under that act, whatsoever his offence may have been. *Burn's Justice, title Commitment*.

I. What kind of Offenders may be committed; and by whom; and in what manner.

II. To what Prison they may be committed; and at whose Charge.

III. How they may be removed and discharged.

I. THERE is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. *2 Hawk. P. C. c. 16. § 1*.—It is said, that whosoever a justice of peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol to remain there till he shall comply. *Id. ib. § 2*.

It seems agreed by all the old books, that whosoever a constable or private person may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind, as the sheriff, or any other officer; and may justify

such imprisonment by his own authority, but not by the command of another. *2 Hawk. P. C. c. 16. § 3*.

But inasmuch as it is certain, that a person lawfully making such an arrest, may justify bringing the party to the constable, in order to be carried by him before a justice of peace; and inasmuch as the statutes of *1 & 2 P. & M. cap. 13*, and *2 & 3 P. & M. cap. 10*, which direct in what manner persons brought before a justice of the peace for felony, shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of *31 Car. 2. c. 2*, commonly called the *Habeas-corpus* act, seems to suppose that all persons, who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice and opinions, are agreeable hereto; it is certainly most adviseable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him. *2 Hawk. P. C. c. 16. § 3*.

It is certain, that the Privy Council, or any one or two of them, or Secretary of State, may lawfully commit persons for treason, and for other offences against the State, as in all ages they have done. *2 Hawk. P. C. 117*.

As to commitments by the Privy Council, two cases in *Leonard*, (*1 Leon. 71*; *2 Leon. 175*.) pre-suppose some power for this purpose, without saying what; and the case in *Anders. 297*, plainly recognises such a power in *High-Treason*. But as to the jurisdiction of Privy Counsellors in other offences, it does not appear to have been either claimed or exercised. But see *post*, as to commitments by the Secretary of State for libel; the cases of *Dorby*, and *Earbury*; which *Lord Camden* said are established, and the Court has no right to overturn them. *11 S. F. 323*.

As to commitments by the Secretary of State; In the case of *Entick v. Carrington*, *C. B. Mich. 6 Geo. 3*, upon a special verdict, respecting the validity of a Secretary of State's warrant to seize persons and papers in the case of libel, a very critical enquiry was made into the source of this power in that officer, in cases of libels and other State crimes. *2 Will. 275*; *11 S. F. 317. 9*.—It appears that the king being the principal conservator of the realm, the Secretary of State has so much of the royal authority transferred to him, as justifies commitment for these crimes, but not the seizure of papers.

The following instances of commitments by the Privy Council and Secretary of State, will further explain the nature of this power.—1. *Howell*, was committed in the 28 *Eliz.* and *Hollyard* in the 30th *Eliz.* by Secretary *Wal-singham*, Privy Counsellor; and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. *1 Leon. 71*. *2 Leon. 175*. *sed vide Stat. 31 Car. 2. c. 2*; *Lord Paym 65*.—2. *Anno 34 Eliz.* the Judges remonstrated against the exercise of this power; and declared that all prisoners may be discharged, unless committed by the Queen's command, or by her whole council, or by one or two of them for *High-treason*. *1 And. 297*.—3. *Melvin* was committed, *an. 4 C. 1*, by Secretary *Conway*, on suspicion of high-treason: but the Court thought the cause of the sus-

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Picton should have been expressed. *Palm*, 558.—4. *Crofton* was committed by the council, an. 14 C. 2, for high-treason generally. *Vangb*, 142: 1 *Sid*. 78: 1 *Keib*, 305.—5. *Fitzpatrick* by the Privy Council, an. 7 W. 3, for high-treason, in aiding an escape: and bailed for neglect of prosecution. 1 *Salk*, 103.—6. *Yasley* was committed, an. 5 W. & M. by the Secretary of State, Lord Nottingham, for refusing to declare if he was a Jesuit. *Carth*, 291. *Skinn*, 369.—7. *Kendal* and *Roe* were committed, an. 7 W. 3, by Secretary *Trumbull* for high treason, in assisting the escape of *Montgomery*; and by *Holt*, C. J. held good, but the prisoners were bailed. 4 *S. T.* 559: 5 *Mol*. 78. *Skinn*, 590: *Holt*, 144: *Lord Raym*, 61, 5. *Comb*, 343: 12 *Mod* 82: 1 *Salk*, 347.—8. *Derby* was committed, 10 An. for publishing a libel; (quære for felony, 11 S. T. 311;) called the *Obscurator*, and the court held the warrant good and legal. *Foster*, 140: 11 S. T. 309.—9. Sir *W. Wyndham* was committed, an. 4 Geo. 1 by Secretary *Stanhope* for high treason; and by *Parke*, C. J. held good. *Stia* 3: 3 *Vin*, 516.—10. *Lord Scarishead*, and *Duplin*, and *Havvy* were committed, an. 2 Geo. 1, by Lord *Townshend*, Secretary of State, for treasonable practices, and admitted to bail 3 *Vin*, 534.—11. *Barbary* was arrested and committed by warrant from the Secretary of State, for being the author of a seditious libel, and his papers seized, and he continued on his recognizance, an. 7 Geo. 2. 8 *Mod*, 177: 11 S. T. 309.—12. *Henley* was committed, an. 31 Geo. 2, by the Earl of *Holderness*, Secretary of State, for high-treason, in adhering to the king's enemies. 1 *Burr*, 642.—13. *Shebbean* was committed, 31 Geo. 2, on two warrants from the Secretary of State, for a libel. 1 *Burr*, 460.—14. *Wilkes* was committed, an. 5 Geo. 3, by warrant from the Earl of *Hallifax*, Secretary of State, for a libel; but discharged by his privilege of parliament. 2 *Will*, 150: 11 S. T. 302.—15. *Sayer* was apprehended, 18 Geo. 3, by warrant from the Earl of *Rochford*, Secretary of State, for high treason, and bailed by Lord *Mansfield*. *Black Rep*, 1165.—See further title *Bail II.* and also title *Arrest*.

As to the manner of commitment, it is enacted by 2 & 3 P. & M. c. 10, That justices of peace shall examine persons brought before them for felony, &c. or suspicion thereof, before they commit them to prison, and shall bind their accusers to give evidence against them. See 2 *Hawk*. P. C. c. 16 § 11.

A Justice of the peace may detain a prisoner a reasonable time, in order to examine him; and it is said, that three days is a reasonable time for this purpose. 2 *Hawk*. P. C. c. 16, § 12: *Dalt*. c. 125. 2 *Inst*, 52, 591.

Every commitment must be in writing, and under the hand and seal, and shew the authority, of him that made it, and the time and place, and must be directed to the keeper of the prison. It may be either in the king's name, and only tested by the justice, or in the justice's name. It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do by law, it can be no fault to command him so to do. 2 *Hawk*. P. C. c. 16 § 13, 14, 15.

It ought to set forth the crime with convenient certainty, whether the commitment be by the Privy Council, or any other authority, otherwise the officer is not punishable by reason of such mittimus, for suffering the party to escape, and the court, before whom he is removed by *habeas corpus*, ought to discharge or bail him; and this

doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot judge whether it were a reasonable ground for imprisonment or not. 2 *Hawk*. P. C. c. 16, § 17. See titles *Arrest*; *Bail*.

A commitment for high treason or felony in general, without expressing the particular species, has been held good, 2 *Hawk*. P. C. c. 16, § 16. But now, since the *Habeas corpus* act, it seems that such a general commitment is not good, and therefore where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery* to make his escape, who was committed by a warrant of a Secretary of State for high treason; on a *Habeas corpus*, they were admitted to bail, because it did not appear of what species of treason Sir *James* was guilty. *Skinn*, 596: 1 *Salk*, 347. S. C.

It is safe to set forth that the party is charged upon oath; but this is not necessary, for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is good 2 *Hawk*. P. C. c. 16, § 17. This resolution was in the case of Sir *W. Wyndham*, 2 Geo. 1, who was committed by the Secretary of State, for high-treason, generally. *Stia*, 2. 3 *Vin*, 515, at large. It was confirmed by *Pratt*, C. J. in *Wilkes's* case, committed by a similar warrant for a libel. 2 *Will*, 158: 11 S. T. 304. And Mr. *J. Foster* says, in cases wherein the justice of the peace hath jurisdiction, the legality of his warrant will never depend on the truth of the information whereon it is grounded. *Curtis's Ca.* 136.—See also *Dalt*. c. 125: *Crompt*, 233: 2 *Inst*, 52: *Palm*, 558. 1 *Salk*, 347: 5 *Mod*, 78: 10 *Mod*, 334: 1 H. P. C. § 82.

Every such mittimus ought to have a lawful conclusion, viz. that the party be safely kept till he be delivered by law, or by order of law, or by due course of law; or that he be kept till further order, (which shall be intended of the order of law) or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment, that he be kept till he find bail; but a commitment till the person who makes it shall take further order, seems not to be good, and it seems that the party committed by such or any other irregular mittimus may be bailed. 2 *Hawk*. P. C. c. 16, § 18.

Also a commitment grounded on an act of parliament ought to be conformable to the method prescribed by such statute; as where the churchwardens of *Northampton* were committed on the 43 *Elizabeth*. cap. 2, and the warrant concluded in the common form, viz. *Until they be duly discharged according to law*; but the statute appointing, that the party should then remain until he should account, for want of such conclusion they were discharged. *Carth*, 152, 153. And where a man is committed as a criminal, the conclusion must be, *until he be delivered by due course of law*; if he be committed for contumacy, it should be, *until he comply*.

II. All commitments must be to some prison within the realm of England. For,

By the Stat. 31 Car. 2. cap. 2, the *Habeas corpus* act, it is enacted, "That no subject of this realm, being an inhabitant or resident of this kingdom of England, dominion of Wales, or town of *Berwick upon Tweed*, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tynier,

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Tangia, or into any parts, garrisons, islands, or places beyond the seas, which then were, or at any time after should be, within or without the dominions of his Majesty."

By *Stat. 14 Ed. 3. c. 10*, Sheriffs shall have the custody of the gaols as before that time they were wont to have, and they shall put in such under-keepers for whom they will answer. And this is confirmed by *Stat. 19 Hen. 7. cap. 10*. Also by *Stat. 5 Hen. 4. cap. 10*, it is enacted, "That none be imprisoned by the justice of the peace, but only in the common gaol, saving to lords, and others who have gaols, their franchise in this case." It seems that the King's grant, since the statute, 5 H. 4. c. 10, to private persons to have the custody of prisoners committed by justices of peace, is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol delivery. 2 *Hawk. P. C. c. 16. § 7*. See *Stat. 11 & 12 IV. 3. c. 19 § 3*, made perpetual by *Stat. 6 Geo. 1. c. 19*, to enable justices of peace to build and repair gaols in their respective counties, where a clause like that in *Stat. 5 H. 4. c. 10*, is inserted.

Also it hath been held, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol; or there be evident danger of a *rescous* from rebels, &c. yet constant practice seems to authorize a commitment to a messenger; and it is said that it shall be intended to have been made in order for the carrying of the party to gaol. 2 *Hawk. P. C. c. 16. § 8 a*.

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol-delivery. *H. P. C. 114*. 2 *Hawk. P. C. c. 16 § 9*.

A prisoner in the custody of the King's messenger, on a warrant from the Secretary of State, who is brought into A. B. by *Habeas corpus* to be bailed, but has not his bail ready, cannot be committed to the same custody he came in, but must be committed to the custody of the marshal, which will prevent the necessity of suing out a new *Habeas corpus*; as he may be brought up from the prison of the court, by a rule of court, whenever he shall be prepared to give bail. 1 *Burr. 460*.

If a person arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county. *H. P. C. 93*. But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county. 2 *Hawk. P. C. c. 16. § 8. Dall. c. 118*. Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not. 2 *Hawk. P. C. c. 16. § 8*.—See *post. Stat. 24 Geo. 2 c. 55*.

By *Stat. 6 Geo. 1. c. 19*, Vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

By *Stat. 24 Geo. 2. c. 55*, If a person is apprehended, upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he

shall be carried back into the first county, and be committed or, if bailable, bailed by the justices in such first county.

As to the charges of commitment, it is enacted by *Stat. 3 Jac. 1. c. 10*, that offenders committed are to bear their own charges, and the charges of those who are appointed to guard them; and if they refuse to pay, the charges may be levied by sale of their goods. And by *Stat. 27 Geo. 2. c. 3*, If they have no goods, &c. within the county where they are apprehended, the justices are to grant a warrant on the treasurer of the county for payment of the charges. But in *Middlesex* the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

By the *Stat. 3 Hen. 7. c. 3*: The sheriff shall certify the names of all prisoners in his custody to the justices of gaol-delivery.

III. As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special cases; and to this purpose it is enacted by 31 *Car. 2 cap. 2*; "That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; unless it be by *Habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common work-house, or house of correction, or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys or executes such warrant, shall forfeit to the party grieved 100*l.* for the first offence, 200*l.* for the second, &c. 2 *Hawk. P. C. c. 16. § 10*.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the King, till he be acquitted on his trial, or have an *ignominia* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol delivery. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where afterwards it appears that there was none; as for the murder of a person thought to be dead, who afterwards is found to be alive; it hath been holden that he may be safely dismissed without any farther proceeding; for that he who suffers him to escape, is properly punishable only as an accessory, to his supposed offence; and it is impossible there should be an accessory where there can be no principal; and it would be hard to punish one for a contempt founded on a suspicion appearing in so uncontested a manner to be groundless. 2 *Hawk. P. C. c. 16. § 22*. But the safest way for the gaoler, is to have the authority of some court, or magistrate, for discharging the prisoner.

If the words of a statute are not pursued in a commitment, the party shall be discharged by *Habeas corpus*. See titles *Arrest, Bail, Imprisonment, Prisoners, &c.*

COMMON. I.

COMMOIGNE, Fr.] A fellow monk; one that lives in the same convent. 3 *Inst.* 15.

COMMONALITY, populus, plebs, communitas.] In *Art. super chartas*, 28 Ed. 1. c. 1, the words *Sout le Commune d'Engleterre* signify all the people of England. 2 *Inst.* 539. But this word is generally used for the middle sort of the king's subjects, such of the commons as are raised beyond the ordinary sort, and coming to have the managing of offices, by that means are one degree under burghesses, which are superior to them in order and authority; and companies incorporated are said to consist of masters, wardens, and *commonality*, the first two being the chief, and the others such as are usually called of the livery. The ordinary people, and freeholders, or at best knights and gentlemen, under the degree of baron, have been of late years called *communitas regni*, or *tota terræ communitas*; yet antiently, if we credit *Brady*, the barons and tenants *in capite*, or military men, were the *community* of the kingdom; and those only were reputed as such in our most ancient histories and records. *Brady's Gloss. to his Introduction to Engl. Hist.*

COMMON.

Communia.] A right or privilege, which one or more persons claim to take or use, in some part or portion of that which another man's lands, waters, woods, &c. do naturally produce; without having an absolute property in such land, waters, wood, &c. It is called an *incorporeal right*, which lies in *grant*, as if originally commencing on some agreement between lords and tenants, for some valuable purposes; which by age being formed into a prescription continues, although there be no deed or instrument in writing which proves the original contract or agreement. 4 *Co.* 37: 2 *Inst.* 65. 1 *Vent* 367.

I. Of the several Kinds of Commons.

II. The Interest of the Owner of the Soil; wherein, of Improvement and Inclosure.

III. The Commoners' Interest in the Soil; and herein, of Apportionment and Extinction.

I. There is not only common of *pasture*, but also common of *fishery* or *fishery*; common of *stovers*; common of *barbary*, which see under their several heads. The word *common* however, in its most usual acceptation, signifies *common of pasture*.—This is a right of feeding one's beasts on another's land: for in those waste ground usually called commons, the property of the soil is generally in the lord of the manor; as in *common field*, it is in the particular reverts. This kind of common is divided into *common in gross*, *common appendant*, *common appurtenant*, and *common per cause de vicinage*.

Common in gross is a liberty to have *common* alone, without any lands or tenements, in another person's land, granted by deed to a man and his heirs, or for life, &c. *F. N. B.* 31, 37. 4 *Rep.* 20.

Common appurtenant is a right belonging to a man's arable land, of putting beasts *commonable* into another's ground. And *common appurtenant* is belonging to an estate for all manner of beasts, or *commonable* or not *commonable*. 4 *Rep.* 37. *Plowd.* 161.

Common appurtenant is a right, in a manner confounded, as appears by *Fitzherbert*; and it is by him defined to be a liberty of *common* appertaining to, or de-

pending on a freehold; which *common* must be taken with beasts *commonable*, as horses, oxen, kine, and sheep; and not with goats, hogs, and geese. But some make this difference, that *common appurtenant* may be severed from the land whereto it pertains; but not *common appendant*; which, according to Sir *Edward Coke*, had this beginning: when a lord enfeoffed another of arable land, to hold of him in *soke*, the feoffee, to maintain the service of his plough, had at first, by the courtesy or permission of the lord, *common* in his wastes for necessary beasts to eat and compost his land, and that for two causes; one, for that it was tacitly implied in the feoffment, by reason the feoffee cou'd not till or compost his land without cattle, and cattle could not be sustained without pasture; so by consequence the feoffee had, as a thing necessary and incident, *common* in the waste and lands of the lord: and this may be collected from the ancient books and statutes; and the second reason of this *common* was, for the maintenance and advantage of tillage, which is much regarded and favoured by the law. *F. N. B.* 180: 4 *Rep.* 37.

Common per cause de vicinage; *common* by reason of neighbourhood; is a liberty that the tenants of one lord in one town have to *common* with the tenants of another lord in another town. It is where the tenants of two lords have used, time out of mind, to have *common* promiscuously in both lordships lying together and open to one another. 8 *Rep.* 78. And those that challenge this kind of *common*, which is usually called *intercommuni*, may not put their cattle in the *common* of the other lord, for then they are distrainable; but they may turn them into their own fields, and if they stray into the neighbouring *common*, they must be suffered. *Term de Ley*. The inhabitants of one town or lordship may not put in as many beasts as they will, but with regard to the freehold of the inhabitants of the other: for otherwise it were no good neighbourhood, upon which all this depends. *Ibid.*

If one lord encloses the *common*, the other town cannot then *common*, but though the *common* of *vicinage* is gone, *common appendant* remains. 4 *Rep.* 38. 7 *Rep.* 5. Every *common per cause de vicinage* is a *common appendant*. 1 *Danv.* Abr. 719.

This is indeed only a permissive right intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits. And therefore either township may enclose and bar out the other, though they have *intercommuni* time out of mind. 2 *Comm.* 34.

Common appendant is only to ancient arable land, not to a house, meadow, pasture, &c. It is against the nature of *common appendant* to be appendant to meadow or pasture: but if in the beginning land be arable, and of late a house hath been built on some part of the land, and some acres are employed to meadow and pasture, in such case it is appendant, though it must be pleaded as appendant to the land, and not to the house, pasture, &c. 1 *Nels.* Abr. 457. This may be *common appendant*, though it belongs to a manor, farm, or plough land: and *common appendant* is of *common right*, but it is not *common appendant*, unless it has been appendant time out of mind. 1 *Danv.* 746. It may be upon condition; be for all the year, or for a certain time, or for a certain number of beasts, &c. by usage. Though it ought to be for such cattle as plough and compost the land, to which it is appendant. *Ibid.* 797. *Common appendant* may be

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to *common* in a field after the corn is severed, till the ground is re-sown: so it may be to have *common* in a meadow after the hay is carried off the same, till *Candlemas*, &c. *Yelv.* 185.

This *common*, which is in its nature without number, by custom may be limited as to the beasts: *common* appurtenant ought always to be for those *levant and couchant*, and may be *sans number*. *Plowd.* 161. A man may prescribe to have *common* appurtenant for all manner of cattle, at every season in the year. 25 *Aff.* 8. *Common* by prescription for all manner of *commonable* cattle as belonging to a tenement, &c. must be for cattle *levant and couchant* upon the land, (which is so many as the land will maintain,) or it will not be good: and if a person grants *common sans number*, the grantee cannot put in so many cattle, but that the grantor may have sufficient *common* in the same land. 1 *Danv. Abr.* 798, 799. He who hath *common* appendant or appurtenant, can keep but a number of cattle proportionable to his land; for he can *common* with no more than the lands to which his *common* belongs is able to maintain. 3 *Salk.* 93. *Common appurtenant* may be to a house, pasture, &c. though *common* appendant cannot; but it ought to be prescribed for as against *common* right: and uncommonable cattle, as hogs, goats, &c. are appurtenant: this *common* may be created by grant at this day; so may not *common* appendant. 1 *Inst.* 122. 1 *Rel. Abr.* 398.

Common appurtenant for a certain number of beasts may be granted over. 1 *Danv.* 802.

By *Stat.* 13 *Geo.* 3. c. 81. § 21, Rams are not to remain on commons from the 25th of *August* to the 25th of *November*.

II. THE property of the soil in the *common* is entirely in the lord; and the use of it, jointly in him and the *commoners*.

Lords of manors may depasture in *commons* where their tenants put in cattle; and a prescription to exclude the lord is against law. 1 *Inst.* 122.

The lord may agist the cattle of a stranger in the *common* by prescription: and he may license a stranger to put in his cattle, if he leaves sufficient room for the *commoners*. 1 *Danv.* 795: 2 *Mod.* 6. Also the lord may surcharge, &c. an overplus of the *common*: and if, where there is an overplus, the lord surcharges the *common*, the *commoners* are not to distrain his beasts; but must commence an action against the lord. *F. N. B.* 125. But it is said, if the lord of the soil put cattle into a *close*, contrary to custom, when it ought to lie fresh, a *commoner* may take the cattle damage feasant: otherwise it is a general rule that he cannot distrain the cattle of the lord. 1 *Danv.* 807.

The lord may distrain where the *common* is surcharged; and bring action of trespass for any trespass done in the *common*. 9 *Rep.* 113.

A lord may make a pond on the *common*: though the lord cannot dig pits for gravel or coal; the statutes of *improvement* extending only to inclosure. 3 *Inst.* 204: 9 *Rep.* 112: 1 *Sid.* 106. If the lord makes a warren on the *common*, the *commoners* may not kill the conies; but are to bring their action, for they may not be their own judges. 1 *Rel.* 90. 405.

By statute, 20 *H.* 3. c. 4, (*Stat. of Merton*), lords may approve against their tenants, viz. inclose part of the

waste, &c. and thereby discharge it from being *common*, leaving *common* sufficient; and neighbours, as well as tenants claiming *common of pasture*, shall be bound by it.—If the lord encloses on the *common*, and leaves not *common* sufficient, the *commoners* may not only break down the inclosures; but may put in their cattle, although the lord ploughs and sows the land. 2 *Inst.* 88: 1 *Rel. Abr.* 406.

Where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers, there the lord has no right under the statute of *Merton*, to enclose and approve the wastes of the manor.—Yet a custom in a manor that any person being desirous of inclosing, may apply to the court, &c. first obtaining the consent of the lord, does not abridge the lord's common-law right of inclosing without any such application, provided he leave *common* sufficient for the tenants. 2 *Term Rep.* 391, 2.

By *Stat.* 29 *Geo.* 2. c. 36, Owners of *common*, with the consent of the majority, in number and value, of the *commoners*; the majority of the *commoners*, with consent of the owners; or any persons with the consent of both, may inclose any part of a *common* for the growth of wood. If the wood is destroyed, the offender may be punished according to *Stat.* 1 *Geo.* 1. c. 48: if not convicted in six months, the owner shall have satisfaction from the adjoining parishes, &c. as for fences overthrown by *Stat. Westm.* 2.—Persons cutting wood on commons shall incur the same penalty. And by *Stat.* 31 *Geo.* 2. c. 41, The recompence is to be paid to persons interested, in proportion to their interest. Tenants for life, or for years determinable on lives, may consent for their term; but that binds not, after determination of their estate.

III. A *commoner* hath only a special and limited interest in the soil, but yet he shall have such remedies as are commensurate to his right, and therefore may distrain beasts damage feasant, bring an action on the case, &c. but not being absolute owner of the soil, he cannot bring a general action of trespass for a trespass done upon the *common*. See *Bridg.* 10, 11: *Godb.* 123, 124: 2 *Leon.* 201, 202.

A *commoner* cannot regularly do any thing on the soil which tends to the melioration or improvement of the *common*, as cutting down of bushes, fern, &c. 1 *Sid.* 251: 12 *Hen.* 8. 2: 13 *Hen.* 8. 15. Therefore if a *commoner* every year in a flood is surrounded with water, the *commoner* cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. 1 *Rel. Abr.* 405: 2 *Bulst.* 116.—But see ante II. and post.

Every *commoner* may break the *common*, if it be inclosed; and although he does not put his cattle in at the time, yet his right of commonage shall excuse him from being a trespasser. *Lit. Rep.* 38: See 1 *Rel. Abr.* 406. That is, supposing the inclosure made by the lord, and that there is not sufficient *common*; or that the inclosure is made by any other person than the lord.

If a tenant of the freehold ploughs it, and sows it with corn, the *commoner* may put in his cattle, and therewith eat the corn growing upon the land; so if he lets his corn lie in the field beyond the usual time, the other *commoners* may, notwithstanding, put in their beasts. 2 *Leon.* 203, 203.

The *commoner* cannot use *common* but with his own proper cattle: but if he hath not any cattle to manure the land,

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land, he may borrow other cattle to manure it, and use the common with them; for by the loan, they are in a manner made his own cattle. 1 *Dunv.* 798. Grantee of common appurtenant, for a certain number of cattle, cannot common with the cattle of a stranger: he that hath common in gross, may put in a stranger's cattle, and use the common with such cattle. *Ibid.* 803. Common appurtenant or appurtenant, cannot be made common in gross; and approvement extends not to common in gross. 2 *Inst.* 86.

A Commoner may distrain beasts put into the common by a stranger, or every commoner may bring action of the case, where damage is received. 9 *Rep.* 11. But one commoner cannot distrain the cattle of another commoner, though he may those of a stranger, who hath no right to the common. 2 *Lutw.* 1238.

Wherever there is colour of right for putting in cattle, a commoner cannot distrain; where there is no colour he may: so he may distrain a stranger's cattle, but not those of a commoner, though he exceeds his number. Where writ of admeasurement lies, he cannot distrain — *Quere*, whether he may distrain cattle surcharged, where the right of common is for a number certain. 4 *Burr.* 2426: 1 *Black. Rep.* 673.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord: or lastly, by a special action on the case for damages, in which any commoner may be plaintiff. *Freem.* 273. But the ancient and most effectual method of proceeding, is by writ of admeasurement of pasture. This lies, either where a common appurtenant or in gross is certain as to number; or where a man has common appurtenant, or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord, as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs, that are called *vicontial* (2 *Inst.* 369: *Finch. L.* 314,) being directed to the sheriff, (*vicecomiti*), and not to be returned to any superior court, till finally executed by him.

It recites a complaint, that the defendant hath surcharged, (*superoneravit*), the common: and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not, as those who have, surcharged the common; as well the plaintiff as defendant. *F. N. B.* 125.—The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle as only are *levant* and *couchant* upon his tenement; (*Bro. Abr.* 1: *Prescription* 28;) which being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common without stint, or *sans nombre*, (*Hendr.* 117,) a thing, which though possible in law, does in fact very rarely exist. *Lord Raym.* 467.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge*, (*de secunda superoveratione*), which is given by the *Stat. Westm.* 2. 13 E. 1. c. 8; and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff. *F. N. B.* 126: 2 *Inst.* 370.—This process seems highly equitable, for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed: but the second offence is a wilful contempt and injustice; and therefore punished, very properly, with not only damages, but also forfeiture. And herein, the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no: which gives this neglected proceeding a great advantage over the modern method by action on the case, wherein the quantum of common belonging to the defendant must be proved upon every fresh trial, for every repeated offence.

This injury, by surcharging, can, properly speaking, only happen where the common is appurtenant or appurtenant, and of course limited by law; or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, *sans nombre*, or without stint, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts. 1 *Rel. Abr.* 399. For the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

There is yet another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit, to which he is by law entitled. This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. *Cro. Eliz.* 198. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner. *Cro. Jac.* 195. This kind of disturbance does indeed amount to a disseisin, and if the commoner chuses to consider it in that light, the law has given him an assize of novel disseisin, against the lord, to recover the possession of his common. *F. N. B.* 179.—Or it has given a writ of *quod permittat*, against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought. *Finch. L.* 275: *F. N. B.* 123. But if the commoner does not chuse to bring a real action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize, or a *quod permittat*. *Cro. Jac.* 195: *Sec 3 Comm.* 238—240.

COMMON OF ESTOVERS.

If any commoner incloses, or builds, on the common, every commoner may have an action for the damage. Where turf is taken away from the common, the lord only is to bring the action: but it is said the commoners may have an action for the injury, by entering on the common, *1 Rol. Abr.* 89, 398: *2 Leon.* 201.

If a commoner who hath a *freehold* in his common be ousted of, or hindered therein, that he cannot have it so beneficially as he used to do; whether the interruption be by the lord or any stranger, he may have an *assise* against him: but if the commoner hath only an *estate for years*, then his remedy is by *action on the case*. And if it be only a small trespass, that is little or no loss to the commoner, but he hath common enough besides, the commoner may not bring any action. *4 Rep.* 37. *8 Rep.* 79: *Dyer* 316.

A commoner cannot dig clay on the common, which destroys the grass, and carrying it away doth damage to the ground: so that the other commoners cannot enjoy the common, *in tantummodo* as they ought *Goob* 344. Also a commoner may not cut bushes, dig trenches, &c. in the common, without a custom to do it. *1 Nels.* 462. If he makes any thing *de novo*, he is a trespasser. he can do nothing to impair the common; but may reform a thing abused, fill up holes, &c. *1 Brownl* 208.

A commoner may abate hedges erected on a common, for though the lord hath an interest in the soil, by abating the hedges, the commoner doth not meddle with it. *2 Mod.* 65. Any man may by prescription have common and feeding for his cattle in the king's highway, although the soil doth belong to another. But the occupation of common by usurpation, will not give title to him that doth occupy it, unless he hath had it time beyond memory.

Upon agreement between two commoners to enclose a common, a party having interest not privy to the agreement, will not be bound; but one or two wilful persons shall not hinder the public good. *Chan Rep* 48. Commons must be driven yearly at *Michaelmas*, or within fifteen days after: infected horses, and stone horses under size, &c. are not to be put into commons, under forfeitures, by *Stat* 32 *H* 8 c 13. New erected cottages, though they have four acres of ground laid to them, ought not to have common in the waste. *2 Inst* 740. In law proceedings, where there are two distinct commons, the two titles must be shewn: cattle are to be alleged *commonable*; and common ought to be in lands *commonable* and the place is to be set forth where the messuage and lands lie, &c. to which the common belongs. *1 Nels* 462, 463.

Common appendant, because it is of common right, shall be apportioned by the commoner's purchase of part of the land in which he hath such common, but common appurtenant shall be extinct by the commoner's purchase of part of the land, in which, &c. Both common appendant and appurtenant shall be apportioned by alienation of part of the land to which the common is appendant or appurtenant. *Co. Lit.* 122. *Hob.* 235; *8 Co* 78. *Owen* 122 *4 Co.* 37: *Co. Eliz.* 594.

A release of common in one acre, is an extinguishment of the whole common. See *4 Co.* 37.

If A hath common in the lands of B as appurtenant to a messuage, and after B. enfeoffs A. of the said lands, whereby the common is extinguished; and then A. leases to B. the said messuage and lands, with all commons, &c. used or occupied with the said messuage, this is a good

grant of a new common, for the time. *Co. Eliz.* 570. If several persons are seized of several parts of a common, and a commoner purchases the inheritance of one part, his entire common is extinct. *1 And.* 159. When a man hath common appendant for a certain number of cattle, and to a certain parcel of land, if he sell part of it, the common is not extinguished; for the purchaser shall have common *pro rata*: but it is otherwise in common appurtenant. *8 Rep.* 78: *1 Nels.* 460. See *Fitz. Abr.* *Com. per tot.*

By *Stat.* 13 *Geo.* 3. c. 81. In every parish where there are common field lands, all the arable lands lying in such fields, shall be cultivated by the occupiers, under such rules as 3-4ths of them in number and value, (with the consent of the land and tithe owners, [the latter not to receive any fines, only rents, § 23.]) shall appoint by writing under their hands: the expence to be born proportionably, § 1, 2, 4, 7.—Under the management of a *field-master*, or *field-revee*, to be appointed annually in May, § 3, 5, 6.

Persons having right of common, but not having land in such fields, and persons having sheep walks, may compound for such right, by written agreement, or may, with their consent, have parts allotted them to common upon. § 8, 9, 10. And the balks, blades and mires may be ploughed up, § 11—14.

Lords of manors with the consent of 3-4ths of the commoners, on the wastes and commons within their manors, may demise (for not more than four years) any part of such wastes, &c. not exceeding 1-12th part; and the clear rents reserved for the same, shall be applied in improving the residue of such wastes, § 14.

In every manor where there are *stinted commons*, in lieu of demising part thereof, assessments on the lords of such manors, and the owners and occupiers of such commons may be made, and the money employed in the improvement of the commons, under the direction of the majority, which (or in some instances 2-3d) may regulate the depasturing, opening, shutting-up, breaking and unstocking the commons, and the kind of cattle to be allowed the commoners, § 16—21.

All rights relative to commons, previous to this act, are saved except as against persons who become subject to regulations made under the *Statute*, § 27.

As to Common in general, See further *Com. Dig.* title *Common*.

COMMON OF ESTOVERS, or *estovers*, that is *necessaries*, from *estoffi* to furnish.] A liberty of taking necessary wood for the use or furniture of a house, or farm, from off another's estate. *2 Comm.* 35. Or in the language of the law, for *house-bote*, *plough bote*, and *hay bote*. See title *Bote*. What botes are necessary, tenants may take, notwithstanding no mention be made thereof in their leases; but if a tenant take more house-bote than is needful, he may be punished for waste *Tarrs de Ley*. Tenant for life may take upon the land demised reasonable estovers, unless restrained by special covenant. and every tenant for years hath three kinds of estovers incident to his estate. *1 Inst.* 41. When a house, having estovers appendant or appurtenant, is blown down by wind, if the owner rebuilds it in the same place and manner as before, his estovers shall continue so if he alters the rooms and chambers, without making new chimneys; but if he erect any new chimnies, he will not be allowed to spend any estovers in such new chimnies. *4 Rep.* 87. *4 Leon.*

COMMON - LAW

§13. If one have a dwelling house whereunto *common of estovers* doth belong, and the house by fire is burnt down, and a new one built near to the place, or in the place in another form, the estovers are gone: but if the old house be only some of it down, it is otherwise; and in all cases where the alterations to a house do no prejudice to the tenant or owner of the land or wood, the estovers will remain. *F. N. B.* 190. Where a man hath estovers for life, if the owner cut down all the wood, that there is none left for him, he may bring an *assise of estovers*; and if the tenant have but an estate for years, or at will, he may have an action on the case. *Moor Ca* 65: 9 *Rep.* 112. If the tenant who hath *common of estovers*, shall use them to any other purpose than he ought, he that owns the wood may bring trespass against him: as where one grants twenty loads of wood to be taken yearly in such a wood, ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending, but then he must keep it for that use. 9 *Rep.* 113. *F. N. B.* 58, 159.

COMMON OF PISCARY, Is a liberty of fishing in another man's water. *Common of piscary* to exclude the owner of the soil, is contrary to law: though a person by prescription may have a separate right of fishing in such water, and the owner of the soil be excluded; for a man may grant the water, without passing the soil; and if one grant *separatam piscariam*, neither the soil nor the water pass, but only a right of fishing. 1 *Inst.* 4, 122, 164. 5 *Rep.* 34. See *Fish and Fishery*.

COMMON OF TURBARY, Is a licence to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to an house, and not to lands, for turfs are to be burnt in the house: and it may be in gross, but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. 1 *Inst.* 4, 122. 4 *Rep.* 37.

There is also a *Common of digging for coals, minerals, stones and the like*. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther, common of pasture being only a right of feeding on the herbage or pasture of the soil which renews annually, but common of turbary and those just mentioned, are a right of carrying away the very soil itself. These several species of common do however all originally result from the same necessity as common of pasture: viz for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and firebote for his fuel: and housebote, ploughbote, cartbote and hedgebote for repairing his house, his instruments of tillage, and the necessary fences of his grounds. 2 *Comm.* 34, 5.

COMMON BENCH, *Bancus communis*, from the Sax. *banc* bank, and thence metaphorically a bench, high seat or tribunal. The court of *Common Pleas* was anciently called *Commun Bench*, because the pleas of controversies between *common persons* were there tried and determined. *Camd. Britan.* 163. In law books and references the court of *Common Pleas* is written *C. B.* from *communis Banco*, (or *C. P.*) And the justices of that court are styled *Justitiam etiam Banco*. See title *Common Pleas*.

COMMON DAY OF PLEA IN LAND, Signifies an ordinary day in court, as *Officium Hilariu*, *Quintidies Pasche*, &c. It is mentioned in the *Stat.* 51 *H. 3.*

Stat. 2. and *Stat.* 3. Concerning general days in bar; see title *Days in Bank*.

COMMON FIELD LAND, See title *Common*.

COMMON FINE, *finis communis*.] A small sum of money, which the tenants within the liberty of some leets pay to the lords, called in divers places *bread silver* or *bread pence*, in others *cert money*; and was first granted to the lord, towards the charge of his purchase of the *commute*, whereby the tenants have the ease to do their suit within their own liberties, and are not compellable to go to the lord's turn in the manor of *Sheepshead* in the county of *Leicester*, every tenant pays 1d. per poll to the lord at the court held after *Michaelmas*, which is there called *common fine*. For this *common fine* the lord may distrain: but he cannot do it without a prescription. 11 *Rep.* 44. There is also *common fine* of the county. See *Fleta*, lib. 7. c. 48. and *Stat.* 3 *Ed.* 1 c. 18.

COMMONS HOUSE OF PARLIAMENT, Is the lower House of Parliament, so called, because the *Commons* of the realm, that is the knights, citizens, and burgesses returned to parliament, representing the whole body of the Commons do sit there. *Comp. jurisd.* See title *Parliament*.

COMMON INTENDMENT, Is common meaning or understanding, according to the subject matter, not strained to any extraordinary or foreign sense: *har to common intendment* is an ordinary or general bar, which is commonly an answer to the plaintiff's declaration. There are several cases in the law where *common intendment*, and intendment take place. and of *common intendment* a will shall not be supposed to be made by collusion. *Co. Lit.* 78, See *Co. Lit.* 303, a, b, &c.

COMMON LAW, *Lex Communis*] Is taken for the law of this kingdom simply, without any other laws; as it was generally holden before any statute was enacted in parliament to alter the same: and the King's courts of justice are called the *Common Law Courts*. The *Common Law* is grounded upon the *general customs* of the realm; and includes in it the *law of nature*, the *law of God*, and the *principles and maxims of the law*: it is founded upon *reason*; and is said to be the perfection of *reason*, acquired by long study, observation and experience, and refined by learned men in all ages. And it is the common birth-right, that the subject hath for the safe-guard and defence, not only of his goods, lands, and revenues; but of his wife and children, body, fame, and life also. *Co. Lit.* 97, 142. *Treatise of Laws*, p. 2.

According to *Hale*, the *Common law of England*, is the common rule for administering justice, within this kingdom, and asserts the King's royal prerogatives, and likewise the rights and liberties of the subject. It is generally that law, by which the determinations in the King's *ordinary courts* are guided; and this directs the course of descents of lands, the nature, extent and qualification of estates; and therein the manner and ceremonies of conveying them from one to another; with the forms, solemnities and obligation of contracts; the rules and directions for the expolition of deeds, and acts of parliament: the process, proceedings, judgments and executions of our courts of justice; also the limits and bounds of courts, and jurisdictions; the several kinds of temporal offences and punishments, and their application, &c. *Hale's Hist. of the Common Law*, pag. 24, 44, 45.

As to the *rise of the Common law*, this account is given by some ancient writers: After the decay of the Roman empire, three sorts of the German people invaded the Britons, viz. the Saxons, the Angles, and the Jutes; from the last sprung the Kentish men, and the inhabitants of the Isle of Wight; from the Saxons came the people called Engle, South, and West Saxons; and from the Angles, the East Angles, Mercians and Northumbrians. These people having different customs, they inclined to the different laws by which their ancestors were governed; but the customs of the West Saxons and Mercians, who dwelt in the midland counties, being preferred before the rest, were for that reason called *jus Anglorum*; and by these laws those people were governed for many ages: but the East Saxons having afterwards been subdued by the Danes, their customs were introduced, and a third law was substituted, which was called *Danish law*; as the other was then styled *West-Saxon-law*, &c. At length the Danes being overcome by the Normans, William called the Conqueror, upon consideration of all those laws and customs, abrogated some, and established others; to which he added some of his own country laws, which he judged most to conduce to the preservation of the peace: and this is what we now call the *Common law*.

But though we usually date our *Common law* from hence, this was not the original of the *Common law*; for Ethelbert, the First Christian King of this nation, made the first Saxon laws, which were published by the advice of some wise men of his council: and King Alfred who lived 300 years afterwards, collected all the Saxon laws into one book, and commanded them to be observed through the whole kingdom, which before only affected certain parts thereof; and it was therefore properly called the *Common law*, because it was common to the whole nation: and soon after it was called, the *sole-right*, i. e. the *people's right*.

Alfred was styled *Anglicarum legum conditor*: and when the Danes, on the conquest of the kingdom, had introduced their laws, they were afterwards destroyed; and Edward the Confessor out of the former laws composed a body of the *Common law*; wherefore he is called by our historians *Anglicarum legum restitutor*. Blount. In the reign of Edw. I. Britton wrote his learned book of the *Common law* of this realm; which was done by the King's command, and runs in his name, answerable to the *Institutions* of the *Civil law*, which Justinian assumes to himself, though composed by others. *Samuel's Prerog.* 6, 21. But Justinian ought to be entitled to the honour, as the *Institutions* were composed by his direction. This Britton is mentioned by Gwin to have been bishop of Hereford.

Bracton, a great lawyer, in the time of Hen. 3. wrote a very learned treatise of the *Common law of England*, held in great estimation; and he was said to be Lord Chief Justice of the kingdom. Also the famous and learned Glanville, Lord Chief Justice in the reign of Hen. 2. wrote a book of the *Common law*, which is said to be the most ancient composition extant on that subject. Besides these, in the time of Ed. 4. the renowned Lawyer Littleton wrote his excellent book of *Engl's Tenures*. In the reign of King James the First, the great oracle of the law, Sir Edward Coke, published his learned and laborious *Institutes* of our law, and commentary on *Littleton*. About the same time likewise Dr. Covel, a civilian, wrote a short *Institute* of our laws. In the reign of King George the

First, Dr. Tho. Wood, a civilian and common lawyer, and at last a divine, wrote an *Institute of the laws of England*, which is something after the manner of the *Institutes* of the *Civil law*.

To conclude the whole of this head, the late learned Judge Blackstone, in the reign of George the Third, published his *Commentaries on the Laws of England*, the best analytic and most methodic system of our laws which ever was published. It is equally adapted for the use of students, and of those gentlemen who choose to acquire that knowledge of our laws, which is, in fact, essentially necessary for every one. See particularly those *Commentaries*, vol. 1. p. 637. and vol. 4. p. 411. on this subject.

COMMON PLEAS, *communis placita*.] Is one of the King's Courts now constantly held in *Westminster Hall*; but in ancient time was moveable, as appears by *Magna Charta*, cap. 11. Before this charter, of King John & Hen. III. there were but two courts, called the King's courts, viz. the King's Bench and the Exchequer, which were then styled *Curia Domini Regis*, and *Aula Regis*, because they followed the court of the King; and upon the grant of the great charter, the court of *Common Pleas* was erected and settled in one certain place, i. e. *Westminster-hall*; and after that, all the writs ran *Quod sit coram justiciariis nostris apud Westm.* whereas before, the party was required by them to appear *Coram me vel justiciariis meis*, without any addition of place, &c. But Sir Edward Coke is of opinion in his preface to the eighth report, and 1 *Inst.* 71 b. that the court of *Common Pleas* existed as a distinct court before the Conquest; and was not created by *Magna Charta*, at which time there were *Justicarii de Banco*, &c. Though before this act, *Common Pleas* might have been held in *Banco Regis*; and all original writs were returnable there.

According to *Madox* the origin of the court of *Common Pleas* is of a much later date than that assigned by Lord Coke. He so far agrees with Lord Coke as to admit that the *Magna Charta* of Hen. III. rather confirmed than erected the *Banc* or *Common Pleas*; and that such a court was in being several years before the *Magna Charta* of 17 of King John, though it was then first made stationary; But in other respects Lord Coke and Mr. *Madox* differ widely; for the latter thinks that some time after the Conquest there was one great and supreme judicature, called the *Curia Regis*, which he supposes to have been of Norman, and not Anglo-Saxon original, and to have exercised jurisdiction over common as well as other pleas: that the *Common Pleas* and *Exchequer* were gradually separated from the *Curia Regis*, and became jurisdictions wholly distinct from it; and that the separation of the *Common Pleas* began in the reign of Richard I. or early in the reign of King John, and was completed by Hen. III. See *Mat. Hist. Exc.* 63, 539. fo. ed. 3 *Comm.* 37: 4 *Inst.* 99: 1 *Inst.* 71 b; and the note there.

Writs returnable in this court, are now *coram justiciariis nostris apud Westm.* But original writs, &c. returnable in B. R. are, *Coram nobis nisi inque fierimus in Anglia*. The jurisdiction of the court of C. P. is general, and extends itself throughout England: it holds pleas of all civil causes at Common law, between subject and subject, in actions real, personal and mixed; and it seems to have been the only court for real causes. In personal and mixed actions it hath a concurrent jurisdiction with the

the *King's Bench*; but it hath no cognisance of pleas of the crown; and *Common Pleas* are all pleas that are not such.

The court of *Common Pleas* does not possess any original jurisdiction; nor has it, like the court of *King's Bench*, any mode of proceeding in common cases peculiar to itself. Its authority is founded on original writs issuing out of the court of *Chancery*; which original writs are the King's mandates for the court to proceed in the determination of the causes mentioned therein. The reason of original writs issuing out of *Chancery* is, because when the courts were united, which was formerly the case, the Chancellor held the seal: therefore, when they were divided, he still keeping the seal, sealed all original writs. *Gilb. H. C. P.* 3.—In all personal actions therefore brought by and against common persons, the only way of proceeding in this court is by original.

There is indeed one other way of proceeding in this court, in common cases, which is sometimes used; and which is called proceeding by *original quia clausum fregit*. This method of proceeding is grounded, in point of law, upon the same kind of original writ as the usual proceeding by *capias* is, the only difference between them being in the *mesne process* after the original is sued out; or at least supposed to be.—Instead of the process to compel the appearance of the defendant being by *capias* against his person, it is in this case by summons and distress against his goods. In a word, it is the same as the ancient mode of proceeding in this court was before the general introduction of the *capias*. (See this Dict. title *Capias*)—The advantage and use of this mode of proceeding by *original q. c. f.* is where a defendant has effects which can be distrained, but he himself cannot be met with to be personally served; the process by *capias* requiring personal service, which is not required in the process by summons.

All actions belonging to this court, come hither either by original, as arrests and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts, not of record, by *pone*, *recoadare*, *accedus ad emiam*, writ of *false judgment*, &c. Actions popular, and actions penal, of debt, &c. upon any statute, are cognisable by this court: and besides having jurisdiction for punishment of its officers and ministers, the court of *Common Pleas* may grant prohibitions, to keep temperal and ecclesiastical courts within due bounds. 4 *Inst.* 99, 100, 118. In this Court are four Judges, created by letters patent; the seal of the court is committed to the custody of the Chief Justice.

The other officers of the *Common Pleas* are the *Custos Breviarum*, three *Prothonotaries* and their *Secondaries*, the Clerk of the *Warrants*, Clerk of the *Effoins*, fourteen *Filers*, four *Exigents*, a Clerk of the *Juries*, the *Chirographer*, Clerk of the *King's Silver*, the clerk of the *Treasury*, Clerk of the *Seal*, of *Outlawries*, and the Clerk of the *Implemment of Fines and Recoveries*, Clerk of the *Errors*, &c. The *Custos Breviarum* is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of *Apprais*, which are delivered to him by the clerks of the assize of every circuit, &c. and he files the rolls together, and carries them into the treasury of records; he also makes out exemplifications, and copies of all writs and records, &c. The *Prothonotaries* enter and enrol all declarations, pleadings, judgments,

&c. and they make out all judicial writs, writs of execution, writs of privilege, *procedendo's*, &c. The *Secondaries* are assistants to the *Prothonotaries* in the execution of their offices; and they take minutes, and draw up all orders and rules of court. The *Filers*, who have the several counties of *England* divided among them, make out all mesne process, as *capias*, *alias*, *pluries*, &c. between the original writ and the declaration: and they make all writs of *view*, &c. The *Exigents*, appointed for several counties, make out all exigents and proclamations in order to outlawry. The Clerk of the *Warrants*, enters all warrants of attorney; inrols deeds of bargain and sale, and estreats all issues. The Clerk of the *Effoins*, keeps the roll of the effoins, wherein he enters them, and non suits, &c. The Clerk of the *Juries*, makes out all writs of *habeas corpora jurator*, for juries to appear; and he enters the continuances till the verdict given. The Clerk of the *Treasury* keeps the records of the court, and makes exemplifications of records, copies of issues, judgments, &c. The Clerk of the *Seals*, seals all writs and mesne process; also writs of outlawry and superseades, and all patents. The Clerk of the *Outlawries*, makes out the writs of *capias utlagatum*. The Clerk of the *Errors* is for the allowance of writs of error, &c. The Clerk of the *Implemments* of fines and recoveries, returns all writs of covenant, writs of entry and leisin, and enrols and exemplifies fines, &c. The Clerk of the *King's Silver* enters the substance of the writ of covenant: and the *Chirographer* ingrosseth all fines, and delivers the indentures to the parties, &c.

To these officers may be added, a *Proclamator*; a *Keeper* of the court; *Cryer*; and *Tipsstaffs*; besides the *Warden of the Fleet*. There are also *Attornies* of this court, whose number is unlimited; and none may plead at the bar of the court, in Term-time, or sign any special pleadings, but *Serjeants* at law.

COMMON PRAYER, *Preces Publicæ*.] The liturgy or prayers used in our church. It is the particular duty of Clergymen every *Sunday*, &c. to use the public form of prayer, prescribed by the *Book of common prayer*: and if any incumbent be resident upon his living, as he ought to be, and keep a curate, he is obliged by the *act of uniformity*, once every month at least, to read the *common prayers* of the church, according as they are directed by the book of *common prayer*, in his parish church, in his own person; or he shall forfeit 5 *l.* for every time he fails therein. *Stat.* 13 & 14 *Car.* 2. *cap.* 4. Also by that statute the book of *common prayer* is to be provided in every parish, under the penalty of 3 *l.* a month: and the *common prayer* must be read before every *lecture*; the whole appointed for the day, with all the circumstances, and ceremonies, &c. Ministers, before all *sermons*, are to move the people to join in a short prayer for the catholic church; and the whole congregation of Christian people, &c. for the King and Royal Family; the ministers of God's word, nobility, magistrates, and whole commons of the realm, &c. and conclude with the *Lord's Prayer*, *Can.* 55. Refusing to use the *Common Prayer*, or using any other open prayers, &c. is punishable by *Stat.* 1 *Eliz.* c. 2. See title: *Church*, *Church warden*, *Parson*, *Service*, and *Sacrament*.

COMMON WEAL, Is understood in our law to be *bonum publicum*, and is a thing much favoured; and therefore the law doth tolerate many things to be done for common

common good, which otherwise might not be done; and hence it is, that *monopolies* are void in law; and that *bonds* and *covenants* to *restrain free trade*, *tillage*, or the like, are adjudged void. 11 Co. Rep. 50: *Plowd.* 25: *Shep. Epit.* 270.

COMMORANCY, *commorantia*, from *commoro*.] An abiding, dwelling or continuing in any place; as an inhabitant of a house in a vill, &c. And *commorancy* for a certain time, may make a settlement in a parish. *Dalt.* See title *Poor*.—*Commorancy* consists in usually lying in a certain place. 4 *Comm.* 273.

COMMORTH, or COMORTH, *comortha*.] From the Brit. *cymorth*, i. e. *subsidium*: a contribution which was gathered at marriages, and when young priests said or sung the first masses, &c. See *Stat.* 4 Hen. 4. c. 27. But *Stat.* 26 H. 8. c. 6, prohibits the levying any such in *Wales*, or the *Marches*, &c. *Cowel*.

COMMOTE, In *Wales*, is half a *cantred* or hundred, containing fifty villages. *Stat. Wallie* 12 Ed. 1. *Wales* was anciently divided into three provinces; and each of these were again subdivided into *cantreds*, and every *cantred* into *commotes*. *Dodrige's Hist. Wal.* fol. 2.—*Commote* also signifies a great seignior or lordship, and may include one, or divers manors. *Co. Lit.* 5.

COMMUNANCE. The commoners, or tenants and inhabitants, who had the right of common, or commoning in open field, &c. were formerly called the *communance*. *Cowel*.

COMMUNE CONCILIUM REGNI ANGLIÆ. The common council of the King and people assembled in parliament.

COMMUNIA PLACITA NON TENENDA IN SCACCARIO, An ancient writ directed to the Treasurer and Barons of the Exchequer, forbidding them to hold plea between common persons (i. e. not debtors, to the King, who alone originally sued and were sued there,) in that court, where neither of the parties belong to the same. *Reg. Orig.* 187. But little obedience would perhaps be now paid to such a writ, was any officer to dare to issue it: for the court of Exchequer, seems by prescription, to have attained a concurrent jurisdiction in civil suits, with the other courts in *Westminster-hall*. See titles *Courts*, *Exchequer*.

COMMUNI CUSTODIA, A writ which anciently lay for the lord, whose tenant holding by knight's service died, and left his eldest son under age, against a stranger that entered the land, and obtained the ward of the body. *F. N. B.* 89: *Reg. Orig.* 161. Since the statute 12 Car. 2. c. 24, hath taken away wardships, this writ is become of no use.

COMMUNITY of the kingdom. *Vide* Commonalty.

COMPANAGE, Fr.] All kind of food, except bread and drink: and *Spelman* interprets it to be *quicquid tibi cum pane sumitur*. In the manor of *Felkerton* in the county of *Nottingham*, some tenants when they performed their boons or work-days to the lords, had three boon loaves with *companage* allowed them. *Rig. de Thurgarton* cited in *Antiq. Nottingham*.

COMPANION OF THE GARTER. Is one of the knights of that most noble order; at the head of which is the King, as Sovereign. See *Stat.* 24 H. 8. c. 13. and title *Garter*.

VOL. I.

COMPASS. An instrument used in navigation, by the direction and assistance whereof vessels are steered to the most distant parts of the world. It was invented soon after the close of the holy war, and thereby navigation was rendered more secure as well as more adventurous, the communication between remote nations was facilitated, and they were brought nearer to each other. See *Rebriſ. Hist. Emp. C. V.* 1 v. 78. See title *Longitude*.

COMPELLATIVUM, An adversary or accuser. *Leg. Athelstan*.

COMPERTORIUM, A judicial inquest in the Civil law, made by delegates, or commissioners to find out and relate the truth of a cause. *Paroch. Antiq.* 575.

COMPOSITION, *compositio*.] An agreement or contract between a parson, patron and Ordinary, &c. for money or other thing in lieu of tithes. Land may be exempted from the payment of tithes, where *compositions* have been made: and real *compositions* for tithes are to be made by the concurrent consent of the parson, patron and Ordinary. Real *compositions* are distinguished from personal contracts; for a *composition* called a personal contract is only an agreement between the parson and the parishioners, to pay so much instead of tithes; and though such agreement is confirmed by the Ordinary, yet (if the parson is not a party) that doth not make it a real *composition*, because he ought to be a party to the deed of *composition*. *March's Rep.* 87. The *compositions* for tithes made by the consent of the parson, patron and Ordinary, by virtue of *St.* 13 Eliz. c. 10, shall not bind the successor, unless made for twenty-one years or three lives, as in case of leases of ecclesiastical corporations, &c. *Compositions* were at first for a valuable consideration, so that though, in process of time, upon the increase of the value of the lands such *compositions* do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a *modus decimandi*. *Hob.* 29. See further title *Tithes*.

The word *composition* hath likewise another meaning, i. e. *dispositio litis*. *Compositions* were in ancient times allowed for crimes and offences, even for murder.—An expedient employed by the civil magistrate, in order to see some bounds to the violence of private revenge. This custom may be traced back to the ancient Germans. *Tacit. de Morib. Ger.* c. 21: *Lord Kaim's Hist. Law Tr.* 1 p. 41, 42, &c.

COMPOSITIO MENSURARUM, Is the title of an ancient ordinance for measures, not printed.

COMPOSTUM. Dung, soil or compost laid on lands. *Registr. Eccl. Cantuar.* MS.

COMPOUNDING FELONY, or *theft-bate*. Is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. It was formerly held to make a man an accessory; but is now punished only with fine and imprisonment. 1 *Hawk. P. C.* c. 59. § 6.—To take any reward for helping a person to stolen goods, is made felony by *Stat.* 4 Geo. 1. c. 11.—And to advertise a reward for the return of things stolen, incurs a forfeiture of 50 l. by *Stat.* 25 Geo. 3. c. 36. See titles *Advertisement*; and also *Felony* & *Misprison*.

COMPRINT, A surreptitious printing of another bookseller's copy, to make gain thereby, which was contrary to Common law, and is now restrained by statute. See title *Literary Property*.

M m

COMPROMISE,

COMPROMISE, *compromissum*] A mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators and *W^{est} 3^o*, it is the faculty or power of pronouncing sentence between persons at variance, given to arbitrators by the parties' private consent. *W^{est} Symb Jet 1* Matters *compromised*, are also matters of law referred, or made an end of — See title *Award*

COMPURGATOR, One that by oath justifies another's innocence. *Compurgators* were introduced as evidence in the jurisprudence of the middle ages — Their number varied according to the importance of the subject in dispute, or the nature of the crime with which a person was charged. *Du Cange loc. Juramentum, vol 3, p. 1599. See Oath, and 3 Comm 342 4 Comm 361, 407. — See also title Clergy.*

COMPUTATION, *computatio*] The true account and construction of time, and to the end neither party to an agreement, &c. may do wrong to the other, nor the determination of time be left at large, it is to be taken according to the just judgment of the law. A deed dated the 20th day of *August* to hold from the day of the date, shall be construed to begin on the 21st day of *August* but if it be the *habentium* it be to hold from the making, or from thenceforth, it shall begin on the day delivered. *1 Inst. 46. 5 Rep. 1* If an indenture of lease dated the 4th day of *July*, made for three years from thenceforth, be delivered at four of the clock in the afternoon of the said 4th day of *July*, the lease shall end the 3d day of *July* in the third year. and the law in this *computation* rejects all fractions or divisions of the day See *Day, Month, Year, Time, Age, &c. &c.*

Computation of miles after the *English* manner, is allowing 5280 feet, or 1760 yards to each mile; and the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most usual way. *Co. Eliz. 212 See M^{ile}.*

COMPUISO, Lat] A writ to compel a bailiff, receiver or accountant, to yield up his accounts it is founded on the statute of *H^{en} 2 cap 12*. And also lies against guardians, &c. *Reg. Orig. 135*

CONCEALERS, *concelatores*, to call a *concelator*, as *men a concealer*, by an *affidavit*] Such as were used to find out *concealed* lands, i. e. such lands as are privately kept from the King by concealment, having nothing to shew for their title or estate therein See *Stat. 39 E² cap 22* There are also *concealers of crimes*, and as to *concealing the son*, &c. see title *Mystification*

CONCESSI, I ha^e granted, A word of frequent use in conveyance, creating a covenant in law, and he (I have given,) makes a warranty *Co. Lit. 384*. This word is of a general extent, and said to amount to a grant, settlement, lease and release, &c. *2 Vautin 96*.

CONCIONATORES, Common-council men, free-men, called to the hall or assembly, as *1 B^o 202* — *Quidam inter eos concionatores* *apud London*, &c. *H^{ist} Hen² cap 16*, &c. 46

CONCLUSION, conclusio] Is when a man by his own act upon record hath charged himself with a duty or other thing, or confessed any matter whereby he shall be concluded as if a sheriff returns that he hath taken the body upon *capias*, and hath not the body in court at the day of the return of the writ, by this return, the sheriff

is concluded from plea of escape, &c. *Terms de Ley*. In another sense, this word *conclusion* signifies the end of any plea, replication, &c. and a plea to the writ is to conclude to the writ; a plea in bar, to conclude to the action, &c. See title *Pleading* — And as to the conclusion of Deeds, see title *Deeds*

CONCORD, *concordia*] Is an agreement made between two or more, upon a trespass committed; and is divided into *Concord executory* and *Concord executed*. *Plowd. 5, 6, 8* These concords and agreements are by way of satisfaction for the trespass, &c. See titles *Accord, Satisfaction*.

Concord is also an agreement between parties, who intend the levying of a fine of lands one to the other, how and in what manner the lands shall pass it is the foundation and substance of the fine, taken and acknowledged by the party before one of the judges of *C^o B.* or by commissioners in the country. See title *Fine*

CONCUBARIA, A fold, pen, or place where cattle lie *Co. B.*

CONCUBERANT, Lying together *Stat. 1 H⁷ cap 6*.

CONCUBINAGE, *concupiscentia*] In common acceptance the keeping of a harlot or concubine but in a legal sense, it is used as an exception against her that sue for dower, alleging thereby that she was not a wife lawfully married to the party, in whose land she seeks to be endowed, but his *concubine* *But c 107 B^o lib 4 tract. 6 cap 8* There was a *concupiscentia* allowed in Scripture to the Patriarchs, *secundum legem naturalem*, &c. *Bloint*.

CONDERS, from the *F.* *condere*, to conduct] Such as stand upon high places near the sea coast, at the time of herring fishing, to make signs with boughs, &c. to the fishermen at sea, which way the shoals of herrings pass, for this may be better discovered by such a stand upon some high cliff on the shore, by reason of a kind of blue colour which the herrings cause in the water, than by those that are in the ships or boats for fishing. These are otherwise called *bars* and *lighthouses*, *directors* and *guiders*. See *Stat. 1 Jac¹ c 23*

CONDITION.

Conditio] A restraint annexed to a thing so that by the non performance, the party to it shall receive prejudice and loss, and by the performance, commodity and advantage. It is a restriction of one's acts, qualifying or suspending the force, and making them uncertain whether they shall take effect or not. Also it is defined to be what is referred to an uncertain chance, which may happen or not happen *11^o 2 part 1. lib 2 fol 156*

A *Conditio* is also defined to be a kind of law or bridle, annexed to one's act, serving to suspend the force, and making it uncertain whether it shall take effect or not it is a *condition* of equality, annexed to an act which either, at the option of the party, or by an effect, &c. may be created, defeated, or changed, upon an event in even. This differs from a *limitation*, which is the bound or compulsion of an estate, or the condition which shall continue *35^o 2 part 117*. See title *Limitation*

A *condition* may be also considered as one of the terms upon which a grant may be made, in this sense a condition in a deed is a *lais of condition* on the happening of which the estate granted may be defeated. *2 Comm 239*

CONDITION I. a.

Of Conditions there are divers kinds, *viz.* conditions in deed, or express; and in law, or implied; conditions precedent, and subsequent; conditions inherent, and collateral, &c.

A *Condition in a deed or express*, is that which is joined by express words to a feoffment, lease, or other grant; as if a man makes a lease of lands to another, reserving a rent to be paid at such a feast, upon condition if the lessee fail in payment, at the day, then it shall be lawful for the lessor to enter. Condition in law or implied is when a person grants another an office, as that of keeper of a park, steward, bailiff, &c. for term of life; here, though there be no condition expressed in the grant, yet the law makes one; which is, if the grantee do not justly execute all things belonging to the office, it shall be lawful for the grantor to enter and discharge him of his office, *Lit. lib. 3 c. 5.*

Condition Precedent is when a lease or estate is granted to one for life, upon condition that if the lessee pay to the lessor a certain sum at such a day, then he shall have fee simple; in this case the condition precedes the estate in fee, and on performance thereof gains the fee-simple. *Condition subsequent* is when a man grants to another his manor of Dole, &c. in fee, upon condition that the grantee shall pay to him at such a day such a certain sum, or that his estate shall cease: here the condition is subsequent, and following the estate, and upon the performance thereof continues and preserves the same: so that a condition precedent doth get and gain the thing or estate made upon condition by the performance of it; as a condition subsequent keeps and continues the estate by the performance of the condition. 1 *Inst.* 201, 327: *Terms de Ley.* If one agree with another to do such an act, and for the doing thereof the other shall pay to much money; here the doing the act is a condition precedent to the payment of the money, and the party shall not be compelled to pay till the act is done: but where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there the money may be recovered before the thing is done; for here it appears that the party did not intend to make the performance of the thing a condition precedent. 3 *Salk.* 95. See post, I, IV.

Inherent Conditions are such as descend to the heir with the land granted, &c.

A *Collateral Condition* is that which is annexed to any collateral act.

Conditions are likewise affirmative, which consist of doing, negative, and consist of not doing: some are further said to be restrictive, for not doing a thing: and some compulsory, as that the lessee shall pay the rent, &c.

Also some conditions are single, to do one thing only; some copulative, to do divers things; and others disjunctive, where one thing of several is required to be done. *Co. Lit.* 201.—See further *Shep. Touch.* 117, &c.

As to certain estates on condition expressed or implied, See more particularly titles *Mortgage*, *Statute-Merchant*, *Elegit*.

Among these several kinds of conditions, the cases which most frequently occur fall under the distinctions of conditions precedent and subsequent. We shall therefore speak of them more at large under the following divisions; wherein shall be considered; in the first place, generally,

I. 1. Of Estates on Conditions implied; and 2. On Condition expressed.—Then more particularly,

II. To what Conditions may be annexed: what Conditions are good: and by what Words they may be created.

III. What shall be a good Performance of a Condition: and in what Manner the Breach of it may be taken Advantage of.

IV. Of Conditions precedent and subsequent.

I. 1. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution; although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office; (*Lit.* § 378;) on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant to another person. *Lit.* § 379 For, an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition.—By *mis use* or *abuse*: as if a judge takes a bribe, or a park-keeper kills deer without authority. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the Common-wealth, is of itself a direct and immediate cause of forfeiture; but non user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. *Co. Lit.* 233. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unintermitted a service, the temporary neglect of them is not necessarily productive of mischief, upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them, and therefore they may be lost and forfeited, like offices either by abuse or by neglect. 9 *Rep.* 50.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenant for life or years enfeoff a stranger in fee-simple: this, is, by the Common law, a forfeiture of then several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to. *Co. Lit.* 215. So if any tenants for years, for life, or in fee, commit a felony; the King or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, “that they shall not commit felony” which the law tacitly annexes to every feudal donation.

2. An estate on condition expressed in the grant itself, is, where an estate is granted either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon performance or breach of such qualification or condition. *Co. Lit.* 201.

These conditions are therefore either precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subse-

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quent are such, by the failure or non-performance of which an estate already vested, may be defeated. Thus, if an estate for life be limited to *A* upon his marriage with *B*, the marriage is a precedent condition, and till that happens no estate is vested in *A*. *Shov. P. C.* 83, &c.—Or if a man grant to his lessee for years, that upon payment of an hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee simple passeth not till the hundred marks be paid, *Co. Litt.* 217.—But if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him or his heirs to re enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible, if the condition be not strictly performed *Litt.* § 325. See *post.* IV.

To this class may also be referred all base fees and fee simples conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of *West.* 2. it remains as at common law, a fee simple on condition that the grantee has heirs of his body. Upon the same principle depend all determinable estates of freehold, as *durante viduitate*, &c. These are estates upon condition that the grantee do not marry and the like. And, on the breach of any of these subsequent conditions by the failure of the contingencies, by the grantee not continuing tenant of the manor of *Dale*, by not having heirs of his body: or by not continuing sole, the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however made between a condition in deed and a limitation, which *Littleton* § 380, 1 *Inst.* 234, denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is granted to a man *so long as he is parson of Dale*, or *while he continues unmarried*, or *until out of the rents and profits he have made 500*l.** and the like, in such case the estate determines as soon as the contingency happens; (when he ceases to be parson, marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. See 10 *Rep.* 41.—But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to *York*, &c.) the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate. *Litt.* § 347 *Stat.* 3 *Hen.* VI. c. 34. See 10 *Rep.* 42. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives; (as if an estate be granted by *A.* to *B.* on condition that within two years *B.* intermarry with *C.*

and on failure thereof, then to *D.* and his heirs;) this the law construes to be a limitation and not a condition: 1 *Vent.* 202; because if it were a condition, then, upon the breach thereof, only *A.* or his representatives could avoid the estate by entry, and so *D.*'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of *B.* determines, and that of *D.* commences, and he may enter on the lands, the instant that the failure happens. So also, if a man by his will devise lands to his heir at law, on condition that he pays a sum of money, and for non-payment, devise it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition. *Cro. Eliz.* 205; 1 *Roll.* 116. 411.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold; provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold. *Co. Litt.* 42; because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost, a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided *A. B.* and *C.* or the survivor of them, shall so long live) this still continues a mere chattel and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee simple, on condition, that unless he goes to *Rome* in twenty-four hours; or unless he marries with *A. B.* by such a day; (within which time the woman dies, or the feoffor marries her himself) or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards, by a condition either impossible, illegal, or repugnant. *Co. Litt.* 206. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to *Rome* in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed. *Ibid.* 2 *Comm.* 152—7.

II. Conditions may be annexed to any estate, whether in fee simple, fee tail, for life or years: they run with the estate, and bind in the hands of whomsoever they come. *Litt. Rep.* 128. But a condition may not be made
but

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but on the part of the lessor, donor, &c. for no man may annex a condition to an estate, but he that doth create the estate itself. *Conditions* are good to enlarge or limit estates: There are four incidents, which conditions to create and increase an estate ought to have. 1. They should have a particular estate, as a foundation whereupon the increase of the greater estate shall be built. 2. Such particular estate shall continue in the lessee or grantee, until the increase happens. 3. It must vest at the time the contingency happens, or it shall never vest. 4. The particular estate and increase must take effect by the same deed, or by several deeds delivered at the same time. 8 Rep. 75.

Conditions to create estates shall be favourably construed: but *conditions* which tend to destroy, or restrain an estate, are to be taken strictly. A feoffment upon condition, that the feoffee shall not alien, is void: but a condition in a feoffment not to alien for a particular time, or to a particular person, may be good. *Hib.* 13. 261. And if a condition is, that tenant in tail shall not alien in fee, &c. or tenant for life or years not alien during the term, these conditions are good: where the reversion of an estate is in the donor, he may restrain an alienation by condition. 10 Rep. 39: 1 *Inst.* 222. If one make a gift in tail, on condition that the donee or his heirs shall not alien, this is good to some intents, and void to others: for if he make a feoffment in fee, or any other estate by which the reversion is discontinued tortiously, the donor may enter; but it is otherwise if he suffer a common recovery. 1 *Inst.* 223.

A liberty inseparable from an estate cannot be restrained; and therefore a condition that a tenant in tail shall not levy a fine, within the Stat. 4 H. 7. c. 24, or suffer a recovery; or not make a lease within the Stat. 32 Hen. 8. c. 36, is void and repugnant. But if the condition restrain levying a fine at common law, it may be good. 2 *Danv. Abr.* 22. A gift in tail, or in fee, upon condition that a feme shall not be endowed; or baron be tenant by the curtesy, is repugnant and void. So is a condition in a lease, &c. that the lessee shall not take the profits: and where a man grants a rent-charge out of land, provided it shall not charge the lands. *Co. Litt.* 146.

Conditions repugnant to the estate, impossible, &c. are void: and if they go before the estate, the estate and condition are void; if to follow it, the estate is absolute, and the condition void. 1 *Inst.* 206: 9 Rep. 128. But if at the time of entering into a condition, a thing be possible to be done and become afterwards impossible by the act of God, the estate of a feoffee (created by livery) shall not be avoided. 2 *Mut.* 204. See ante I. 2.

Where a condition is of two parts, one possible, and the other not so, it is a good condition for performing that part which is possible. *Cro. Eliz.* 780. Though if a condition is of two parts conjunctive, and one part becomes impossible, by the act of God, the person bound is not obliged to perform the other. 1 *Rel. Abr.* 446. l. 45: 2 *Mut.* 202, 203. If a condition be in the copulative, and is not possible to be performed, it is said it may be taken in the disjunctive. 1 *Danv. Abr.* 73.

Where an estate is to be wholly created upon a condition impossible to be performed, there the estate shall never come in esse. 1 *Leon.* c. 311. A woman makes a feoffment to a man that is married, upon condition that he

shall marry her; this condition is not impossible, for the man's wife may die, and then he may marry her. 2 *Danv.* 25. A reversion may be granted in tail upon condition, that if the grantee pays so much, he shall have the fee. 8 Rep. 73. But if a man grants lands, &c. for years, upon condition that if the lessee pay 20s. within one year, that he shall have it for life: and that if he after the year pay 20s. he shall have the fee; though both sums are paid, he shall have but an estate for life: the estate for life, at the time of the grant, being only in contingency, and a possibility cannot increase upon a possibility, nor can the fee increase upon the estate for years. 8 Rep. 75.

If a lease be made to two, with condition to raise a fee, and one dies, the survivor may perform the condition, and have the fee; but if they make partition, the condition is destroyed. 8 Rep. 75, 76. If a feoffee grant the reversion of part of the land, on a lease for years, on which a rent upon condition is reserved, all the condition is confounded and gone; though if the lessee assign part, the condition remains, for he cannot discharge the estate of the condition. 2 *Danv. Abr.* 119. A man makes a feoffment upon condition, and after levies a fine to a stranger, the condition is gone. *Ibid.* 120. If a feoffee upon condition to infeoff another, infeoff a stranger; or if it be to re-infeoff the feoffor, and he grant the land to another person, upon condition to perform the condition, the condition is broken, because the feoffee hath disabled himself to do it: so where such feoffee, upon condition to re-infeoff, &c. takes a wife, that the land is subject to the dower of the wife; and so if the land is recovered, and execution sued out by another, the condition is broken. *Co. Litt.* 221: 1 *Danv.* 79.

If one disseise the feoffee, or any other who hath land by just title, and thereof infeoff a stranger on condition, and the land is lawfully recovered from him that hath the title; by this the condition is destroyed: and if a disseisor make a feoffment in fee upon condition, and after the disseisee doth enter upon the feoffee, this doth extinguish the condition. *Perk. fect.* 821. If the feoffee makes a feoffment of all or part of the land to the feoffor, before the condition is broken; the condition is gone forever: and if he make a lease for life or years only, then the condition will be suspended for that time. *Co. Litt.* 218. But it is otherwise where the feoffment or lease for life or years, are made to any other but the feoffor. *Ibid.* Where the condition of a feoffment is, that if the feoffor or his heir pay a certain sum of money to the feoffee such a day, and before that day the feoffor dieth without heir or if the feoffment be made by a woman on condition to pay her 10l. or that the feoffee infeoff her by a certain day, and they intermarry before the day, and the marriage doth continue till after it; in these cases the condition is gone. *Perk. fect.* 763, 764.

A condition that would take away the whole effect of a grant is void; and so it is if it be contrary to the express words of it. Conditions against law are void; but what may be prohibited by law, may be prohibited by deed. 1 *Inst.* 206, 220. He that taketh an estate in remainder, is bound by condition in a deed, though he doth not seal it.

Conditions in restraint of marriage have not generally been favoured, as contrary to sound policy; but where a legacy has been given over to another, there the condition has always been held good; and it seems that such conditions,

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sons as only reasonably restrain children from imprudent marriages will be always supported.—That is to say, where they operate only as particular, not as universal restrictions. In the case of *Scott v. Tyler*, 2 Bro. C. R. 431, &c. it was determined after very long arguments, that a condition annexed to a legacy, that the legatee should not marry under twenty-one, without consent of her mother, (or rather that the legacy should vest previous to twenty-one, if the legatee married with such consent,) was a valid condition.—And upon marriage without such consent, it was determined to go to the mother under a gift of a general residue—See the first paragraph of Div. III. of this title.—And the cases of *Peyton v. Bury*, 2 P. Wms. 626, and the following cases cited in Mr. Cox's note there, viz. *Bellasis v. Ermine*, 1 C. C. 22; *Fry v. Porter*, 1 C. C. 138; *Jewell v. Duke*, 1 Vern. 19; *Shotton v. Grymes*, 2 Vern. 357; *Alton v. Alton*, 2 Vern. 482; *Creagh v. Wilson*, 2 Vern. 572; *Gillet v. Wigg*, 1 P. Wms. 284; *Piggot v. Morris*, S. C. C. 26; *Sambell v. Bayly*, Prec. Ch. 562; *King v. Withers*, Gilb. 26; *Harvey v. Alton*, Talb. 212; *Com. Rep.* 726, and 1 Atk. 361; *Pullen v. Reach*, 1 Willf. 21; *Underwood v. Morris*, 2 Atk. 184; *Dalry v. Debonnaire*, 2 Atk. 265; *Elton v. Elton*, 1 Willf. 159; *Cheney v. Greydon*, 2 Atk. 616; *Reynish v. Martin*, 3 Atk. 350; *Wheeler v. Bingham*, 3 Atk. 314; 1 Willf. 137; *Long v. Davis*, 4 Burr. 2052; *Hemings v. Munchley*, 1 Bro. C. R. 303.—That where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void, See 4 Burr. 2055; *Com. Rep.* 739, and the cases there cited.—The case of *Scott v. Tyler* above-mentioned, and *Amos v. Horner*, 1 Eq. Ab. 112, p. 9, have determined that a bequest of the residue, notwithstanding some contradictory authorities, is equivalent to a limitation over; where the condition is precedent and never performed.—As to the invalidity of a legacy in perfect restraint of marriage see *Knapp v. Nevers*, Amb. 662; and *Elton v. Elton*, 1 Willf. 159. And the rule of the ecclesiastical law is, that where a portion is given in consideration that a daughter should never marry, the condition is void, *Savinb.*—See also *Rosi's* notes on *Com. Rep.* 728, and the cases there cited; and at large on this subject, *Fonblaque's Treatise of Equity* i. 245, &c. and this Dict. title *Marriage*.

The word "If" will not always make a condition; but sometimes it makes a limitation, as where a lease is made for years, *if A. B. lives so long*. And this is contrary to a condition; for a stranger may take advantage of an estate determined thereby, &c. *Co. Lit.* 236; *Dyer* 300. *Sub conditione* is the most proper word to make a condition: *proviso* is as good a word, when not dependant upon another sentence; but in some cases, the word *proviso* may make no condition, but be only a qualification or explanation of a covenant. 2 *Danv.* 1, 2. And neither the word *proviso*, nor any other, makes a condition, unless it is *restrictive*. *Plowd.* 34; 1 *Nelf.* 466.

Regularly the word "for" does not import a condition, though it has the force of a condition *when the thing granted is executory, and the consideration of the grant is a service, or some such thing, for which there is no remedy; but the stopping the thing granted;* as in the case of an annuity granted *pro consilio*, or for executing the office of a steward of a court, or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to

be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the condition is not precedent, and therefore the performance thereof need not be averred when the annuity is demanded. *Per Hobart Ch. J. Hob. 41. Mich. 10 Jac.* in the case of *Cowper v. Andewes*.

As the intent of the testator chiefly governs in wills, such construction is always made of the words, as will best support his intent, and therefore these words *ad faciendum, faciundo, ea intentione, ad effectum*, &c. in a will create a condition. *Co. Lit.* 204 a. See titles *Devise, Will*.

A grant to one to the intent he shall do so and so, is no condition, but a *trust and confidence*. *Dyer* 138. Some words in a lease do not make a condition but a *covenant*, upon which the lessor may bring his action. A lease being the deed of lessor and lessee, every word is spoken by both; and a condition may be therein, though it sounds in *covenant*. 1 *Nelf.* 464. A *covenant* not to grant, sell, &c. may be a condition; and *covenant* that, paying the rent, the lessee shall enjoy the land, is *conditional*. 2 *Danv.* 2. 6. Where words are indefinite, and proper to denote an estate, they shall be taken to have the force of a condition. *Palm* 503.

III. A condition may be well performed, when it is done as near to the intent as may be: for if the condition of a feoffment be that the feoffee shall make an estate back to the feoffor and his wife, and the heirs of their two bodies, remainder to the right heirs of the feoffor; in this case, if the feoffor die before, the estate shall be made to the wife without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife, &c. *Co. Lit.* 219; 8 *Rep.* 69. If a condition be performed in *substance* and *effect*, it is good although it differs in words; as where it is to deliver letters-patent, and the party bound having lost them, delivers an exemplification, &c. 2 *Danv.* 40. Though payment of the money before the day, is payment at the day, in performance of a condition; yet a feoffor, &c. cannot re-enter, and revest his old estate by force of the condition, till the day whereon the condition gives him power to re-enter. *Ibid.* 121. If a man seised of land in right of his wife, make a feoffment in fee on condition, and dies; if the heir of the feoffor enters for the condition broken, and defeats the feoffment, his estate vanishes, and presently it is vested in the wife. *Co. Lit.* 202. And if a person seised of land, as *heir* on the part of his mother, makes a feoffment on condition and dieth; though the heir on the part of the father, who is *heir* at *Common law*, may enter for the condition broken, the *heir* of the part of the mother shall enter upon him, and enjoy the land. *Ibid.* 12.

Where there is a condition in a feoffment or lease, that if no distress can be found, the feoffor, &c. shall re-enter; if the place is not open to the distress, as if there be only a cupboard in the house, which is locked, &c. it is all one as if there was no distress there, and the feoffor, &c. may enter. 2 *Danv.* 46. When a rent is to be paid upon condition at a certain day, the lessor cannot enter for the condition broken, before demand of the rent. *Ibid.* 98. And the lessor ought to demand the rent at the day, or the condition shall not be broken by the non-payment of the rent. A re-entry may be given on a feoffment,

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feoffment, &c. though none be reserved: if one make a lease for life or feoffment upon condition, that if the feoffee or lessee does such an act, the estate shall be void: now although the estate cannot be void before entry, this is a good condition, and shall give an entry to the lessor, &c. by implication. 1 *Roll. Abr.* 408. A lease for life on condition, being a freehold, cannot cease without entry; but if it be a lease for years, the lease is void *ipso facto*, on breach of the condition without any entry. 1 *Inst.* 214. If a lease for years is, that, on breach of the condition, the term shall cease, the term is ended without entry; but where the words are, that the lease shall be void, it is otherwise. *Cro. Car.* 511: 3 *Rep.* 64. Regularly, where one will take advantage of a condition, if he may enter, he must do it; and if he cannot enter, he must make a claim. *Co. Lit.* 218. Where on condition broken, lessor brings an *assumpsit*, entry is not necessary; if tenant defends, he is bound by the rule, to confess entry.

No one can reserve the power or benefit of re-entry, on breach of a condition to any other but himself, his heirs, executors, &c. parties and privies, in right and representation: privies in law, grantees of reversions, &c. are to have no advantage by it. But by the *Stat.* 32 *H. 8. c.* 23. Grantees of reversions may take advantage against lessors, &c. by action. 1 *Inst.* 214, 215: *Plowd.* 175. Where one doth enter for a condition broken, it generally makes the estate void *ab initio*, and the party comes in of his first estate; and he shall have the land in the same manner it was when he parted with it; and his possession at the time of making the condition; therefore he shall avoid all subsequent charges on the lands. 4 *Rep.* 120: *Plowd.* 186: *Co. Lit.* 233. If one enters on a condition performed, he shall avoid all incumbrances upon the land after the condition made: and a condition when broken, or performed, &c. will defeat the whole estate. So that if there be a lease for life, remainder in fee, on condition that the lessee for life shall pay 20*l.* to the lessor; if he pay not this money, the estate in remainder will be avoided also. *Dyer* 127: 8 *Rep.* 90. But this may be otherwise by special limitation to an use: and if tenant for life, and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall re-enter, this may be good without defeating the whole estate; though regularly a condition may not avoid part of an estate, and leave another part entire, nor can the estate be void as to some persons, and good as to others. 8 *Rep.* 150: 1 *Inst.* 214.

Lessee for life makes a feoffment on condition, and enters for the condition broken; by this he shall be re-entred to his estate for life, and reduce the reversion to the lessor; and the rent due to the lessor shall be revived: but in this case the lessee will not be in the same course as he was before, for his estate is subject to a forfeiture, though he be tenant for life still. *Roll.* 474: *Shep. Abr.* 405.

Tenants by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, for life, or years, &c. hold their estates subject to a condition in law, not to grant a greater estate than they have, nor to commit waste, &c. 1 *Inst.* 233. And estates made by deed to infants, and feme covert, upon condition, shall bind them, because the charge is on the land. 2 *Dowr.* 30. A release of all a man's right may be upon condition; a lessee may surrender upon condition; a contract may be

upon condition, &c. But a parson cannot resign upon condition, any more than be admitted upon condition: and a condition cannot be released on condition. 9 *Rep.* 85.

No person shall defeat any estate of freehold upon condition without shewing the deed wherein the condition is contained: but of chattels real or personal, &c. a man may plead that such grants or leases were made upon condition without shewing the deeds; and in the case of a condition to avoid a freehold, though it may not be pleaded without the deed, it may be given in evidence to a jury, and they may find the matter at large. *Lit.* 374: 5 *Rep.* 40. A condition may be apportioned by act of law, or of the lessee. 4 *Rep.* 120. But a man cannot by his own act divide, or apportion a condition, which goes to the destruction of an estate. 1 *Nelf. Abr.* 474. A condition in a will is a thing odious in law, which shall not be created without sufficient words. 2 *Lev.* 40. A devise to the heir at law, provided he pay to *A. B.* 20*l.* is a void condition, because there is no person to take advantage of the non-performance. 1 *Lutw.* 797. Yet conditional devises, as well of lands as of goods, are allowed by our law, and not being performed, the heir or executors shall take advantage of them. 1 *Nelf.* 467.

Where there are negative and affirmative conditions, the pleader must shew, not only that he has not broke the negative ones, but also that he has performed the affirmative ones. *Fletcher v. Richardson*, *Hardw.* 322.

As to relief against the breach of conditions. Some say that in all cases of penalty or forfeiture that lie in compensation, Equity will relieve; for where they can make compensation, no harm is done. So that although an express time be appointed for the performance of a condition, the judge may, after that day is past, allow a reasonable space to the party, making reparation for the damage, if it be not very great, nor the substance of the covenant destroyed by it. See *Fonblanque's Treat. Eq. i.* 337, and the cases there cited.

The substantial distinction which governs the interference of Courts of Equity in cases of conditions broken, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made: and therefore, where *A.* conveyed lands to *B.* &c. upon trust, that if *C.* the son of *A.* within six months after the death of *A.* should secure to trustees 500*l.* for the younger children of *C.* then after such security given to convey to *C.* and his heirs; and until the time for giving such security in trust for the eldest son of *C.* and in default of such security, to convey to such eldest son and his heirs; *C.* died before such security given: yet this condition precedent being only in the nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* to the younger children. 1 *Wils. v. Crjmes*, 1 *C. C.* 89: See *Cheswick v. B. Howell*, *Finch.* 173: *Pitcairne v. Birse*, *Fin. b.* 403: *Woodman v. Blake*, 2 *Fenn.* 222: *Bartie v. Falkland*, 2 *Fenn.* 359: *Heyward v. Abrell*, 1 *Eqn.* 222: *Bland v. M'dilton*, 2 *C. C.* 1: *Francis's Machine*, p. 49.

But though Equity will, under some circumstances, relieve against the breach of a condition precedent, where damages are certain; yet it seems, that they will not where the damages accrued are contingent, and cannot be estimated. *Sweet v. Anderson*, 5 *Fin.* 93. pl. 15. See *Treatise of Equity*, pp. 209, 37, 391.

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IV. There are no precise technical words required in a deed, to make a stipulation a condition *precedent* or *subsequent*; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other according to the nature of the transaction, *per Ashburnst Justice, 1 Term Rep. 645*.—Further, as to the nature of conditions precedent and subsequent, See 3 *Atk.* 364: 2 *P. Wms.* 419, 626: 1 *Vern.* 83: 3 *C. C.* 130: 3 *Lev.* 132: *Framm on Cont. Rem.*: 2 *Burr.* 899: 4 *Burr.* 1930: 1 *Will.* 105, 136: 2 *Bro. C. R.* 67: and *Ib.* 431, 489, as to a condition annexed to a legacy, that the legatee should marry with consent of her mother, which was held to be valid. In 1 *Eq. Ab.* 108, it is said that conditions precedent are such as are annexed to estates, and must be punctually performed *before* the estate can vest. A condition subsequent, is when the estate is executed; but the *continuance* of such estate depends on the breach or performance of the condition. The two most material points of discussion respecting the doctrine and different operations at law, and in equity, of conditions precedent and subsequent arise, 1. From cases where conditions are annexed to devises, making them void on the marriage of the devisee without consent: See *ante* II. and title *Marriage*: And 2. From cases arising on the vesting of portions and legacies made payable at a future time. See titles *Devise, Legacy, Portions*.

Conditions precedent are such as must be punctually performed before the estate can vest; but on a condition subsequent, the estate is immediately executed: yet the *continuance* of such estate dependeth on the breach or performance of the condition. *Co. Lit.* 218: *Eq. Abr.* 108. As if I grant, that if *A.* will go to such a place, about my business, that he shall have such an estate, or that he shall have 10*l.* &c. this is a condition precedent. 1 *Rel. Abr.* 414. So if I retain a man for 40*s.* to go with me to *Rome*, this is a condition precedent, for the duty commences by going to *Rome*. 1 *Rel. Abr.* 914. So if a man, by will devises certain legacies, and then devises all the residue of his estate to his executor, after debts, legacies, &c. paid and discharged, this is a condition precedent; so that the executor cannot have the residue of the estate before the debts and legacies are discharged. 1 *Rel. Abr.* 415: 1 *Jones* 327: *Cro. Car.* 335.

But if a man devises a term to *A.* and that if his wife suffers the devisee to enjoy it for three years, that she shall have all his goods as executrix; but if she disturbs *A.* then he makes *B.* executor, and dies, his wife is executrix presently; for though in *grants* the estate shall not vest till the condition precedent is performed, yet it is otherwise in a *will*, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of being executrix, if she perform it not. *Cro. Eliz.* 219.

Where the *one promise* is the consideration of the *other*, and where the performance and not the promise is, *must be gathered from the words and nature of the agreement*, and depends intirely thereupon; for, if there was a *positive* promise that one should release his equity of redemption, and on the other side, that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the

plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him 7*l.* (so that the release is the consideration, and therefore, being executory, it is a condition precedent, which must be averred. 12 *Mod.* 455, 460. *Thorp v. Thorp*.)

If there be a day set for the payment of money, or doing the thing which one promises, agrees or covenants to do for another thing, and that day happens to incur before the time, the thing for which the promise, agreement or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing; after the day is past the other shall have action for the money, or other thing, though the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Per Holt Ch. Justice.* 12 *Mod.* 461: *Pasch.* 13 *W.* 3. *Thorp v. Thorp*.

M. agrees to give *A.* so much for the use of a coach and horses for a year, and *A.* agreed further with *M.* to keep the coach in repair; it was averred the coach and horses were delivered to *M.* but nothing of the repair; and *Holt Ch. Justice* held upon this evidence, that repairing was not a condition precedent, and therefore need not be averred. *Per Holt Ch. Justice at Guildhall*, and judgment *pro quacunte*. 12 *Mod.* 503: *Pasch.* 13 *Will.* 3. *Atkinson v. Morris*.

But if the agreement had been that *A.* had agreed to give *M.* a coach and horses for a year, and to repair the coach, and that for that *M.* promised so much money, then the repairing had been a condition precedent necessary to be averred. *Per Holt Ch. Justice.* 12 *Mod.* 503: *Pasch.* 13 *W.* 3. in *S. C.*

Condition that *A.* shall do, and for the doing *B.* shall pay, is a condition precedent, but time fixed for payment will verify the condition; *per Holt Ch. Justice.* 1 *Salk.* 171. *Pasch.* 13 *Will.* 3. *B. R. Thorp v. Thorp*.—See this *Dist.* title *Award*.

If *A.* makes a lease for five years to *B.* upon condition, that if *B.* pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and make livery and seisin to *B.* this passes the freehold immediately, and *B.* has a fee conditional; because if the freehold was not to vest in *B.* till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers. *Lit. sect.* 350: *Co. Lit.* 216, 217.

But in case of a lease for life, with such a condition, the freehold passes not before the condition performed; because the livery may presently work upon the freehold. But if a man grants an advowson, &c. (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition performed. *Co. Lit.* 217.

If *A.* leases to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs, at a day, that *B.* shall have the fee, and before the day *A.* is attainted of treason and executed; now though the condition became impossible by the act and offence of *A.* yet *B.* shall not have a fee, because a precedent condition to increase an estate must be performed; and if it becomes impossible, no estate shall rise. *Co. Lit.* 210. Alto in equity, with respect

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respect to conditions precedent and subsequent, the prevailing distinction seems to be, to relieve against the breach or non-performance, not so much whether the condition be *precedent* or *subsequent*, as whether a *compensation* can be made. 1 *Fern.* 79, 167. As if *A.* conveys lands to *B.* &c. and their heirs, upon trust, that if *C.* the son of *A.* within six months after the death of *A.* should secure to the trustees 500*l.* for the younger children of *C.* then after such security given, to convey to *C.* and his heirs, and until the time for giving such security, in trust for the eldest son of *C.* and in default of such security, to convey to such eldest son and his heirs, if *C.* dies before any such security given, yet this condition, though *precedent*, being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* for the younger children. 1 *Chan. Ca.* 89.

If a feme covert, having power by will to devise lands, devises them to her executors, to pay 500*l.* out of them to her son; provided, that if the father gives not a sufficient release of certain goods to her executors, that then the devise of the 500*l.* should be void, and go to the executors; and after her death a release is tendered to the father, and he refuses, yet upon making the release after, the money shall be paid to the son; for it was said to be the standing rule of the court, *that a forfeiture should not bind, where a thing may be done after, or a compensation made for it*; as where the condition is to pay money, &c. and though it is generally binding, where there is a devise over, yet here, it being to go to the executors, it is no more than the law implies. 2 *Ventr.* 252.

See more concerning Conditions under title *Bond*—See also 2 *Com. Dig.* title *Condition*.—And 1 *Inff.* 201, 203, 206, 237, in the notes.

CONDUITS, for water in *London*, shall be made and repaired, and the Lord Mayor and Aldermen may incur into default therein, &c. *Stat.* 35 *H. 8. c.* 10.—See further title *London*.

CONE AND KEY, A woman at the age of fourteen or fifteen years might take the charge of her house, and receive *cone* and *key*. *cone* or *colne* in the *Sax* signifying *computus*; so that she was then held to be of competent years, when she was able to keep the *accounts* and *keys* of the house. *Bract. lib.* 2 *cap.* 37. And there is something to the same purpose in *Glanv. lib.* 7 *cap.* 9.

CONY-BURROWS, Places where conies or rabbits breed and haunt, &c. Commoners cannot lawfully dig up coney-burrows in the common. 2 *Wils.* 51.—See title *Common*.

CONFEDERACY, *confederatio*.] Is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false *confederacy* between divers persons shall be punished, though nothing be put in execution; but this *confederacy*, punishable by law before it is executed, ought to have these incidents; *first*, it must be declared by some matter of prosecution, as by making of bonds, or promises the one to the other; *secondly*, it should be malicious, as for unjust revenge; *thirdly*, it ought to be false against an innocent person; and *lastly*, it is to be out of court voluntarily. *Terms de Ley*. Where a writ of conspiracy doth not lie, the *confederacy* is punishable; and inquiry shall be made of *conspirators* and *confederators*, who bind themselves together, &c. See *post*, title *Conspiracy*.

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CONFESSION.

CONFESSION, *confessio*.] Is where a prisoner is indicted of treason or felony, and brought to the bar to be arraigned; and his indictment being read to him, the court demands what he can say thereto; then he either confesses the offence, and the indictment to be true, or pleads *Not guilty*, &c.

Confession may be made in two kinds, and to two several ends: the one is, that the criminal may confess the offence whereof he is indicted openly in the court, before the judge, and submit himself to the censure and judgment of the law; which confession is the most certain answer, and best satisfaction that may be given to the judge to condemn the offender; so that it proceeds freely of his own accord, without any threats or extremity used; for if the confession arise from any of these causes, it ought not to be recorded: as a woman indicted for the felonious taking of a thing from another, being thereof arraigned, confessed the felony, and said that she did it by commandment of her husband; the judges in pity would not record her confession, but caused her to plead *Not guilty* to the felony; whereupon the jury found that she did the fact by compulsion of her husband, against her will, for which cause she was discharged. 27 *Affix. pl.* 50.

The other kind of confession is, when the prisoner confesses the indictment to be true, and that he hath committed the offence whereof he is indicted, and then becomes an *approver*, or *accuser* of others, who are guilty of the same offence whereof he is indicted, or other offences with him; and then prays the judge to have a coroner assigned him, to whom he may make relation of those offences and the full circumstances thereof. See title *Necessary*.

There was also a third sort of confession, formerly made by an offender in felony, not in court before the judge, but before the coroner in a church, or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the realm. 3 *Inff.* 129.—See title *Abjuration*.

Confession is likewise in civil cases, where the defendant confesses the plaintiff's action to be good: by which confession there may be a mitigation of a fine against the penalty of a statute; though not after verdict. *Finch.* 387: 2 *Keb.* 408.

There is also a confession indirectly implied, as well as directly expressed in criminal cases; as if the defendant, in a case not capital, doth not directly own himself guilty of the crime, but by submitting to a fine owns his guilt; whereupon the judge may accept of his submission to the King's mercy. *Lamb. lib.* 4. *c.* 9. By this indirect confession, the defendant shall not be barred to plead *Not guilty* to an action, &c. for the same fact: the entry of it is, that the defendant puts himself on the King's mercy. And of the direct confession, *that he acknowledges the indictment*. And this *last* confession carries with it so strong a presumption of guilt, that being entered on record, on indictment of trespass, it estops the defendant to plead *Not guilty* to an action brought afterwards against him for the same matter; but such entry of a confession of an indictment of a capital crime, it is said, will not estop a defendant to plead *Not guilty* to an *appeal*, it being in case of life. And where a person upon his arraignment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it worth not amount to felony, where it doth; the judges, upon pro-

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able circumstances, that such confession may proceed from fear, weakness, or ignorance, may refuse such a confession, and suffer the party to plead *Not guilty*. 2 Hawk. P. C. c. 31. § 2.

A confession may be received, and the plea of *Not guilty* be withdrawn, though recorded. *Kel.* 11. The confession of the defendant, whether taken upon an examination before justices of peace, in pursuance of the 1 & 2 P. & M. c. 13. or 2 & 3 P. & M. c. 10, upon an offender's being bailed or committed for felony; or taken by the Common law, upon an examination before a Secretary of State, or other magistrate, for treason or other crimes, is allowed to be given in evidence against the party confessing; but not against others. Also two witnesses of a confession of high treason, upon an examination before a justice of peace, were sufficient to convict the person so confessing, within the meaning of 1 Ed. 6. cap. 12, and 5 & 6 Ed. 6. cap. 11, which required two witnesses in high treason; unless the offender should willingly confess, &c. But the *Stat. 7 & 8. cap. 3*, requires two witnesses, except the party shall *willingly* without violence confess, &c. *in open court*. 21 *ass. P. C.* r 46. § 3.—See title *Evidence*.

It has been held, that wherever a man's confession is made use of against him, it must all be taken together, and not by parcels. 2 Hawk. P. C. c. 46. § 5. And no confession shall, before final judgment deprive the defendant, of the privilege of taking exceptions in arrest of judgment, to faults apparent in the record. *Ibid.* c. 32. § 4. A demurrer amounts to a confession of the indictment as laid, so far, that if the indictment be good, judgment and execution shall go against the prisoner. *Bro.* 86: S. P. C. 150: *H. P. C.* 246. And in criminal cases, not capital, if the defendant demur to an indictment, &c. whether in abatement, or otherwise, the court will not give judgment against him to answer over, but final judgment. 2 Hawk. c. 32. § 7.—See title *Abatement*. Where a prisoner confesses the fact, the court has nothing more to do than to proceed to judgment against him. *Confessus in iudicio pro judicato habetur*. 11 *Rep.* 30: 4 *Inst.* 66.—See further, 2 Hawk. P. C. c. 32, and this Dict. title *Evidence*.

CONFESSOR, *Lat. confessor, confessorarius*.] Hath relation to private confession of sins, in order to absolution: and the priest who received the auricular confession, had the title of confessor, though improperly; for he is rather the confessor, being the person to whom the confession is made. His receiving the confession of a penitent, was in old *English* to shrove or shrive; whence comes the word *beshrived*, or looking like a confessed or shrived person, on whom was imposed some uneasy penance. The most solemn time of confessing was the day before *Lent*, which from thence is still called *Shrove-Tuesday*. *Covel.*—See title *Papists*.

CONFIRMATION, *confirmatio*, from the verb *confirmare, firmum facere*.] A conveyance of an estate, or right in esse, that one hath in or to lands, &c. to another that hath the possession thereof, or some estate therein; whereby a voidable estate is made sure and unavoidable; or a particular estate is increased, or a possession made perfect. 1 *Inst.* 275: See *Shep. Touch.* 311. It is a strengthening of an estate formerly made, which is voidable, though not presently void: as for example; a bishop grants his chancellorship by patent, for term of the patentee's life; this is no void grant, but voidable by the bishop's

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death, except it be strengthened by the confirmation of the dean and chapter.

Confirmation, is also defined to be the approbation or assent to an estate already created; which as far as is in the confirmer's power, makes it good and valid: so that the confirmation doth not regularly create an estate, but yet such words may be mingled in the confirmation as may create and enlarge an estate: but that is by force of such words as are foreign to the business of confirmation, and by their own force and power, tend to create the estate. *Gilb. Ten.* 75.

A Confirmation is of a nature nearly allied to a release; the words of making it are these, *Have given, granted, ratified, approved, and confirmed*. *Litt.* § 515, 531.

The words *dedi & concessi*, are as strong as the word *confirmavi*, for they amount to a grant of the right of the person in possession; and if he has any right, I can never after impeach his estate. *Gilb. Ten.* 79. See further what words shall enure as a confirmation in *Vin. Abr.* title *Confirmation* (X.)

Madex in p. 19. of the *Dissert.* annexed to the *Formul. Angl.* says, that most ancient Confirmations made after the conquest, often run like feoffments; and are distinguishable from them, chiefly by some words importing a former feoffment or grant.

In ancient times, when feoffees were frequently disfeised of their lands upon some suggestion or other, charters of confirmation seem to have been in great request. For in the early times after the conquest, so many confirmations may be met with, successively made to the same persons, or their heirs or successors, of the same lands and possessions, that it looks as if they did not think themselves secure in their possessions against the King, or the great lords who were their feoffors, or in whose fees their lands lay, unless they had repeated confirmations, from them, their heirs or successors. And these Confirmations very anciently seem to have been some times made, either by precept or writ from the King, or other lords, to put the feoffees, or their heirs or successors into seisin, after they had been disfeised, or to keep them in their seisin undisturbed, or else by charter of express Confirmation. *Shep. Touch. edit.* 1791 p. 314. in n. And on this subject of confirmation in general, see *Sheppard's* whole chapter.

Confirmation, *aut est perficiens, crescens aut diminuens*. *Perficiens*, as it feoffee upon condition make a feoffment, and the feoffor confirm the estate of the second feoffee: *Crescens*, that doth always enlarge the estate of a tenant; as tenant for years, to hold for life, &c. *Diminuens*, as when the lord of whom the land is holden, confirms the estate of his tenant, to hold by a less rent. 9 *Rep.* 142.

The lord may diminish the services of his tenant by confirmation; but not reserve new services, so long as the former estate in the tenancy continues: and therefore if he confirm to the tenant, to yield him a hawk, &c. yearly, it is void. *Lit. sect.* 539: 1 *Co. Inst.* 296. Leases for years may be confirmed for part of the term, or part of the land, &c. But it is otherwise of an estate of freehold, which being entire, cannot be confirmed for part of the estate. 5 *Rep.* 81. There may be a confirmation implied by law, as well as express by deed; where the law by construction makes a confirmation of a grant made to another purpose: and a confirmation may enlarge

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large an estate, from an estate held at will to term of years; or a greater estate; from an estate for years to an estate for life; from an estate for life, to an estate in tail, or in fee; and from an estate in tail to an estate in fee-simple. 1 *Inst.* 305; 9 *Rep.* 142; *Dyer* 253. But if the confirmation be made to *lessee* for life or years, of his *term* or *estate*, and *not* of the *land*, this doth *not* increase the estate, though if the lessor confirm the *land*, to have and to hold the *land* to the lessee and his heirs, 'this will enlarge the estate, and so of the rest. *Co. Lit.* 299; *Plowd.* 48.

In every good confirmation, there must be a precedent rightful or wrongful estate in him to whom made, or he must have the possession of the thing as a foundation for the confirmation to work upon; the confirmor must have such an estate and property in the land, that he may be thereby enabled to confirm the estate of the confirmee; the precedent estate must continue till the confirmation come, so that the estate to be increased comes into it; and it is required that both these estates be lawful. *Co. Lit.* 296; 1 *Rep.* 146; *Dyer* 109; 5 *Rep.* 15. If one have common of pasture in another's land, and he confirms the estate of the tenant of the land, nothing passes of the common, but it remains as it was before: so if a man have a rent out of the land, and he doth confirm the estate which the tenant hath in the land, the rent remaineth. *Lit. sect.* 537.

Tenant for life makes a lease for years to a man, and after leases the land to another person for years; and he in reversion confirms the last lease, and after that the first lease, this is not good: the second lessee hath an interest before by the confirmation of him in reversion. But in a like case, confirmation of the first lease, after the second was confirmed, was held good: for the lease takes no interest by the confirmation, but only to make it durable and effectual. *Moor, c.* 180; 1 *Inst.* 296; *Plowd.* 10.

If a disseisor confirm the land to the disseisor but for one hour, one week, a year, or for life, &c. it is a good confirmation of the estate for ever: and if he confirms the estate of the disseisor without any word of heirs, he hath a fee simple; and if a disseisor make a gift in tail, and the disseisor doth confirm the estate of the donee, it shall enure to the whole estate: also if the disseisor enfeoffs *A.* and *B.* and the heirs of *B.* and the disseisor confirms the estate of *B.* for his life; this shall extend to his companion, and for the whole fee-simple. *Co. Lit.* 291, 297, 299.

But where the estate is divided, it is otherwise; as if there be an estate for life, the remainder over, there the confirmation may be of either of the estates: and if the lessee of a disseisor of a lease for twenty years, make a lease for ten years; the disseisor may confirm to one of them, and not to the other. 1 *Cro* 472; 5 *Rep.* 81. If a disseisor or any other make a lease for years to begin at a day to come, a confirmation to the lessee before the lease begins will not be good; for there is no estate in him. *Co. Lit.* 296.

The tenant in tail of land hath a reversion in fee expectant; in this case, the confirmation of the estate-tail will not extend to the reversion. And if my disseisor make a lease for life, the remainder in fee, and I confirm the estate of the tenant for life; this shall not confirm the estate of him in remainder: but if I confirm the remainder estate, without any confirmation to tenant for life, it shall enure to him also. *Co. Lit.* 297, 298. If

lands are given to two men, and the heirs of their two bodies begotten, and the donor confirms their estate in the lands, to have and to hold to them two and their heirs; this shall be construed a joint estate for their lives, and after they shall have several inheritances. *Co. Lit.* 299. Tenant in tail, or for life, of land, lets it for years, if after he makes a confirmation of the land to the lessee for years, to hold to him and his heirs for ever, the lessee hath only an estate for the life of the tenant in tail, &c. and therein his lease for years is extinct. *Lit. sect.* 606.

A freehold for life, and term for years, it is said, cannot stand together of the same land, in the same person. 1 *Nels. Abr.* 480. If a feme lessee for years marries, and the lessor confirms the estate of husband and wife, to hold for their lives, by such a confirmation the term will be drowned; and the husband and wife are jointenants for their lives. *Co. Lit.* 300. But if the feme were lessee for life, then by the confirmation to husband and wife for their lives, the husband holdeth only in right of his wife for her life; but shall take a remainder for his life. *Ibid.* 299. Confirmation to lessee for life, and a stranger to hold for their lives, is void, for there is no privity; but it is otherwise, if for years. 2 *Darv. Abr.* 141. If tenant for life grant a rent-charge, &c. to one and his heirs, he in reversion is to confirm it, otherwise it is good only for the life of tenant for life. *Lit.* 529. A tenant for life, and remainder-man in fee, join in a lease, this shall be taken to be the lease of tenant for life, during his life, and confirmation of him in remainder: though after the death of tenant for life, it is the lease of him in remainder, and confirmation of tenant for life. 6 *Rep.* 15; 1 *Nels. Abr.* 481.

If lessee for years, without impeachment for waste, accepts a confirmation of his estate for life; by this he hath lost the privilege annexed to his estate for years. 8 *Rep.* 76. Acceptance of rent in some cases makes a confirmation of a lease: As if a man leases for life, reserving rent upon a condition of re entry; if after the condition is broken, by non-payment of the rent, the lessor distrains for the said rent, this act shall be a confirmation of the lease, so as he cannot enter. 2 *Darv.* 128, 129.

What a person may defeat by his entry, he may make good by his confirmation. *Co. Lit.* 300. But none can confirm, unless he hath a right at the time of the grant; he that hath but a right in reversion cannot enlarge the estate of a lessee. 2 *Darv.* 140, 141. And where a person hath but *interesse termini*, he hath no estate in him, upon which a confirmation may enure. *Co. Lit.* 290.

As confirmation is to bind the right of him who makes it, but not alter the nature of the estate of him to whom made, it shall not discharge a condition. *Poph.* 51. If *A.* enfeoffs *B.* upon condition, and after *A.* confirms the estate of *B.* yet the condition remains: though if *B.* had enfeoffed *C.* so that the estate of *C.* had been only subject to the condition in another deed, and after *A.* had confirmed the estate of *C.* this would have extinguished the condition, which was annexed to the estate of *B.* 1 *Rep.* 147. A confirmation will take away a condition annexed by law and by confirmation, a condition after broken in a deed of feoffment is extinguished. 1 *Co. Rep.* 146. Confirmations may make a defeasible estate good; but cannot work upon an estate that is void in law. *Co. Lit.* 295.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

[illegible]

his goods, he shall not be received to enlarge his appeal; and forasmuch as there is apar to have the goods so left out, the King shall have them as *confiscate*, according to the rule, *Quia non capis Christus, capti sibi sunt.* Stann. P. C. lib. 2. cap. 24.

CONFORMITY to the church of England. See *Stat. & Eliz. s. 2, &c.* and titles *Recusant, Nonconformist, Religion*.

CONFRERES, *confiâtres*.] Brethren in a religious house; fellows of one and the same society. *Stat.* 32 Hen. 8, c. 24.

CONGEABLE, From the Fr. *congé*, leave or permission] Signifies in our law as much as lawful, or lawfully done, or done with permission; as entry congeable, &c. *Int. f. 420.*

CONGE D'ESLIRE, *Fr.* i. e. leave to choose.] The King's license or permission sent to a dean and chapter to proceed to the election of a bishop, when any bishoprick becomes vacant. See title *Bishop*.

CONINGERIA, A coney-borough, or warren of conies. *Inq. ann* 47 H. 3.

other

CONFISCATE, or CONFISCATED. From the Lat. *confiscare*, and that from *seiscus*, which signifies metonymically the Emperor's treasure: and as the Romans say, such goods as are forfeited to the Emperor's treasury for any offence are *bona confiscata*, to we say of those that are forfeited to our King's Exchequer. And the *title* to have these goods is given to the King by the law, when they are *not claimed* by some other: as if a man be indicted for stealing the goods of another person, when they are in truth his own proper goods, and when the goods are brought into court against him, and he is asked what he says to the said goods, if he *disclaims* them, he shall lose the goods, although that afterwards he be ac-

CONJURATION, an ancient ceremony of the
complicit made by persons standing in a circle, or
public harm: but was more especially used for the pur-
ing (as was supposed) persons suspected with the devil,
or some evil spirit, to know any secret, or whether they
pose. The difference between *conjuratio* and *incantatio*
was said to be, that a person using the *art*, endeavour-
ed by prayers and invocations to compel the devil to say
or do what he commanded him; the *magus* dealt rather by
friendly and voluntary conference, or agreement with the
devil or familiar, to have his desires served, in him of
blood or other gift offered. Both differed from *incanta-
ment* or *forcery*; because the latter were supposed to be per-
sonal conferences with the devil, and the former were but
medicines and ceremonial forms of words usually called
charms, without apparition. *Covent*.

Hawkins, in his *Pleas of the Courts* lib. 6. c. 9. says,
that *conjurers* are those who, by force of certain magical
words, endeavour to raise the devil, and oblige him to
execute their commands. *Witchers* are such who by way
of conference bargain with an evil spirit, to do what
they desire of him: and *Sorcerers* are those, who by the
use of certain superstitious words, or by the means of
images, &c. are said to produce strange effects, above
the ordinary course of nature. All which were anciently
punished in the same manner as *heretics*, by the writ de
haeretico comburendo, after a sentence in the ecclesiastical
court: and they might be condemned to the pillory,
&c. upon an indictment at Common law. 3 *Inst.* 44:
H. P. C. 38.

The *Stat.* 33 H. 8. c. 8: and 1 *Jac.* 1 c. 12, against
conjuratio and *witchcraft* are repealed, by *Stat.* 9 Geo. 2.
c. 5, which enacts, that no prosecution shall be com-
menced on the same: but where persons pretend to ex-
ercise any kind of *witchcraft* or *conjuratio*, &c. or un-
dertake to tell fortunes, or from pretended skill in any
crafty science to discover where goods stolen or lost may
be found, upon conviction, they shall be imprisoned a year,
and stand in the pillory once in every quarter, in some
market town, and may be ordered to give security for
their good behaviour. See 4 *Comm.* 60.

CONQUEST *Conquestus*, the feudal term for purchase;
As to countries granted by conquest, see title *Plantations*.
And also title *King*.

CONSANGUINEO, A writ mentioned in *Reg.* Orig.
de avo, pro 225 of consanguineus, &c. f. 226. See *Cognate*.

CONSANGUINEUS FRATER, A brother by the
father's side. 2 *Comm.* 232.

CONSANGUINITY, *consanguinitas*.] Is a kindred by
blood for birth: as affinity is a kindred by marriage: and it
is considerable in the descent of lands, who shall take it as
next of blood, &c. and also in administrations, which
shall be granted to the next of kin. See title *Descent*;
Executor.

The *Stat.* 33 H. 8. c. 8: and 1 *Jac.* 1 c. 12, against
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be found, upon conviction, they shall be imprisoned a year,
and stand in the pillory once in every quarter, in some
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their good behaviour. See 4 *Comm.* 60.

CONSEQUENTIA, *consequentia*.] Is a kindred by
blood for birth: as affinity is a kindred by marriage: and it
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next of blood, &c. and also in administrations, which
shall be granted to the next of kin. See title *Descent*;
Executor.

of his goods; the men not daring to go on with their work. *Ort. T. 167 v. Gurrett v. Taylor. H. breaks the fence of B. by which cattle get into C.'s ground, C. shall have case against A. but not trespass. Per Roll: Sty. 131: Cowper v. S. J. Idem. If A. beats his horse by which he runs on B. A. is the trespasser, and not B. 2 Salk. 631.*

He that makes a fire in his field must see that it does no harm, and answer the damage if it does; but if a sudden storm riseth which he cannot stop, it is a matter of evidence, and he must shew it. 1 Salk. 13. pl. 4: *Turbergil v. Stamp*. If a man keeps a beast of a savage nature, as a lion, &c. it is at his peril to keep him up, and he is answerable for all the consequences of his getting loose; per *Raymond Ch. J. Gibb. 187. The King v. Huggins*. See title *Actions*.

CONSERVATOR, Law. A protector, preserver, or maintainer; or a standing arbitrator, chosen and appointed as a guarantee to compose and adjust differences that should arise between two parties. *St. Paroch. Antiq. 2. 513.*

CONSERVATOR OF THE PEACE, *conservator vel custos pacis*. Is he that hath an especial charge to see the king's peace kept: and of these cons. *Lambard* saith, that before the reign of Ed. III. who first created Justices of the Peace, there were divers persons that by the common law had interest in keeping the peace; some whereof had that charge by tenure, as holding lands of the king by this service, &c. And others as incident to their offices which they bore, and so included in the same, that they were nevertheless called by the name of their office only: also some had it simply, as of itself, and were therefore named *custodes pacis*, wardens or conservators of the peace. The Chamberlain of Chester is a conservator of the peace in that county, by virtue of his office. 4 *Inst.* 212. Sheriffs of counties at common law are conservators of the peace; and *constables*, by the common law were conservators, but some say they were only subordinate to the conservators of the peace, as they are now to the justice.

The King's Majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the King's peace. The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Marshal, and Lord High Constable of England, (when any such officers are in being) and all the Justices of the court of King's Bench, (by virtue of their offices,) and the Master of the Rolls, (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff, and both of them may take a recognizance or security for the peace. Constables, tythingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it. 1 *Comm.* 350. See title *Justices of Peace, Commitment*.

CONSERVATOR OF THE TRUCE AND SAFE-CONDUCTS, *conservator induciarum et salvoarum regis*

duarum.] Was an officer appointed by the king's letters patent, whose charge was to inquire of all offences done against the king's truce and safe-conducts upon the main sea, out of the liberties of the cinque ports, as the admirals customably were wont to do, and such other things as are declared in *Stat. 2 Hen. 5. c. 12. 6*. Two men learned in the law were joined to conservators of the truce as associates; and masters of ships sworn not to attempt any thing against the truce, &c. And letters of request and of marque were to be granted when trade was broken at sea to make restitution. *Stat. 4. H. 5. c. 7*: See title *Truce*.

There was anciently a Conservator of the privileges of the Hospitallers and Templars. *West. 2. c. 43*. And the Corporation of the great level of the fens consists of a governor, six bailiffs, twenty conservators, and commonalty. *Stat. 15 Car. 2. c. 17*.

CONSIDERATIO CURIE, is often mentioned in law pleadings, and where matters are determined by the court. *Idem* *consideratum est per curiam, i. e.* Therefore it is considered and adjudged by the court; *consideratio curie* is the judgment of the court.

CONSIDERATION, *consideratio*. The material cause, *quid* or *pro quo*, of any contract, without which it will not be effectual or binding. This consideration is either *expressed*; as when a man bargains to give so much, for a thing bought; or to sell his land for 100 l. or grants it in exchange for other lands; or where I promise that if one will marry my daughter or build me a house, &c. I will give him a certain sum of money; or one agrees for a certain sum to do a thing. Or it is *implied*, when the law itself enforces a consideration; as where a person comes to an inn, and there staying eats and drinks, and takes lodging for himself and horse, the law presumes he intends to pay for both, though there be no express contract for it; and therefore if he discharge not the house, the host may stay his horse; and so if a taylor makes a garment for another, and there is no express agreement what he shall have for it; he may keep the clothes till he is paid, or sue the party for the same. 5 *Rep.* 19: *Plowd.* 308: *Dyer* 30, 337.

Considerations may be considered either as relating to contracts generally or to deeds in particular; and further relating thereto, See titles *Assumpsit, Deed*.

As to contracts, a consideration may be defined to be the reason which moves the contracting party to enter into the contract.—This consideration must be a thing lawful in itself, or else the contract is void. A good consideration is that of blood or natural affection between near relations; the satisfaction accruing from which, the law esteems an equivalent for whatever benefit may move from one relation to another. 3 *Rep.* 83: 1 *Inst.* 271: 1 *Rep.* 176. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any valuable consideration, as for marriage; for money, for work done, or for other reciprocal contracts can never be impeached at law; and if it be of a sufficient adequate value is never set aside in equity: for the person contracted with has then given an equivalent in recompence and is therefore as much an owner, or a creditor as any other person. 2 *Com.* 444: *Noy's Max.* 87: *Hob.* 230. See titles *Fraud; Fraudulent Conveyance*.

CONSIDERATION

These valuable considerations are divided by the Civilians into four species—*De ut des*—*Facio ut facias*—*Facio ut des*—*De ut facias*, the bare mention of which is here sufficient.

A consideration of any sort or other is so absolutely necessary to the forming of a contract that a *nudum pactum* or bare agreement to do or pay any thing on one side without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it. *Dr. & St. d. 2. c. 24.* As if one man promises to give another 100*l.* here there is nothing contracted for or given on one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honour or conscience, which the municipal laws do not take upon them to decide, certainly those laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude: nay even if the promise be founded on a *strict* moral obligation (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum*. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases where such promise is authentically proved by written documents. 2 *Comm.* 445, 6.—*Blackstone* instances voluntary bonds and notes—as to which latter, see *Fonblanque's observations in Treat. Eq.* 334, 7.

Deeds also must be founded upon good and sufficient consideration, not upon an usurious contract. *Stat. 13 Eliz. c. 8.*—Nor upon fraud or collusion either to deceive purchasers, *bona fide*, or just and lawful creditors: *Stat. 13 Eliz. c. 5: 27 Eliz. c. 4.*—Any of which bad considerations will vacate the deed and subject such persons as put the same in ure, to forfeitures, and often to imprisonments. A deed also, or other grant made without any consideration is, as it were of no effect: for it is construed to enure or to be effectual, only to the use of the grantor himself. *Perk. §. 533.* The consideration of deeds also, like that of contracts, may be either a good or valuable one—Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasers. 2 *Comm.* 296. See further title *Deeds*.

A consideration ought to be matter of profit and benefit to him to whom it is done; by reason of the charge or trouble of him who doth it. *Cro. Car. 8.* If a person hath disbursed several sums for another, without his request, and afterwards such other says, that in consideration he hath paid the said sums for him, he promises to pay them: this is no consideration, because it was executed before. But it will be otherwise, if the sums were paid at the request of the other. *Moor 220: Cro. Eliz. 282.* A mere voluntary curesy will not be a good consideration of a promise: but the value and proportion of the consideration is not material, to maintain an action; for a shilling or a penny, is as much binding as 100*l.* Though in these cases, the jury will, give damages proportionably to the loss. *Hob. 5: 10 Rep. 76.*

A consideration that is void in part, is void in the whole: and if two considerations be alledged, and one of them is found false by the jury, the action fails. *Hob.*

CONSPIRACY

1061 *Cro. Eliz. 248.* But if there be a double consideration, for the granting of a promise, for the benefit whereof an action is brought; though one of the considerations be not good, yet if the other be good, and the promise broken, the action will lie upon that benefit: the non consideration is enough to support the promise. 1 *Lill. Abr. c. 4.* A consideration shall be lawful, to ground an assumpsit, 2 *Lill. Abr. 108.* Where considerations are valuable, and consist of two or more parts, then the performance of every part ought to be shown. *Cro. Eliz. 579.* In case a deed of gift must be made of lands, or a fine and recovery, be passed, and no consideration is expressed in the deed, or for the doing thereof, it shall be intended by the law, that it was made in trust, for the use of the donor or donors; for it shall be presumed he would not part with his land without a consideration; and yet the deed shall be construed to operate for nothing, and that which is most reasonable. 1 *Lill. Abr. 109.*

CONSIGN, Is a word used by merchants, where goods are assigned, delivered over, or transmitted from beyond sea or elsewhere to a factor, &c. *Lex Mercat.* See titles *Merchant, Factor*.

CONSILIUM, dies consilii. A time allowed for one accused to make his defence, and answer the charge of the accuser—it is now used for a speedy day appointed to argue a *demurrer*; which the court grants after the demurrer joined, on reading the record of the cause, &c.

CONSIMILI CASU, writ of entry is. A writ of entry. This and the writ in *casu proventus* lay not at common law, but are given by statute *Glac. 6. Ed. 2. c. 7. and 13 Ed. 1. c. 24.* for the reversioner after alienation; but during the life of the tenant in dower, or other tenant for life. See *F. N. B. 205, 206: 3 Comm. 183. n.*

CONSISTOR, A magistrate so called, *scilicet* Rogero de Gant, Willielmo consistori *Cestriae*, &c. *Blount.*

CONSISTORY, consistorium. Signifies as much as *praetorium*, or tribunal: it is commonly used for a council-house of ecclesiastical persons, or place of justice in the spiritual court; a session or assembly of prelates. And every archbishop and bishop of every diocese hath a consistory court, held before his chancellor, or commissary in his cathedral church, or other convenient place of his diocese, for ecclesiastical causes, 4 *Infr. 338.* The bishop's chancellor is the judge of this court, (supposed to be skilled in the civil and canon law, and in places of the diocese, far remote from the bishop's consistory, the bishop appoints a commissary (*commissarius foraneus*) to judge in all causes within a certain district, and a registrar to enter his decrees, &c. 2 *Rot. Abr. 286: Seld. Hyst. of Tuben. 423, 414.* From the sentence of this consistory court an appeal lies by virtue of *Stat. 24 H. 8. c. 22.* to the archbishop of each province respectively.

CONSOLIDATION, consolidatio. Is used for the uniting of two benefices into one. *Stat. 37 H. 8. c. 21.* Which union is to be by the assent of the ordinary, patron and incumbent, &c. and to be of small churches lying near together. Vide titles *Church, Union*. This word is taken from the civil law, where it signifies properly an uniting of the possession, occupancy or profit of lands, &c. with the property. See also *Extinguishment, Infuance*.

CONSPIRACY, conspiratio. This word was formerly used almost exclusively, for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony; who after acquittal, shall have writ

CONSPIRACY.

of conspiracy. See 33 *Edw. 1. Stat. 2* : 7 *Hen. 5.* : 18 *Hen. 6. c. 12.* See post title *Conspirator*. Now, it is no less commonly used for the unlawful combination of journeymen to raise their wages, or to refuse working. Except on certain regulated conditions; an offence particularly provided for by *Stat. 2 & 3 E. 6. c. 15* : (revised, continued and confirmed by *Stat. 22 & 23 Car. 2. c. 19*, now expired;) which enacts among other things, that if any artificer do conspire, that they shall not do their works but at a certain price; or shall not take upon them to finish that another hath begun; or shall do but a certain work in a day; or shall not work but at certain times, every person so conspiring, shall forfeit for the first offence 10*l.* or be imprisoned 30 days; for the second 20*l.* or be pilloried; and for the third 40*l.* or be pilloried, lose an ear and become infamous. — This *Stat. 2 & 3 E. 6. c. 15*, appears to be yet in force, though not frequently resorted to for remedy in this case; the proceeding being usually by indictment for conspiracy.

By the Common law there can be no doubt that all confederates whatsoever, wrongfully to prejudice a third person are highly criminal. 1 *Hawk. J. C. c. 72. § 2.* — See further *Stat. 5 Eliz. c. 4.* particularly §§ 18, 19, 20. and this Dict. titles *Labourers*; *Servants*.

Journymen confederating and refusing to work unless for certain wages, may be indicted for a conspiracy; notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution; for this offence consists in the conspiring and not in the refusal, and all conspiracies are illegal though the subject matter of them may be lawful. See the case of *The Tub-women v. The London Brewers*, 8 *Mod.* 11, 320. — So also a bare conspiracy to do a lawful act to an unlawful end is a crime; though no act be done in consequence thereof. 8 *Mod.* 321. — The fact of conspiring need not be proved on the trial, but may be collected by the jury from collateral circumstances. 1 *Black. Rep.* 392 : *Sira.* 144. And if the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy. Lord Mansfield in the case of the prisoners in the *King's Bench. Hil. T. 26 Gl. 3.* — 1 *Marsh. P. C. c. 72. § 1. in v.*

Writ of conspiracy lies for him that is indicted of a trespass, and acquitted, though it was not felony; also upon an indictment for a riot. 2 *Mod.* 306 : 5 *Mod.* 405. Where a man is falsely indicted of any crime, which may prejudice his fame or reputation; and though it doth not import slander, if it endangers his liberty, or if the indictment be injurious to his property. &c. writ of conspiracy lieth. 3 *Salk.* 97. But though a conspiracy to charge falsely be indictable, yet the party ought to shew himself to be innocent; and the writ of conspiracy lies not without an acquittal. *Mod. Caf.* 137, 185, 186. Not only writ of conspiracy; which is a civil action at the suit of the party; but also action on the case in the nature of a writ of conspiracy, doth lie for a false and malicious accusation of any crime, whether capital or not capital, even of high treason; and this though the bill of indictment is found *ignoramus*, or it does not go so far as an indictment. And the same damages may be recovered in such action, as in a writ of conspiracy, where the party is lawfully acquitted by verdict. 1 *Roll. Abr.* 111, 112 : 9 *Rep.* 56 : See *Gill. Ca.* 185 : 10 *Mod.* 148, 214 : *Salk.* 155. An action on the case is preferable, as being more

in use, and the proceedings easier, and not attended with such niceties as the writ of conspiracy. See titles *Malicious Prosecution*; *Action*.

If one falsely and maliciously procure another to be arrested; and brought before a justice of peace to be examined concerning a felony, &c. on purpose to vex and disgrace him; and put him to charges and trouble, although he is not indicted for the same, yet he may have an action on the case, in which he need not aver that he was lawfully acquitted, as he ought to do in a writ of conspiracy; but he must aver that the accusation was false & malicious, which words are necessary in the declaration; and it must appear that there was no ground for it. And as an action on the case may be prosecuted against one person, where the writ of conspiracy is indictable, doth not lie but against two, this action is much commonly brought. 1 *Danv. Abr.* 203, 213 : 1 *Roll. Abr.* 562, 563.

Conspirators may be indicted at the suit of the King; and at the Common law, may may prefer an indictment against conspirators, who only conspire together, and nothing is executed: though the conspiracy ought to be declared by some act, or promise to stand, by one another, &c. But a bare conspiracy will not maintain a writ of conspiracy, at the suit of the party, because he is not damaged by it; though it is a ground for an indictment. 9 *Rep.* 56 : 2 *Roll. Abr.* 77. If the defendants can show any foundation or probable cause of suspicion, they shall be discharged; and if a man hath good cause of suspicion that a person is guilty of felony, and causes him to be indicted, in prosecution of justice, action of conspiracy will not lie; but is so otherwise if the prosecutor imposes the crime of felony, where no felony was committed. 1 *Roll. Abr.* 115 : 4 *Rep.* 438.

An action lies not against a justice of peace, who sends out his warrant upon a false accusation; but it lies if he makes it out without any accusation. 1 *Leit.* 187. Conspiracies ought to be out of court; for if a prosecution be ordered in a course of justice, and witnesses appear against a party, &c. there shall be no punishment; and if persons acted only as jurors in a criminal matter, or judges in open court, there is no ground for prosecution. 8 *P. C.* 173 : 12 *Rep.* 24. If all the defendants but one are acquitted on indictment for conspiracy, that one may be acquitted also; because one person alone cannot be indicted for this crime; and husband and wife, being but one person, may not be indicted alone for a conspiracy. 2 *Roll. Abr.* 703. The acquittal of one person is the acquittal of another, upon indictment of conspiracy. 9 *Mod.* 220, (221) where only two are indicted, and it is shewd or proved that they conspired with others, unknown. Though where one is found guilty, according to the opinion of the Lord Chief Justice Hale, if the other doth not come in upon process, or if he dies pending the suit, judgment shall be had against the other. 1 *Fep.* 154. Writ of conspiracy was brought against two persons, and one found Not guilty; the other shall not have judgment; but in action on the case, it had been good. *Gr. Eliz.* 707. Any action on the case in the nature of a conspiracy may be brought against one only. 1 *Hawk. P. C.* 122 : 3. If the parties are found guilty of the conspiracy, upon an indictment of felony, at the King's suit; the judgment is, that they shall lose their Frank law (which disables them to be put upon any jury, to be sworn as witnesses, or to appear in person in any

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of the King's court) and that their lands, goods, and chattels be seized as forfeited, and their bodies committed to prison; which is called a *Bill of Attainder*. 2 *Inst.* 123. 222. *Comp. Inst.* 156. *1 Inst.* 217. 22. There has been no instance of the villainous indictment since the reign of Edward III. The usual mode of punishment at present is, by pillory, fine, imprisonment, and surety for good behaviour. See *1 Inst.* 227. 228. 229. The Quarter Sessions have jurisdiction over this offence. *Fitch* 88. 89. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

The matter of the conspiracy counts as such a man's life, where the villainous judgment is concerned. *1 Inst.* P. C. 72. For conspiring to murder another, &c. one of the parties is bound to be killed, and some others had judgment of the judges, and to be hanged in the neck with the legate. *1 Inst.* 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

CONSPIRATORS, *conspiratores*. By *Stat.* 33 E. 1. c. 1. are defined to be those that do bind themselves by oath, covenant, or other alliance, that every of them shall aid the other falsely and maliciously to indict persons, or falsely to move or maintain pleas, &c. And such as retain men in the country, with rapiers, or fees, to maintain their malicious enterprises, which extends as well to the takers as the givers, and the wards and bailiffs of great lords, who, by their office or power undertake to bear and maintain quarrels, pleas or debates, that concern other parties than such as relate to the state of their lords or themselves. 2 *Inst.* 384. 385. And such as conspirators, false informers, and imbracers of inquests, the King hath provided a writ in the *Chancery*; and the justices of either bench and justices of assize, shall, on every plaint awarded inquest thereupon. *Stat.* 28 E. 1. c. 3. c. 10. From the description of conspirators, in several of our old law books, conspiracy is taken generally, and confounded with *maintenance* and *champerty*; see those titles. Besides these, there are *conspirators in treason*; by plotting against the Government, &c. See title *Treason*.

CONSPIRATIONE, The writ that lay against conspirators. *Reg. Orig.* 134. *F. N. B.* 174.

CONSTABLE.

On this subject, recourse has been had to a very useful, accurate and ingenious performance on "The Office of a Constable"; [8vo Pamphlet 1791] which appears, tho' published without the author's name, to come from the pen of a gentleman intimately versed in English antiquities; and to whom the Publick are indebted for many, more amusing and other equally instructive, performances.—If it should be objected, that a little too much asperity is attached to some of his remarks on this subject, he may plead in his excuse, that as in the body natural, so also in the body politic, where lenitives have been applied in vain, it is sometimes painfully necessary to recur to corrosives. The effect of this kind of observations, is, it is hoped, preserved in the following abridgment; though the "hard words, jealousies, and fears" are conveyed in gentler language.

CONSTABLE.

The Origin of the word *Constable*, erroneously thought to be in the Saxon language, is undoubtedly to be found in the name of the *Ruffian Emperor*; who was so called, as his title imports, no more than superintendent of the imperial matters; or, in other words, the Emperor's Master of the Horse; but having in process of time obtained the command of the army, his name, (corrupted into *constabularius* and *constabularius*; see *Spelman*.) began to signify a commander; and with this signification appears to have been introduced into England at the Norman Conquest; or perhaps sooner.

THE CONSTABLE OF ENGLAND, or *Lord High Constable*, was anciently an office of the highest dignity and importance in the realm. He was the leader of the King's armies; and had the cognizance of all contracts and other matters touching war or peace. *1 R. 2. c. 1. c. 2.*—and see *Madox's History of the Exchequer*, p. 27. He sat as Judge with the Earl Marshal having precedence of him in the court of Chivalry;—and he is by some of our books also called Marshal.—See title *Marshal*.

This office, which appears to have been granted by William the Conqueror, to Walter Earl of Gloucester, or according to others to William Fitzosborne or Roger de Mortimer, became hereditary in two different families, as annexed to the earldoms of Hereford; and in that right after a lapse of near two centuries, was revived by judgment of law, in the person of Edward Stafford Duke of Buckingham; who, being attainted of high treason, an. 13 H. 8. this office became forfeited to the crown. Since this period there has been no Lord High Constable, except *pro tempore* at a Coronation, or on other solemn occasions.

CONSTABLES OF CASTLES, were keepers or governors of the castles of the King, or of Great Barons, and who were frequently hereditary, or by feudal tenure; such were the Constables of the Tower, the Constable of London, or Baynard's Castle, and Constables of the castles of Dover, Wexham, Cliffe, &c. &c. some of which offices though not now hereditary, are remaining to this day. There are the constables intended in *Magna Charta*, c. 17. 20. and who, in the *Stat. of Westminster*, 1. 3. c. 1. are called Constables of Fees; and there considered as keepers of prisons; a constant part indeed of all ancient charters. See 2 *Inst.* 31. The statutes of 5 H. 4. c. 1. reciting the oppressions of these constables, and enacting that none be imprisoned but in the common gaol, seems to have put an end to a race of tyrants, who by their misconduct had rendered themselves odious to the people.

A Constable of the Exchequer is mentioned in the *Dialogus Scaccarii*, l. 1. c. 5.—in the *Stat. de distributione Scaccarii*, 11 H. 3. c. 5.—in *Mesa*, l. 2. c. 31.—and in *Madox's History of that Court*, p. 27.

The Constable of the Staple is also mentioned in some old statutes. See 17 E. 3. c. 8. 13 E. 3. c. 9. 23 H. 8. c. 6.

THE CONSTABLE OF THE HUNDRED, or the *High, Chief or Head Constable* (as he is otherwise called) is next to be spoken of. By the *Stat. of Winchester*, 13 Ed. 1. c. 6. it is ordained that in every hundred or franchise there shall be chosen two constables to make the view of armour, and to present the defaults of armour, and of the suits of towns and of highways, &c.

CONSTABLE.

Lambard (on *Constables*, p. 3) *Coke* (4 *Inst.* 267) and *Hule* (2 *P. C.* 96) all agree in declaring that Constables of the hundred were first introduced by this statute. (And see *Cro. Eliz.* 375). And though it has been asserted that they were officers and conservators of the peace at Common law, and that the *Stat. of Winton* only enlarged their authority, yet no evidence has hitherto been produced to that purpose.—See *Sulk.* 175, 381: 11 *Mod.* 215: 2 *Ld. Raym.* 1193, 5.—The first mention made of the High Constable in any statute subsequent to that of *Winton*, is in *Stat.* 3 *E.* 4. c. 1.

Nothing, however, can be more certain than that the Constable of the hundred, or High Constable, whether he be allowed an officer at the Common law, or not, was instituted long before the *Stat. of Winton*. This curious fact is ascertained by a writ or mandate of 36 *H.* 8, preserved in the *Adversaria* to *Watts's* edition of *Matthew Paris*, and from which cc. 4 & 6 of the *Stat. of Winton* are evidently taken; though it has hitherto escaped the notice of every writer or speaker upon the subject. By this writ it is provided, “that in every hundred there should be constituted a CHIEF CONSTABLE, at whose mandate all those of his hundred sworn arms, should assemble and be observant to him, for the doing of those things which belong to the conservation of the king's peace.” No mention of this officer, it is believed, can be any where found prior to the date of this instrument; which perhaps may no more determine the question as to his original creation than the *Stat. of Winton*. Be this as it will, the discovery ought at least to reach those who are desirous of explaining the antiquities of our law, to look into matters of record, and to trust very little to opinion.

THE CONSTABLE OF THE VILL (or Petty Constable, as he is frequently called, to distinguish him from the officer last mentioned) is he who is generally understood by the term Constable, when mentioned without any peculiar addition.

THIS CONSTABLE has been repeatedly acknowledged by the law, to be “one of the most ancient officers in the realm for the conservation of the peace,” *Popb.* 13: 4 *Inst.* 265. It must be confessed, however, that no mention of him by this identical name, is any where found to occur anterior to the writ or mandate of King *Henry III.*, already mentioned; whereby it is also provided, that in every village or township, there should be constituted a constable or two, according to the number of the inhabitants. But it is pretty certain that Lord *Coke's* idea is right, and that *This officer is as old as the institution of the frank-pledge, usually attributed to King ALFRED*, and was in fact originally the senior or chief pledge of the tithing or decima. See the *Stats.* 2 *E.* 3. c. 3: 20 *H.* 6. c. 14: 28 *H.* 8. c. 10.

Thus it appears that the ordinance of *Hen. III.*, far from instituting the office, merely enlarged the number of officers, placing them in towns and villages, instead of franchises; since it might frequently happen, that a manor of great extent, had only a single constable for several townships; a case exactly similar, indeed, sometimes occurring at this day, where a township, comprehending several hamlets, equally populous it may be with itself, has only one constable for the whole. [For a constablewick cannot be created at this day, unless by act of parliament. 1 *Mod.* 13.]

We find the Constable beginning to be familiarly known by that name, in the time of King *Edward I.*; but not previously. In some articles of enquiry at the Eyre, perhaps, or Trailbailon, certainly in the time of *Edward I.*, are items in which this officer is mentioned. *Coll. Madox. Mus. Brit.* iii, 285.—He seems also to be meant in the two chapters of the Eyre, as given in *Flota, lib.* 1. c. 20. §§ 126, 133.

He is named in the *Stat.* of 2 *E.* 3. c. 3, for the first time; as also in those of 4 *E.* 3. c. 10: 5 *E.* 3. c. 14: 25 *E.* 3. §. 1. c. 6: and 36 *E.* 3. §. 1. c. 2; and in several statutes now repealed or obsolete, in the reigns of *R.* 2, *H.* 4, and *H.* 6: 1 *H.* 7. c. 7. &c.

Notwithstanding any thing that has been said or omitted in the course of this enquiry, it seems highly probable that, at the Common law, and before the mandate of *Henry III.*, the Constable of the hundred, and the Constable of the manor were officers of the same nature and authority, originating at the same time, and differing only as to the extent of their several districts; in short, that they bore to each other the same analogy as subsisted between the bailiff of the hundred and the bailiff of the manor. It follows that the constable of the hundred neither possessed nor could have exercised any more authority within the precinct of the latter, than the constable of one manor possessed or could have exercised in another; the manor being to all intents and purposes exempt from, and excluded out of the hundred.

Lord *Bacon* observes, that though the High Constable's authority hath the more ample circuit “yet I do not find, says he, that the petty constable is subordinate to the high constable, or to be ordered or commanded by him.” Those cases wherein it has been adjudged, that the being subject to a particular lger, shall not excuse a man from serving the office of constable of the hundred, seem therefore to have been decided upon a wrong principle. See 3 *Kb.* 197, 230, 1: *Freem.* 348: 11 *Mod.* 215.

All this is spoken with an exception, not of acts of parliament only, but also of the powers and pretensions exercised or asserted by the Quarter Sessions, which latter has now usurped to much and so long, with respect to the election and controul, both of the constable of the hundred and the constable of the vill, that it is become difficult, if not impossible, to determine, with any degree of precision, the actual rights of either.

In considering the powers and duties of this important officer, we may divide our researches, according to the treatise already quoted, under the following heads.

- I. 1. His Quality, and 2. Qualifications.
- II. 1. His Election; and 2. Who are exempted.
- III. His Power and Authority.
- IV. His Duty. [These two are in many instances co-extensive, and are therefore carefully to be compared together].
- V. His Protection, Indemnity, and Allowances; and lastly,
- VI. His Responsibility and Punishment.

But first it may be necessary to state a few particulars as to the HIGH CONSTABLE, or Constable of the hundred or manor division; who is as much the officer of the justice of the peace as the Constable of the vill. *For.* 128. He is elected at the leet or tithing of the hundred, or by justice of the peace. 1 *Ro. Ab.* 535: *Baili.* 174: 3 *Kb.*

CONSTABLE I. & II.

107. And by Stat. 29 Geo. II. c. 25. § 8, 9, in Westminster a High Constable is to be elected annually by the Dean or High Steward or his deputy at a court leet. ~~As to his power~~—he may hold petty or statute sessions (for hiring servants) according to ancient usage. Stat. 5 Eliz. c. 4. But it is doubtful whether he can arrest for breach, or take surety, of the peace. 1 Salk. 381; Cro. Eliz. 375, 6.—He is said to be an officer within the annual mutiny act, for billeting of soldiers; and liable to the penalties thereby inflicted for mal-practice in so doing; and he may occasionally make a deputy, whose acts in his principal's absence, will be good. 1 Blackst. 350: 3 Burr. 1262; but see the act § 1.—Under Stat. 4 E. 4. c. 1, 39 Eliz. c. 20, and 13 Geo. 1. c. 23. He may determine complaints of clothiers, and see after abuses mentioned in those acts.—His Duty is.—To present those who harbour strangers for whom they will not answer. 13 Ed. 1. c. 6.—To deliver lists of persons qualified to serve on juries. 3 Geo. 2. c. 25; and see 3 & 4 Ann. c. 18.—On receiving notice of any robbery to make fresh suit and hue and cry after the felons, and to defend actions against the hundred by those robbed. 8 Geo. 2. c. 16. See title Hue and Cry, and Stat. 13 E. 1. c. 6.—To collect the county rate, and pay it to the treasurer, or accountant, at the Sessions, on pain of imprisonment. 12 Geo. 2. c. 29.—The Stat. 17 Geo. 2. c. 5, as to his paying the allowance for vagrants is altered by Stat. 26 Geo. 2. c. 34.—To enforce the laws against profane swearing 19 Geo. 2. c. 21.—To give notice to the constables of the orders of the Lieutenant or Deputy Lieutenant as to the militia. 26 Geo. 3. c. 107.—This officer is removable by the justices of the peace, on good cause. Bullst. 174: 1 Salk. 150.—He shall be discharged from serving the office of collector of the poor's rate during his office. 2 Jones 46.

I. THE CONSTABLE was ordained *in p. p. s. felon* and to keep the peace, of which he is a conservator by the Common law 10 E. 4. 18. Crompt. J. 201: 4 Inst. 265.

His office is therefore, First, original or primitive as conservator of the peace; and Secondly, ministerial and relative to justices of the peace, coroners, sheriffs, &c. who e precepts he is to execute. 1 Hale P. C. 88.

He is however an officer only for his own precinct, and cannot execute a warrant directed to the constable of the vill, or to all constables, generally, of that particular jurisdiction; for he is a constable no where else; nor is he compellible to do it, though the warrant be directed to him by name; but he may, if he will, and to indeed may any other person 1 Hale P. C. 459 Comb. 446. Carth. 508: 1 Salk 16. 3 Salk 99 2 Ll Raym. 1300. 12 Mod 316. 1 Jst. 312, n. 2 Black Rep 1155 1 H. Blk 13—See Stat. 24 Geo. 2. c. 55, under which a constable may execute a warrant in any other county, &c. if indorced by a justice of such other county, &c. and carry the offender before a justice of such other county, &c. and if the offender shall give bail, the constable is to deliver the recognizance, examination or confession of the offender, and all other proceedings relating thereto to the clerk of assizes, or clerk of the peace of the county, &c. where the offence was committed, under the penalty of 10*l*. But if the offence shall not be bailable, or the offender shall not give bail, the constable shall carry the offender before a justice of the county where the offence was committed.

He is an officer of the court of Quarter-Sessions, over whom they have power. Comb. 201.

2. The Common law requires, that every constable should be *idoneus homo*, i. e. apt and fit to execute the said office; and he is said in law to be *idoneus*, who has these three things, honesty, knowledge and ability: honesty to execute his office truly, without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as body, that he may intend and execute his office when need is, diligently; and not for impotence or poverty neglect it. 8 Rep. 41 b. And if one be elected constable who is not *idoneus*, he by the law may be discharged of his office, and another who is *idoneus* appointed in his place.

He must be an inhabitant of the place for which he is chosen. 12 Mod. 256.

He ought not to be the keeper of a publick house. 6 Mod 42—And this is made an express disqualification in Westminster, by Stat. 29 Geo. II. c. 25.

II. 1. THE CONSTABLE is chosen by the Common law, at the leet; or, where there is no leet, at the tourn; sometimes by the suitors and sometimes by the Steward; and now in many towns and parishes by the parishioners; all according to ancient and particular usage. If he be present when chosen, he is to take the oath in court; if absent, he may be sworn before a (single) justice of the peace. But in the latter case he ought to have special notice of his election, and a time and place should be appointed for his taking the oath, [well and truly to serve the office]. 4 Inst. 265: 2 Salk 502: Comb 416: 2 Jones 212: Salk. 175: Ll Raym. 70, 1: 2 Stra. 1119, 1149: 5 Mod. 130, 1: 2 Harak. P. C. c. 10. § 46.

Constables of London, (which city is divided into twenty six wards, and every ward into precincts, in each whereof is a constable), are nominated by the inhabitants of each precinct on St. Thomas's day, and confirmed, or otherwise, at the court of wardmote; and after they are confirmed, they are sworn into their offices at a court of Aldermen, on the next Monday after Twelfth day; their oath is long and particular, and goes to duties now seldom performed, but regulated by articles of the wardmote inquest, which directs the several matters to be observed by the constable; who is in the nature of a general superintendant of the morals of the inhabitants; and he ought to notice all new-comers, who if of bad character, may be required to give security for their good behaviour, or be imprisoned; and see Carth. 129, 138.—Every Constable may execute warrants through the whole city.

In case a Constable die, or quit the precinct, two justices may make and swear a new one, till the lord of the manor shall hold a court leet, or till the next quarter sessions, who may either approve of the constable so made, or appoint another. Also, if he continue above a year in office, the quarter sessions may discharge him, and put another in his place until the lord shall hold a court. But justices of the peace, either in or out of the quarter sessions, cannot in any other case discharge a constable chosen in the leet. Stat. 13 & 14 Car. 2. c. 12: Comb. 328. Stra 789, 1050, 1213: Bullst. 174: Sty. 362: Burr 51.

A mandamus may be granted to the steward of a court-leet to swear a constable. Comb. 285.

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A person may be indicted for not taking upon him the office of constable. *Str.* 920: see 5 *Mod.* 96, for the form of the indictment.

In the leet or tourn where one is elected constable, and refuses to be sworn, he may, if present, be fined for the contempt; if absent, amerced or subjected to a penalty for non-acceptance of the office according to the order. 5 *Mod.* 130.

Though the justices of the peace have not originally the making of the constable, it is matter of the peace within their general jurisdiction, and they may examine it in their sessions. 2 *Jon.* 212: see 1 *Mod.* 13. And on just cause remove them. 4 *Inst.* 267. And by warrant compel them to appear and be sworn. 5 *Mod.* 128: *All.* 78.

An information in the nature of a *quo warranto* is grantable against one to shew by what authority he exercises the office of constable. 2 *Str.* 1213.

2. EXEMPTIONS from serving the office.—1. *Age* *Persons*, incapacitated by weakness should never be elected; and in *Westminster* those of sixty-three years old are expressly exempted by *Stat.* 31 *Geo.* 2 c. 1. § 13.—2. *Alldermen of London.* *Doug.* 538: 1 *Jon.* 462 *Cro. Car.* 585.—3. *Apothecaries* practising in, or within seven miles of *London*, free of the company, or in the country having served seven years *Stat.* 6 & 7 *W.* 3. c. 4.—4. *Attornies* of the courts of *K. B.* and *C. P.* *Noy.* 112: *Mun.* 30: *Cro. Car.* 389: *Doug.* 538.—5. *Barbers*, see *post*, *Surgeons*.—6. *Practising Barristers.* 2 *H. P. C.* 103: 1 *Mod.* 22.—7. *Dissenters* being teachers and preachers, but not others, by *Stat.* 1 *W. & M.* c. 18. See *post*.—8. *Foreigners* naturalized, 5 *Fur.* 2790, who may rather be said to be incapacitated.—9. *Militia*, sergeants or private men serving in. 26 *Geo.* 3. c. 107. § 130.—10. *Parliament*, servants to members of. 1 *Mod.* 13, but this seems doubtful.—11. *Physicians*, President and fellows of the college in *London* by *Stat.* 32 *H.* 8. c. 40: but no other physicians, nor they elsewhere. See 1 *Mod.* 22, & *contra* 1 *Sid.* 431: 2 *Leb.* 578: 2 *H. P. C.* 100.—12. *Prosecutors of Felons*; the original proprietor, or first assignee of a certificate, (commonly called a *lyburn-ticket*) if a parish or ward office; within the parish or ward in which the felony happened; to be only once used, by *Stat.* 10 & 11 *W.* 3. c. 23: but this is no exemption from serving the office for a manor; nor, as it should seem, for a vill or township; nor where the office is to be executed out of the privileged district. 2 *Burr.* 1182.—13. *Surgeons*, free of the surgeons' company in *London*, examined, approved and exercising the science, by *Stats.* 5 *H.* 8. c. 6: 32 *H.* 8. c. 42: 18 *Geo.* 2 c. 15 and by custom *all* surgeons. *Com. Rep.* 312 and it seems by the same statutes, *barbers* free of that company in *London*—A college *but* *at Oxford* *Doug.* 531.—but not *Masters of Arts.* 5 *Vin.* 429—Nor *Justices of peace* in another county *Str.* 926, But see *note Alderman*—Nor *Officers of the Guards.* 1 *Lev.* 233: 1 *Sid.* 272, 355: 2 *H. P. C.* 100—Nor *Officers or watchmen* at the *Custom House.* 1 *Sid.* 272.—Nor *Tenants in ancient demesne.* 1 *Feet.* 314—Nor, a younger brother of the *Town-Hawk.* 1 *Term Rep.* 679

It however a gentleman of quality, or a physician, officer, &c. be chosen constable, where there are sufficient persons beside, and no special custom concerning it; it is said such persons may be relieved in *B. R.* 2 *Hawk. P. C.* 100. c. 10 y 41.

A Constable may make a Deputy; but the constable is answerable, and his deputy ought to be sworn, though it is not in all cases necessary. *Sid.* 355: and see *note* 129. 3 *Burr.* 1262: *Str.* 942: *Crompt. J. P.* 201: *Bacon L.* 1. 137: *Moore* 845: 3 *Bull.* 78: 1 *Ro. Rep.* 274: 1 *Ro. Ab.* 591: 1 *Term Rep.* 682.—But if the Deputy is duly allowed and sworn, the principal is not answerable. *Wood b.* 1. c. 7—*Dissenters* chosen to the office of constables, &c. scrupling to take the oaths, may execute the office by deputy, who shall comply with the law in this behalf, *Stat.* 1 *W. & M.* c. 18. Constables may appoint a deputy, or person to execute a warrant, when by reason of sickness, &c. they cannot do it themselves. A woman made constable, by virtue of a custom, that the inhabitants of a town shall serve by turns, on account of their estates or houses, may procure another to serve for her, and the custom is good. *Cro. Car.* 389: 2 *Term Rep.* 395. See 2 *Hawk. P. C.* c. 10. § 37.

III. THE CONSTABLE hath as good authority in his place, as the Chief Justice of *England* hath in his. 1 *Ro. Rep.* 238.

It may save much trouble to the enquirer to class the objects of his power and authority, as well as those of his duty, in alphabetical order; a method in some measure formerly pursued in Law Dictionaries, but not with sufficient care and accuracy.

1. *Affray*—If He see one making affray, or assaulting another, or breaking the peace, or hear or know one to menace, or threaten to kill, wound, maim, or beat another, the Constable may take and set him in the stocks, or commit him to prison, (as he may persons about to make an affray, and commanded to disperse,) till the offender find surety to keep the peace, or for his good behaviour. *Crompt. J. P.* 130, 1, 155, 201: *Dalt.* 33 *Lamb.* 135, 141.—But he may not let one who hath broken the peace in the stocks, if he can have him to the next gaol for the night. 22 *E.* 4. 35—Neither may he commit a party after an affray to compel him to find surety of the peace, as he cannot take any man's oath that he is in fear of his life. But he may upon complaint arrest the party, and bring him before a justice of peace, (which indeed is always the safest way) to find surety. *Cro. El.* 375: *Bro. Lit. Faux Imp.* 6: 2 *Hale P. C.* 88, 90. It men be making affray in a house, and the doors are shut, or persons making affray, run into a house, the constable may enter to see the peace kept. And if man-slaughter, or bloodshed is likely to ensue, and entrance upon demand is refused, he may break open the doors to keep the peace and prevent the danger. *Crompt. J. P.* 130 *b.* 2 *Hale P. C.* 95, 135. See *post* 2.

And of the *liberty*, requiring; See next division *Arrest.*

4 *boyles* *Sec.* 3 and *post* 14.

2. *Arrest of felons*, &c. Where a felony is committed, though out of his precinct, the constable may, *ex officio*, without a warrant, arrest the felon, (if found within his precinct) and imprison him till he can be conveyed to a justice of peace, or to the common jail. 2 *Hale P. C.* 90, 95, 120.—If the felon in any case resists or flies, whether after arrest or before, and cannot be taken, the Constable may kill him, and such killing is justifiable. 1 *Hale P. C.* 461, 90. 2 *Hale P. C.* 90.—Where a felony has been actually committed, the constable, (or any person) upon probable grounds of suspicion, may lawfully (and

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it is the constable's duty to) apprehend the suspected person, and carry him before a magistrate. *Crompt. J. P.* 233. *2 Hale P. C.* 9: 11 *Mod.* 248: *Doug.* 345: *Ledwith v. Catchpole, Pasch. 23 Geo. 3. B. R. Hawk. P. C.* c. 11. § 15 n. *Stat. 22 G. 3. c. 58* empowers constables and watchmen to arrest persons suspected of conveying away stolen goods by night.—Probable grounds are very many, e. g. common fame; hue and cry levied; goods found on a person, &c. *Crompt. J. P.* 87, 154: *Ow.* 121: 12 *Rep.* 92: 2 *Hale P. C.* 81: 3 *Bulst.* 287.—In case of a felony committed, or in danger to be committed, (as if one beat or wound another dangerously,) the constable, either upon complaint, or hue and cry, may break open the doors to take the offender, if upon demand and notice, he will not yield himself, or entrance be refused; or if the constable act under a justice's warrant for treason or felony. And he may imprison the offender till the injured party is out of danger. 2 *Hale P. C.* 82, 90, 4: *Crompt. J. P.* 141: *Brownl.* 211: 1 *Bulst.* 146.—The Constable may officially imprison for a time to prevent felony; as if he see two with weapons drawn ready to fight: or if a man in a fury be purposed to kill, maim, or beat another. He may also arrest and imprison one for a felonious intent, as if a man bring a helpless infant into a field or elsewhere, and leave it to perish for want, and the constable see this himself. *Moore* 284: *Poph.* 13. Though no felony has actually been committed, constable and his assistants are justified in arresting on a *voen charge* of felony. *Doug.* 359, 360, and in this case constable may discharge the person suspected. *C. Fl.* 202, 752: *Dalt.* 272. He may arrest persons coming before the King's justices with force and arms, or who bring force in assay of the peace, or go or ride armed in a warlike and unnecessary manner. *Stat. 2 E. 3. c. 3.*—And see the *Stat. 5 E. 3. c. 14*, as to his arresting of *Robbers, fence, &c.* *Stat. 1 E. 3. c. 14*—He may take aid of his neighbours to arrest another, or in execution of any part of his duty at Common law, and under several statutes, and they are compelled to assist him; upon assay or such like he may raise the people of the realm to cause the peace to be observed. *Crompt. J. P.* 141: 201 b. *Comb.* 309.—He may carry one that he has arrested for felony to the common goal, and the goaler is bound to receive him. 1 *Hale P. C.* 595.

As to what Constable shall do with a prisoner when taken at for an assay, see *Assay* above.—In other offences he may convey his prisoners to the sheriff, or his jailor of the county, or to the jailor of the franchise in which they are taken, who are bound to receive them, *Stat. 4 I. 3. c. 10*: See *Stat. 5 H. 4. c. 10*: 23 *H. 8. c. 2*. But the best way in all cases is, to take him to a justice of peace, to bail or discharge him; till when it is the duty of the constable to keep and imprison an offender. 2 *H. P. C.* 95, 120.—If a felon fly, constable ought to seize his goods, and keep them for the King's use, and send hue and cry after him. *Stat. 27 El. c. 13*: *Dalt.* 289, 340: *Crompt. J. P.* 211 b. and on notice of robbery, is to make hue and cry. *Stat. 8 Geo. 2. c. 16*.

And going. See *ante* 2.

And see *ante* 1, 2.

3. *Breaking open Doors.* See this division *passim*.—Other occasions not yet mentioned which justify to do so, are—*A capias utla, autem, or capias pro fine.*—On forcible entry and detainer found by inquisition, or view of justices.—

On escape from a lawful arrest.—On warrant to search for stolen goods if found. 2 *Hale P. C.* 151, 117.—It is best always, and generally requisite, first to signify the cause of the constable's coming, and to demand that the door should be opened. 2 *Hawk. P. C.* c. 14: *Foff.* 136, 320.

4. *Defectors;* Constable may apprehend persons suspected to be such, and take them before a justice; under the annual mutiny acts; and he is allowed 20s. for each.

5. *Disorderly Houses and Persons.*—If there be disorderly drinking or noise at an unreasonable time of night, especially in inns, taverns, or ale-houses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; as is constantly done in London and Middlesex. 2 *Hale P. C.* 95.—He or his watchmen, (or indeed any men,) may apprehend indecent night walkers, and commit them till morning. 2 *Hale P. C.* 98.—And he may arrest and commit lewd persons frequenting bawdy houses, to make them find security for their good behaviour. *Crompt. J. P.* 153 b. See title *Bawds, &c.*, and *Stat. 5 E. 3. c. 14*.

Felons.—Arrest, imprisonment, and flight of. See *ante* 2.

Hue and Cry.—See *ante* 2 *ad finem*; and IV.

6. *Husbandry.*—He may grant testimonials under seal to servants in, licensing them to change their masters. *Stat. 5 Eliz. c. 4*. And by the same statute, he is to cause all persons mete for labour, to serve by the day, in mowing, reaping, &c. or on refusal, set them in the stocks. By *Stat. 43 El. c. 7*, and 15 *Car. 2. c. 2*, persons unlawfully cutting corn growing, robbing orchards or gardens, breaking fences, pulling up fruit trees, spoiling woods, &c. (not being felony,) not satisfying the damages, shall be committed to the constable to be whipped.

Imprisonment.—See this division *passim*.

7. *Inn-keepers.*—The constable on complaint may compel them to receive guests. *Stat. 1 Jac. 1. c. 9*. *Crompt. J. P.* 201. See *Stat. 1 Jac. 1. c. 9*.

8. *Insult, to himself;* He may imprison any one insulting, assaulting, or making assay on him, or opposing him, though only verbally, in execution of his office. 12 *Rep.* 238. *Crompt. J. P.* 131: *Cloyst.* 10.

9. *Lunatics or Madmen.*—The constable may take and imprison; and he shall not be charged if they die there. *O. v. 98*, and see *Stat. 17 Geo. 2. c. 5*, § 20 and this Dict. title *Lunatics*.

10. *Peace, Surety of.* See *ante* 1, 2.—The constable may take surety by obligation in his own name, but not otherwise, and may certify it at the session. 10 *E. 4. c. 18*. *By. Peace, pl. 2*. *Stat. 17 Geo. 2. c. 5*, § 23. *Crompt. J. P.* 131: 4 *1st.* 265: *Cro. El.* 375, 6.

11. *Plaques, in the time of.*—Constable may command infected persons to keep in the house. *Stat. 1 Jac. 1. c. 31*. See title *Plague*.

12. *Warrants.*—Where constable has a warrant, he is tied up thereby, to act only as it directs. 11 *Mod.* 136.—If he arrests on a general warrant, (before some justice) he may carry his prisoner to what justice he will. 5 *Rep.* 59. See *Stat. 24 Geo. 2. c. 55*, as to indented warrants, by which offenders may be taken in any county; *ante* 1.

Though the constable is not named in 2 *Ed. 3. c. 10*, nor appointed to be the officer to execute the warrant, yet the justices may command him to execute it. 1 *Mod.* 381. And a constable need not be named in a

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rant, but should keep it for his own justification.—See *Stat. 24 Geo. 1. c. 44*; 1 *Sult.* 281; 2 *Ld. Raym.* 1196.

The *Constable* is the proper officer to a justice of peace, and bound to execute his lawful warrants; and therefore where a statute authorizes a justice to convict a person of any crime, and to levy the penalty, &c. without saying to whom such warrant shall be directed, the *constable* is the officer to execute the warrant, and must obey it. 5 *Mod.* 130; 1 *Salk.* 351. *Constable* must at his peril take notice that his warrant is by one in the commission of the peace. 12 *Mod.* 347. and that the matter is within the justice's jurisdiction. 2 *Hack. P. C. c.* 13, § 11.—And if guilty of misdemeanour in executing a lawful warrant, he becomes a trespasser. 12 *Mod.* 344.—But a warrant properly penned, (even though the magistrate who issue it should exceed his jurisdiction,) will by *Stat. 24 Geo. 2. c. 44*, at all events indemnify the officer who executes it ministerially. 4 *Comm.* 788.

13. *Watch*.—Constable hath power *ex officio* to keep a watch for the purpose to raise or pursue hue and cry upon robberies committed, by the statute of *Winton. c. 1*; to search for lodgers in suburbs of cities that are suspicious persons, which is to be done every week, or at least once in fifteen days, by the same statute *c. 4*; for such as ride or go armed, by the statute of 2 *E. 3. c. 3*; for night walkers and persons suspicious, either by night or day, by the statute of 5 *E. 3. c. 4*. And it is in his power to hold such watches as often as he pleases, and the watchmen are his ministers and assistants, and are under the same protection with him, and may act as he doth, and regularly he ought to be in company with them in their walk and watch. 2 *Hale P. C.* 97.

A watchman hath a double protection of the law, viz. 1. As an assistant to the constable when he is present or in the watch. 2. Purely as a watchman set by order of law; and the law takes notice of his authority; and the killing of a watchman in the execution of his office is murder. 2 *H. P. C. at sup.*—If an inhabitant refuse to watch in his turn, constable may set him in the stocks. 3 *Lev.* 208.—See *Stat. 14 Geo. 3. c. 90*, for regulating the nightly watch and duty of constables in *Windsor*; 10 *Geo. 2. c. 22*, for *London*, and other acts only of very local importance, and which those who are to act under should diligently consult. See this Dict. title *Watchmen*.

IV. THE CONSTABLE'S duty and office continue till his successor be chosen. 12 *Mod.* 256. Though he may for just cause be removed by the authority which elected him. *Id.* 174. 2 *Hack. P. C. c.* 10, § 37, 38.

256. See *Id.* 1. *Deleys*.—Constables are to enforce the penalties against the *deleys* or. See *ant.* and this Dict. title *Deleys*. And see 1 *J. 1. c. 9*; and 3 *C. 1. c. 4*.—And by *Stat. 20 Geo. 2. c. 31*, Constable is to give notice of the days appointed for licensing.

Assessors. See *ant.* III. 2. and this Dict. title *Assessors*. See *III.*

Repairs. By *Stat. 22 H. 8. c. 5*, Constable and two most able inhabitants in the parish, are to make an assessment for the repairs of the church, to be allowed by justices. See 1 *Hack. P. C. c.* 77, § 7.

Raid.—If Constable have notice that one is committed, it is his duty to pursue the felon immediately, though in the night. *Co. El.* 16.

Customs.—By several statutes, constables are to be assisting to all persons appointed for the collecting and management of the *customs*; and to persons having a warrant from the lord treasurer, &c. to make a search for goods that have not paid the customs. See *int. al. Stat.* 12 *Car. 2. c. 19, 23*; and 13 & 14 *Car. 2. c. 11*.

Distress, for rent.—Constables are to assist in. See this Dict. title *Distress*.—He is to make distresses under justices' warrants. *Stat. 27 Geo. 2. c. 20*; under which constable may take his own *reasonable charges*.

Drunkenness.—To assist the justices in punishing; under *Stat. 4 Jac. 1. c. 5*.

Escape. See *post.* VI.

Felons. See *ant.* III. 2. *Felon's goods*, constable must keep goods found on the felon till trial, and then return them according to the directions of the court.

Fines, constables to assist at. See this Dict. title *Fines*.

Fishing unlawful, constable is to assist in enforcing acts against.

Forcible entry, constable is to give assistance to justices of the peace, in removing, or shall be committed and fined. 5 *Rip. 2*.

Game acts, to enforce. See this Dict. title *Game*.

Ganpowder. Under *Stat. 12 Geo. 3. c. 61*, constable may by warrant search for ganpowder. See title *Ganpowder*.

Hawkers and Pedlars. By *Stat. 8 & 9 W. 3. c. 25*, constable is to assist in putting the laws in execution against *hawkers and pedlars*, that travel without licenses, and by *Stat. 11 Geo. 2. c. 26*, against hawkers of *spoons*.

Highways, constable is to be aiding and assisting in putting the acts in execution relating to; and to return lists of persons qualified for the office of surveyor, &c. but he is not bound to present them if out of repair. 1 *Vent.* 336. See this Dict. title *Highway*.

Horses, constable is to be assisting in driving off commons, forests, &c. *bois* and cattle; on pain of 40 s. *Stat. 32 H. 8. c. 13*, but see *Stat. 8 Eliz. c. 8*, and 21 *Jac. 1. c. 2*.—And in levying duties on *horses* under *Stat. 25 Geo. 3. c. 19*.

Hue and Cry. By *Stat. 13 E. 1. st. 2. c. 6*; 27 *El. c. 13*; 8 *Geo. 2. c. 16*; to make *hue* and *cry* after offenders where a felony or robbery is committed: to call upon the parishioners to assist in the pursuit; and if the criminal be not found in the precinct of the first *constable*, he is to give notice to the next, and thus continue the pursuit from town to town, and county to county. And where offenders are not taken, constables shall levy the tax to satisfy an execution, on recovery against a hundred, and pay the same to the sheriffs, &c. and neglecting to make *hue* and *cry*, shall forfeit 5 l. See this Dict. tit. *Hue and Cry*.

Hybrids. See *ant.* III.

Imprisoners. See *ant.* III.

Juries. Under *Stat. 4 & 5 W. & M. c. 24*; 7 & 8 *W. 3. c. 32*; 8 & 9 *W. 3. c. 10*; 3 & 4 *An. c. 8*; 3 *Geo. 2. c. 25*, *Constables* are to give in to the justices at *Michaelmas* sessions yearly, a list of persons qualified to serve on *juries*. These lists are to be made from the rates of each parish, and *constables* wilfully omitting persons qualified, or inserting wrong persons, shall forfeit 20 s. See this Dict. title *Jury*.

Labourers. See III.

Land tax Acts, to assist operation of.

Leads. See *Thieves*.

Lottery

CONSTABLE V.

Lottery Offices illegal, constable is to endeavour to suppress. *Stat.* 27 *Geo.* 3. c. 1.

Malt. See this Dict. title *Malt*.

Measures. By *Stat.* 22 *Car.* 2. c. 8, constable is to search and examine if any persons use other measures than such as are *Winchester* measure, and agreeable to the standard; and to seize and break the same; and see *Stat.* 31 *Geo.* 2. c. 17, for *Westminster*.

Militia, constable's duty as to. See the statutes relating to *The Militia*.

Night Walkers. See III.

Physicians, College of. By *Stats.* 14 & 15 *H.* 8. c. 5; and 32 *H.* 8. c. 40, In the city of *London*, constable is to be assisting to them in putting their laws in execution.

Plague. See ante III.

Poor's Rate. Under *Stat.* 43 *Eliz.* c. 2. § 12, the weekly rate for the relief of the poor is to be assessed, in case the parishioners disagree, by the churchwardens and constables, who are in either case to levy the rate; and by § 35, the churchwardens and constables of every parish are to collect the sums rated, and pay the same over to the High-Constable. And see *Stat.* 12 *Geo.* 2. c. 29. and this Dict. title *Poor*.

Postage. Under *Stat.* 9 *An.* c. 10, to levy money due for postage of letters under 5*l.* § 30.

Presentments. Constable is at the quarter-sessions to make presentment of all things against the peace, and belonging to his office. *Dalt. J. P.* 474: *Fitz. J. P.* 6. And they are usually summoned by the sheriff to attend the quarter-sessions and assist to make presentments; which seems justified by no express law, though perhaps by usage.

Riot. Constables are to suppress, and they may ex officio commit offenders, &c. See *Stat.* 1 *Geo.* 1. c. 5. and this Dict. title *Riot*.

Robbery. See *Huc and Cry*.

Scavengers' rates in *London* shall be made by constables and churchwardens under *Stat.* 2 *W. & M.* ji. c. 8.

Seals. Under a presentment in theleet and the steward's warrant, constable and his assistant may put them in the cucking stool. *Moore* 847.

Servants. See III. Constable to assist in levying duty on, under *Stat.* 25 *Geo.* 3. c. 43.

Soldiers. Constables are to quarter soldiers in inns, ale-houses, victualling houses, &c. Not to receive any reward to excuse quartering them. To give in lists to the justices, of the houses and persons obliged to quarter soldiers, and to provide carriages for troops on their march. See the annual statutes concerning *Soldiers*, and ante III.

Statutes, or Acts of Parliament; constables are called upon to assist in the execution of these, on almost innumerable occasions.

Sunday. Constable is to enforce acts 1 *C.* 1. c. 1, and 29 *C.* 2. c. 7, against the profanation of. See this Dict. title *Idleness*.

Swearing. By *Stat.* 19 *Geo.* 2. c. 21, Constable is to levy the penalty for profane swearing; which is 1*s.* for a servant, labourer, &c. 2*s.* for others under the degree of a gentleman; and 5*s.* for a gentleman; and as the crime is repeated, the penalty is to be doubled.

Tinners' party, of lead, iron, copper, &c. Constable, watchmen and beadies are to apprehend. *Stat.* 29 *Geo.* 2. c. 30.

Trinkets. Constable to assist in enforcing the act 13 *Geo.* 3. c. 84.

Vagrants. Constables to assist in enforcing the laws against. See this Dict. title *Vagrants*.

Warrants of Justices. It is part, and a great part of constable's duty to execute these, which are issued under an amazing variety of acts of parliament; in all which cases constable's office is chiefly ministerial. See ante III.

Watch. See ante III.

Weavers. Kidderminster, constables to assist, by *Stats.* 22 & 23 *C.* 2. c. 8.

Weights. Under *Stats.* 8 *H.* 8. c. 5, and 16 *C.* 1. c. 19, constables, being head officers of places, shall have in their custody sealed weights, &c. under penalties: persons buying or selling by false weights or measures, forfeit 5*s.* leviable by constables.

Wreck. Under *Stat.* 12 *An.* ji. 2. c. 18, Constables may call together assistance to save ships from wreck; and see this Dict. title *Wreck*.

V. IF A CONSTABLE doth not his duty, he may be indicted and fined by the justices of peace; on the other hand, he is protected by law, in the execution of his duty.

It has been already mentioned that he shall have aid of the county to pacify affrays.

By *Stat.* 7 *Jac.* 1. cap. 5, If any action is brought against a constable, for any thing done by virtue of his office, he, and also all others who in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers he shall have double costs. But this must be certified on the record by the judge. 2 *Vint.* 45: *Doug.* 294.—And see *Stat.* 19 *Geo.* 2. c. 21, against profane swearing, which gives treble costs.

By *Stat.* 24 *Geo.* 2. c. 44, No action shall be brought against any constable, or other officer, or any person acting by his order, and in his aid, for any thing done in obedience to any warrant of a justice of peace, until demand of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days; and in case after such demand, and compliance therewith, any action shall be brought against such constable, &c. without making the justice a defendant; then on producing and proving such warrant, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then on proof of such warrant, the jury shall find for such constable, &c. and if the verdict shall be given against the justice, the plaintiff shall recover his costs against him, to be taxed so as to include costs plaintiff shall be liable to pay to such defendant, &c. No action shall be brought against any constable, &c. unless commenced within six calendar months after the act committed.—This statute extends only to actions of tort. See *Bullen's N. P.* 24.

The charges of sending malefactors to jail, were at Common law to be borne by the vill, in which they were apprehended. 1 *Hals. P. C.* 96. But now under *Stats.* 3 *Jac.* 1. c. 10, and 27 *Geo.* 2. c. 3, where a malefactor has not sufficient property in the county where he is taken, on application by the constable or officer conveying him, a justice of peace may on oath examine into and ascertain

CONSTABLE VI.

ascertain the reasonable expenses to be allowed; and by warrant without fee, order the treasurer of the county to pay the same, except in *Midshire*, where such expenses are to be paid by the overseers of the place where the offender was taken.

If in the execution of his office, and acting within his own district, after competent notice that he is constable, he, or any that come to his assistance, be killed, it is murder; although the party killing do not know his person. 1 *Hale P. C.* 9, 459 460, 1 2 *Ld. Raym.* 1300 But see *Leach's* cases in *Crown Law* 211.

If two men are combating, and the constable come to part them and is hurt, he shall have action of trespass, and if he hurt them, they shall not have action against him. And so of those who aid him, every man who is assisting to the constable in the execution of his office having the same protection that the law gives to the constable. *Crompt. J. P.* 130 2 *Hale P. C.* 97.

If he be removed without just cause, the court of King's Bench will by rule of court order him to be restored to his place. *Burgh* 174.

A justice of peace's warrant is a sufficient justification of a constable in a matter within his jurisdiction of such justice. *Stra* 711 See ante III. 12.

By *Stat. 18 G. 3 c. 19*, every constable is every three months, and within fourteen days after he goes out of office, to deliver to the overseers of the poor an account entered in a book, kept for the purpose, and signed by him, of all sums by him expended and received on account of the parish, &c. which overseers are within fourteen days to lay the same before the inhabitants, and, if approved, are to pay the money due out of the poor rates, but, if disallowed, are to deliver the book back to the constable, who may produce it before a justice of peace, giving reasonable notice to the overseers, which justice is to examine the account, determine objections, settle the sum due, and enter it in, and sign the account, and the overseers are to pay such sum out of the poor's rate, but may appeal (giving notice) to the quarter-sessions.

VI. A CONSTABLE arresting one possessed of money, who dies, is chargeable with the money. And so where he takes from a felon money of which he had robbed another, even though he should be afterwards robbed of it himself. *Osw.* 121.

Neglecting a duty incumbent on him, either by Common law, or by statute, he is for his default indictable. 1 *Salk* 381: 2 *Ro. Ke.* 78.

If he will not return his warrant, or certify what he has done under it, he may be fined 6 *Mod.* 83 1 *Salk* 381, but see 5 *Mod.* 16 *Gib.* 192.

If he wilfully lets a felon escape out of the stocks, and go at large, it is felony. 1 *Hale P. C.* 596. And it seems generally agreed, that all voluntary escapes in the office, amount to the same crime as the offender was guilty of, whether treason or felony. 2 *Harc. P. C.* c. 19 § 22 & seq.

It is a misdemeanour in him to discharge an offender brought to the watch-house by a watchman in the night. 2 *Burr.* 867 But see III. 2.

He is liable to various pecuniary and sometimes personal punishments, on neglecting the duty imposed on him by several statutes.

THE CONSTABLE'S OATH.

YOU shall swear, that you will well and truly serve our Sovereign Lord the King in the office of Constable for the township of C. within this manor, [or district & county] for the year now next ensuing, or until you shall be thereof discharged by due course of law. You shall see the King's peace kept, and keep all such peace as are usually accustomed and ought to be kept, and you shall well and truly to and execute all other things belonging to the said office according to the best of your knowledge.

So help you God.

FORM OF AN OBLIGATION to be taken by a Constable for keeping the Peace.

KNOW ALL MEN by these presents, That I A. B. of C. in the county of D. do hereby make, substitute and appoint E. F. yeoman, constable of the township of C. [or manor, &c.] of C. as of old, in the sum of forty pounds to wit the said L. L. or his lawful attorney, executor, administrators or assigns to receive and to be well and faithfully made, I bind myself, my heir, executor, and administrators, firmly by these presents, that each my seal. Dated this — of —, in the 30th year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King Defender of the Faith and so forth, and in the year of our Lord 1795.

THE CONDITION of the above obligation is such, That if the said constable shall faithfully perform his duty, as of old, in the sum of forty pounds to wit the said L. L. or his lawful attorney, executor, administrators or assigns to receive and to be well and faithfully made, I bind myself, my heir, executor, and administrators, firmly by these presents, that each my seal. Dated this — of —, in the 30th year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King Defender of the Faith and so forth, and in the year of our Lord 1795.

Signed, sealed and delivered }
in the presence of }

OATH of the APPRAISERS of Goods distrained for Rent; to be administered by the CONSTABLE.

YOU shall swear that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understanding.

So help you God.

APPOINTMENT of a DEPUTY.

I A. B. Constable of C. in the county of D. do hereby make, substitute and appoint E. F. of the same place, yeoman, my true and lawful Deputy in the office aforesaid, as long as I shall hold the same; or thus, during the continuance of my will and pleasure, [or for any particular purpose] dated, &c.

For a command or PROCLAMATION for RIOTERS to disperse, See title RIOT.

CONSTAT,

CONSTAT.

CONSTAT, Lat.] The name of a certificate, which the clerk of the pipe, and auditors of the *Exchequer*, make at the request of any person who intends to plead or move in that court, for the discharge of any thing: and the effect of it, is the certifying writ *constat* (appears) upon record, touching the matter in question. See *Stats* 3 & 4 Ed. 6 c. 4. 13 Eliz. c. 6. A *constat* is held to be superior to an ordinary certificate, because it contains nothing but what is evident on record. And the exemplification under the great seal, of the enrolment of any letters patent, is called a *constat*. *Co. Lit.* 225.

CONSTRUCTIVE TREASON. The *Stat.* 25 Ed. 3 c. 2, was made to define *treason*, and prevent the subject from being condemned for *constructive treason*. See title *Treason*.

CONSUEUDINARIUS, A ritual or book, containing the rites and forms of divine offices, or the customs of abbeys and monasteries: it is mentioned in *Brampton*.

CONSUEUDINIBUS ET SERVICIIS, Is a writ of right close, which lies against the tenant that deforcest his lord of the rent or service due to him. *Reg. Orig.* 159 F N B 151. When the writ is brought by the party in the right only, he shall count of the seisin of his ancestor, and the writ be in the *debit*, but when he counts of his own seisin, then the writ is in the *debit et sol't*, &c. And if the party say in the writ *ut in redditibus et annuatim*, these words prove that the demandant himself was seised of the services; and then if he count in such writ of seisin of his ancestors and not of his own seisin, the writ shall abate: that if he will bring a writ of customs and services of the seisin of his ancestors, he ought to leave these words *ut in redditibus*, &c. out of the writ.

Where a person brings a writ of customs and services against any tenant, and by count demands homage, the writ ought to make special mention thereof; as *ut in homagio*, &c. or the writ shall abate. *New Nat. Brev.* 338 F N B 151. If this writ be brought against tenant for life, where the remainder is over in fee, there the tenant may pray in aid of him in the remainder, &c.

CONSUL, Lat.] In our law books signifies an earl. *Bract.* l. 1 c. c. tells us, that *comes* is derived from *consul*, as *consul* is derived from *consulendo*: and in the laws of Edward the Confessor, mention is made of *consules* and *consules*. Blount—*Consuls* among the ancient Romans, were chief officers, of which two were yearly chosen, to govern the city of Rome. Those who now pass under the name of *Consuls* residing in England sent from foreign nations, and in foreign ports sent from England, are merchants, or persons of eminence and knowledge, appointed to take care of the affairs and interests of merchants. See *Lex Mercat.*

CONSULTA ECCLESIA, A church full, or provided for. *Corv.*

CONSULTATION, consultatio.] A writ whereby a cause having been removed by Prohibition from the Ecclesiastical court, to the King's court, is returned thither again, for if the judges of the King's court, upon comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the Ecclesiastical court, then upon this consultation or deliberation they decree it to be returned; whereupon the writ in this case obtained, is called a *Consultation*. *Reg. Orig.* 44, &c. Statute of *Writ of Consultations*, 24 Ed. 1.

VOL. I.

CONTEMPT.

This writ is in nature of a *procedendo*; but properly a *consultation* ought not to be granted, but in case where a man cannot recover at the Common law, in the King's courts. *New Nat. Br.* 119. Causes of which the Ecclesiastical or Spiritual courts have jurisdiction, are of administrations, admissions of clerks, adultery, appeals in ecclesiastical causes, apostasy, general bawdery, blasphemy, solicitation of chastity, dilapidations and church repairs, celebration of divine service, divorces, fornication, heresy, incest, institution of clerks, marriage rites, oblations, obventions, ordinations, commutation of penance, pensions, procurations, schism, simony, tithes, probate of wills, &c. and where a suit is in the Ecclesiastical court, for any of these causes, or the like, and not mixed with any temporal thing, if a suggestion is made for a prohibition, a *consultatio* shall be awarded. 5 Rep. 9.

To move for a prohibition in another court, after motion in the *Chancery*, &c. on the same libel which is granted, is merely vexatious, for which a *consultation* shall be hid. *Cro. Eliz.* 277. Where a *consultation* is granted upon the right of the thing in question, there a new prohibition shall never be granted on the same libel; but where granted upon any default of the prohibition, in form, &c. there a prohibition may be granted upon the same libel again. 1 *Nels. Abi.* 485. See title *Prohibition*.

CONTEMPT, contemptus.] A disobedience to the rules, orders or process of a Court, which hath power to punish such offence; and one may be imprisoned for a *contempt* done in court; but not for a *contempt* out of court, or a private abuse. *Cro. Eliz.* 689. But for contempt out of court, an attachment may be granted. Attachment also lies against one for *contempt* to the court, to bring in the offender to answer on interrogatories, &c. and if he cannot acquit himself, he shall be fined. 1 *Lill* 305. If a sheriff, being required to return a writ directed to him, doth not return the writ, it is a *contempt*: and this word is used for a kind of misdemeanor, by doing what one is forbidden; or not doing what he is commanded. 12 Rep. 36. And as this is sometimes a greater, and sometimes a lesser offence, so it is punished with greater or less punishment, by fine, and sometimes imprisonment. *Dyer* 128, 177. 1 *Bull.* 85.

If a defendant in Chancery on service of a *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur or answer to the bill against him, he is then said to be in *contempt*, and the respective processes of contempt are in successive order awarded against him. These are attachment; attachment with proclamations; a commission of rebellion; and finally a *sequestration*. 3 *Comm* 443.

An attachment of contempt may issue against a bishop, or other peer: but for not returning a *fiat facias de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary, or official. *Rex v. Bishop of St. Asaph*, 1 *Wils.* 332.

It is a contempt to institute a suit fictitiously, though the demand is real, either to hurt any person, or to get the opinion of the court. *Coxe v. Phillips*, *Hardv.* 237, 239.—See further title *Attachment*; and 4 *Comm* 263.

Contempts against the King's prerogative; are by refusing to assist him for the good of the publick, either in his councils, by advice, if called upon; or in his wars, by personal service, for defence of the realm, against a rebellion or invasion. 1 *Harw. P. C. c.* 22.

P p

Under

CONTEMPT.

Under this class may be ranked the neglecting to join the *passé comitatus*, or power of the county, being thereunto required by the sheriff or justices according to the *Stat. 2 Hen. 5. c. 8*; (see title *Riots*;) which is a duty incumbent upon all that are 15 years of age, under the degree of nobility and able to travel *Lamb. Eliz. 315*.

Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of our own; or doing or receiving any thing that may create an undue influence, in favour of such extrinsic power; as by taking a *penſion* from any foreign prince without the consent of the King. *3 Inst. 144*.—Or by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council; or by letters from the king to a subject, commanding him to return from beyond the sea; (for disobedience to which his lands shall be seized till he doth return, and himself afterwards punished;) or by his writ of *ne exeat regno* or proclamation commanding the subject to stay at home.

Disobedience to any of these commands is a high imprisonment and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the King's Courts of justice. *4 Comm. 122*: See also *1 Harok. P. C. c. 22, 23, 24*: 'And this Dict. titles *Oaths, King*.

CONTENEMENT, *contenementum*.] Is said to signify a man's countenance or credit, which he hath together with, and by reason of, his freehold: in which sense, it is used in the *Stat. of 1 Ed. 3.* and other statutes: and *Spelman* in his *Glossary* says, *contenementum est aſſimulatio et conditio forma, qua quis in repub. ſuſſiſtit*. But *contenement* is more properly that, which is necessary for the support and maintenance of men, agreeable to their several qualities, or states of life. See *Magna Charta, c. 14*: and *Glanvil. lib. 9. c. 8.* and this Dict. tit. *Disſeſs*.

CONTINGENT LEGACY, See title *Legacy*.

CONTINGENT REMAINDER, Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect. *3 Rep. 20*: *2 Comm. 169*: And see *10 Rep. 85*: See this Dict. titles *Estate, Limitation, Remainder*; and also title *Executory Devise*.

CONTINGENT USE, Is a use limited in a conveyance of land, which may or may not happen to vest, according to the contingency expressed in the limitation of such use: a use in contingency is such which by possibility may happen in possession, reversion or remainder. *1 Rep. 121*.

CONTINUAL CLAIM, See title *Claim*.

CONTINUANCE, Is the continuing of a cause in court, by an entry upon the records there for that purpose. There is a *continuance* of the *assise*, &c. And *continuance* of a *writ* or *action* is from one term to another, in case where the sheriff hath not returned a former writ, issued out in the said action. *Kitch. 262*. *Continuances* and *cessions* are amendable upon the roll, at any time before judgment: they are the acts of the court, and at Common law they may amend their own acts before judgment,

CONTRACT.

though in another term; but their judgments are only amendable in the same term wherein they are given. *3 Lev. 431*. Upon an Original, a term or two or three terms may be mesne between the teste and the return; and this shall be a good *continuance*; for the defendant is not at any prejudice by it, and the plaintiff may give a day to the defendant beyond the common day, if he will.

But a *continuance* by *capias* ought to be made from term to term, and there cannot be any mesne term, because the defendant ought not to stay so long in prison. *2 Danv. Abr. 150*. If a man recover upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be *continuances* between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not compleat, till the second judgment, upon the return of the writ of inquiry of damages. *Ibid. 153*. If the plaintiff be nonsuit, by which the defendant is to recover costs; if the plaintiff will not enter his *continuances*, on purpose to save the costs, the defendant shall be suffered to enter them. *Co. Jac. 316, 317*. The course of the Court of King's Bench is to enter no *continuance* upon the roll, till after issue or demurrer, and then to enter the *continuance* of all upon the back, before judgment: and if it is not entered, it is error. *Trin. 16 Jac. B. R.* Vide titles *Discontinuance, Process*.

CONTINUANDO, A word used in a special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action: and to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuo* is to the whole time, in which the rest of the trespasses were done; which is in this form, *Continuando* (by continuing the trespass aforesaid, &c. from the day aforesaid, &c.) until such a day, including the last trespass. *Terms de Lay*.

In trespass with a *continuo* of divers things, though of some of these things there could be no *continuo*, yet it shall be good for those things for which the *continuo* could be, and not for the others: but if the *continuo* had been particularly of such things whereof a *continuo* could not be, then it had been nought. *3 Lev. 94*. Every day's trespass is said to be a several trespass; tho' a *continuo* may not be of men's continuing a trespass day and night, for some time together; for mankind must take some rest: where cattle do trespass upon ground, they are continually trespassing night and day, and therefore the *continuo* in that case is good. *1 Lill. Abr. 307*. Trespass for breaking an house with a *continuo*, is good; and until a re-entry is made, the continuation of the possession, is a continuing of the trespass. *Lutw. 1342*. See title *Trespass*.

CONTRABAND GOODS, From *contra*, and the Ital. *banda*, an edict or proclamation.] Are those which are prohibited by act of parliament, or the King's proclamation to be imported into, or exported out of this into any other nation. See titles *Navigation-Acts*: *Customs*.

CONTRACCAUSATOR, A criminal, or one prosecuted for a crime: this word is mentioned in *Leg. H. 1. cap. 61*.

CONTRACT, *contractus*.] A covenant or agreement between two or more persons, with a lawful consideration or cause, *West. Symb. part 1*. As if a man sells his horse

or other thing to another, for a sum of money; or covenants in consideration of 20*l.* to make him a lease of a farm, &c. these are good *contracts*, because there is a *quid pro quo*, or one thing for another: but if a person make promise to me, that I shall have 20*s.* and that he will be debtor to me therefore, and after I demand the 20*s.* and he will not give it me, yet I shall never have any action to recover this 20*s.* because this promise was no *contract*, but a bare promise, or *nudum pactum*; though if any thing were given for the 20*s.* it it were but to the value of a penny, then it had been a good *contract*. See title *Confidation*.

Every *contract* doth imply in itself an *assumpsit* in law, to perform the same; for a *contract* would be to no purpose, if there were no means to enforce the performance thereof. 1 *Lill. Abr.* 308. Where an action is brought upon a *contract*, and the plaintiff mistakes the *sum agreed upon*, he will fail in his action: but if he brings his action on the *promise in law*, which arises from the debt, there, although he mistakes the sum, he shall recover. *Alley* 29. See titles *Action*, *Assumpsit*.

There is a diversity where a *day of payment* is limited on a *contract*, and where not; for where it is limited, the *contract* is good presently, and an action lies upon it, without payment. but in the other not: If a man buys 20 yards of cloth, &c. the *contract* is void, if he do not pay the money presently; but if day of payment be given, there the one may have an action for the money, and the other trower for the cloth. *Dyer* 30, 293. Where a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money it is a *contract*; but if he do not, it is no *contract*. *Nov's Mtr* 87: *Hob* 41. The property of any thing sold is in the buyer immediately by the *contract*; though regularly it must be delivered to the buyer, before the seller can bring his action for the money. *Nov* 88. If one *contract* to buy a horse or other thing of me, and no money is paid, or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases, no action will lie for the money, or the thing sold, but it may be sold to another. *Plowd.* 128, 309.

All *contracts* are to be certain, perfect and compleat: For an agreement to give so much for a thing as it shall be reasonably worth, is void for uncertainty; so a promise to pay money in a short time, &c. or to give so much, if he likes the thing when he sees it. *Dyer* 91: 1 *Bull* 192. But if I *contract* with another to give him 10*l.* for such a thing, if I like it on seeing the same, this bargain is said to be perfect at my pleasure: though I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action on the case against him. *Nov* 104. If a *contract* be to have for cattle sold 10*l.* if the buyer do a certain thing, or else to have 20*l.* it is a good *contract*, and certain enough. And if I agree with a person to give him so much for his horse, as J. S. shall judge him worth, when he hath judged it, the *contract* is compleat, and an action will lie on it; and the buyer shall have a reasonable time to demand the judgment of J. S. But if he dies before the judgment is given, the *contract* is determined. *Perk. Just.* 112, 114: *Shep. Abr* 294.

In *contracts*, the time is to be regarded, in and from which the *contract* is made: the words shall be taken in

the common and usual sense, as they are taken in that place where spoken; and the law doth not so much look upon the *form of words*, as on the *substance and mind* of the parties therein. 5 *Rep.* 83: 1 *Bull.* 175. A *contract* for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not sealed and delivered, it is all one as by word. But if the *contract* be by writing sealed and delivered, and is turned into a deed, then it is of another nature; and in this case generally the action on the verbal *contract* is gone, and some other action lies for breach thereof. *Plowd.* 130, 309: *Dyer* 90.

Contracts, not to be performed in a year, are to be in writing, signed by the party, &c. or no action may be brought on them: but if no day is set, or the time is uncertain, they may be good without it. *Stat.* 29 *Car.* 2. c. 3. And by the same statute, no *contract* for the sale of goods for 10*l.* or upwards, shall be good, unless the buyer receive part of the goods sold; or give something in earnest to bind the *contract*; or some note thereof be made in writing, signed by the person charged with the *contract*, &c. See title *Frauds*; *Agreement* III, IV.

If two persons come to a draper, and one says, let this man have so much cloth, and I will pay you; there the sale is to the undertaker only, though the delivery is to another by his appointment: but if a *contract* be made with A. B. and the vendor scruples to let the goods go without money, and C. D. comes to him and desires him to let A. B. have the goods, and undertakes that he shall pay him for them, that will be a promise within the statute 29 *Car.* 2. c. 3, and ought to be in writing. *Mod. Caf.* 249.

A *contract* made and entered into upon good consideration, may for good considerations be dissolved. See *Agreement* and *Sale*. As to *Usurious Contracts*, See title *Usury*.

CONTRAFACCTION, *contrafactio*.] A counterfeiting; *contrafactio sigilli regis*, a counterfeiting the King's seal *Blount*.

CONTRA FORMAM COLLATIONIS, A writ that lay where a man had given lands in perpetual alms, to any late houses of religion, as to an abbot and convent, or to the warden or master of any hospital and his convent, to find certain poor men with necessaries, and do divine service, &c. If they aliened the land, to the disherison of the house and church, then the donor or his heirs, should bring this writ to recover the lands. It was had against the abbot or his successor; not against the alienee, though he were tenant of the land: and was founded upon the statute of *Westm.* 2. c. 1: *Reg. Orig.* 238: *F. N. B.* 210.

CONTRA FORMAM FIOFFAMENTI, A writ that lay for the heir of a tenant enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain services and suits to his court, who was afterwards distrained for more services than were mentioned in the charter. *Reg. Orig.* 176: *Old Nat. Br.* 162.

CONTRA FORMAM STATUTI, *contrary to the form of the statute in such case made and provided*.] The usual conclusion of every indictment, &c. laid on an offence created by statute.

It one statute be relative to another, as where the former makes the offence, the latter adds a penalty, the indictment ought to conclude *contra formam statutorum*. 2 *Hale's Pl. C.* 1, 3, c. p. 24.

Where there are several statutes, and it does not appear on which the information is founded, the concluding *contra formam statuti* is ill. *Cro. Jac. 142. pl. 19. Broughton v. Moor*, cited as adjudged in *Talbot & al'*. Where one *act* makes the offence, and another gives the penalty, an information must be *contra formam statutorum*; in the case of *Talbot and Sheldon*, indicted for recusancy *contra formam statuti*, 23 *Eliz. c. 1.* and the judgment reversed because the penalty was demanded; for the 10 *Eliz.* made the offence, and the 23d gave the penalty: but, if the information had been for the offence only, it had been good; *per Coke. Ow. 135. Trin 9 Jac* See 5 *Vin. Abr.* 552, 556.—See further titles *Statuti*, *Indictment*.

CONTRAMANDATIO PLACITI, A respiting or giving a defendant further time to answer; or a countermand of what was formerly ordered. *Leg. H. 1. c. 59.*

CONTRAMANDATUM, Is said to be a lawful excuse which the defendant in a suit by attorney alledgeth for himself, to shew that the plaintiff hath no cause of complaint. *Blount.*

CONTRAPOSITIO, A plea or answer. *Leg. Hen. 1. c. 34.*

CONTRARIENTS, In the reign of King *Edw. 2.* *Thomas Earl of Lancaster* taking part with the *Barons* against the King, it was not thought fit, in respect of their great power, to call them rebels or traitors, but *contrarients*: and hence we have a record of those times, called *Rotulum Contrariantium*.

CONTRATENERE, To with-hold. *Si quis decimas contrateneat. Leg. Alfredi apud Brompton, c. 9.*

CONTRIBULES, *contribuales*, kindred or cousins. *Lamb. p. 75.*

CONTRIBUTION, *contributio*.] Is where every one pays his share, or contributes his part to any thing. One *parcener* shall have contribution against another; one *ben* have contribution against another *ben*, in equal degree: and one *purchaser* shall have contribution against another. Also *consors* in a statute shall be equally charged, and not one of them solely extended. 3 *Rep. 12, 13, &c.* On a statute or recognisance, there is a contribution and stay till the full age of the heir, &c. and this doth extend to the lessee for life or years, of the consor, who has part of the land liable, and the heir within age the residue; for the land of every one of them ought to be charged equally, because the whole is liable to the judgment; and this cannot be, if during the nonage, the burden shall fall upon one only. *Jenk. Cent. 36.* If lands are mortgaged, and then devised to one person for life, with remainder to another; both devisees shall make contribution to payment of the mortgage-money. *Chan. Caf. 224, 271.*—See title *Mortgage*.

Where goods are cast into the sea, for the safe-guard of a ship, or other goods, &c. aboard in a tempest; there is a contribution among merchants, towards the loss of the owners. See title *Insurance*. And where a robbery is committed on the highway, and damages are recovered against one or a few persons, in an action against the *bundred*, the rest of the inhabitants shall make contribution to the same. 27 *Eliz. c. 13.* See title *Robbery*.

CONTRIBUTIO FACIENDA, A writ that lieth where there are tenants in common, that are bound to do one thing, and one is put to the whole burden; as where they jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falling into decay, one of

them will not repair the mill; now the other shall have a writ to compel him to contribute to the reparations. And if there be three coparceners of land, that owe suit to the lord's court, and the eldest performs the whole; then may she have this writ to compel the other to make their contribution. So where one suit is required for land, and that land being sold to divers persons, suit is demanded of them all, or some of them by distress, as entirely as if all the land were still in one. *Reg. Orig. 175: F. N. B. 162.*

CONTROLLER, *Fr. contrerolleur, Lat. contrarotulator.*] An Overseer or officer relating to public accounts, &c. And we have divers officers of this name; as controller of the King's Household; of the Navy; of the Customs; of the Excise; of the Mint, &c. And in our courts, there is the controller of the Hamper, of the Pipe, and of the Pell, &c. The office of Controller of the Household, is to control the accounts of the Green Cloth; and he sits with the Lord Steward and other officers in the counting-house, for daily taking the accounts of all expences of the household. The Controller of the Navy controls the payment of wages; examines and audits accounts; and inquires into rates of stores for shipping, &c. Controllers of the Customs and Excise, their office is to control the accounts of those revenues. And the Controller of the Mint, controls the payment of wages, and accounts relating to the same. Controller of the Hamper is an officer in the Chancery attending the Lord Chancellor daily in term-time, and upon seal-days; whose office is to take all things sealed from the Clerk of the Hamper, inclosed in bags of leather, and to note the just number and effect of all things so received, and enter the same in a book, with all the duties appertaining to his Majesty, and other officers for the same. The Controller of the Pipe is an officer of the Exchequer, who writes out summons twice every year to the sheriffs to levy the farms and debts of the Pipe; and keeps a controlment of the Pipes, &c. Controller of the Pell is also an officer of the Exchequer, of which sort there are two, who are the Chamberlain's clerks, that do or should keep a controlment of the Pell, of receipts and goings out: and this officer was originally such as took notes of other officers' accounts or receipts, to the intent to discover if they dealt amiss, and was ordained for the Prince's better security. *Fleta. lib. 1. cap. 18: Stat. 12 Ed. 3. cap. 3.* This last seems to be the original use and design of all Controllers.

CONTROVER, *controveur*] Signifies in our law one that of his own head deviles or invents false news. 2 *Inst. 227.*

CONVENABLE, *Fr.*] Agreeable. *Stat. 27 Ed. 3. c. 21.* See *Covenable*.

CONVENIENT, *conveniens*.] Of the use of this word, Sir *Edw. Coke* in his Institute says,—*Non solum quod licet sed quod est conveniens est considerandum, nihil quod est inconveniens est licitum.* 1 *Inst. 66.*

CONVENT, *conventus*.] Signifies the fraternity of an abbey or priory; as *societas* doth the number of fellows in a college. *Bract. lib. 2. c. 35.*—See title *Monastery*, *Mortmain*.

CONVENTICLE, *conventiculum*.] A private assembly or meeting for the exercise of religion; first used as a term of disgrace for the meetings of *Wickliffe* in this nation, above two hundred years since: and now applied to the illegal meetings of the *Non-conformists*: it is mentioned in the

the statutes 2 Hen. 4. c. 15; 1 H. 6. c. 3. and 16 Car. 2. c. 4; which statute was made to prevent and suppress conventicles: and by Stat. 22 Car. 2. cap. 1, It is enacted, that if any persons of the age of sixteen years, subjects of this kingdom, shall be present at any conventicle, where there are five or more assembled, they shall be fined 5 s. for the first offence, and 10 s. for the second; and persons preaching incur a penalty of 20 l. Also suffering a meeting to be held in a house, &c. is liable to 20 l. penalty. Justices of peace have power to enter such houses, and seize persons assembled, &c. And if they neglect their duty, they shall forfeit 100 l. And if any constable, &c. know of such meetings, and do not inform a justice of peace, or chief magistrate, he shall forfeit 5 l. But the Stat. 1 W. & M. ft. 1. c. 18, ordains that protestant dissenters shall be exempted from penalties: though if they meet in a house, with the doors locked, barred, or bolted, such dissenters shall have no benefit from that statute. By Stat. 10 An. c. 2, Officers of the government, &c. present at any conventicle, at which there shall be ten persons, if the Royal family be not prayed for in express words, shall forfeit 40 l. and be disabled. See titles *Heresy*, *Non-conformists*, *Religion*.

CONVENTIO, A word used in ancient law-pleadings, for an agreement or covenant: as *A. B. queritur, &c. de C. D. &c. pro eo quod non teneat conventionem, &c.* There is a strange record of the court of the manor of Hatfield, in Com. Ebor. held anno 11 Ed. 3, relative to a convention to sell the Devil, and on earnest given, and non-delivery, action brought; which on hearing was adjudged *in infernum*.

CONVENTIONE, A writ that lies for the breach of any covenant in writing, whether real or personal: and it is called a *Writ of Covenant*. *Pig. Orig.* 115: *F. N. B.* 145.

CONVENTION, A parliament assembled, but in which no act is passed, or bill signed. *Dict.*

The term *Convention*, is rather applied to the meeting of the Lords and Commons, without the assent of, or being called together by, the King; and which can only be justified *ex necessitate rei*.

Of this nature was the *Convention-Parliament*, which restored King Charles II. and which met above a month before his return: the Lords by their own authority, and the Commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament. And if this Convention had not so met, it was morally impossible that the kingdom should have been settled in peace.

In a similar manner, at the time of the Revolution, *A. D.* 1688, the Lords and Commons by their own authority, and upon the summons of the Prince of Orange, (afterward William III.) met in a *Convention*, and therein disposed of the Crown and Kingdom. And it is declared by Stat. 1 W. & M. ft. 1. c. 1. that this *Convention* was really the two houses of parliament, notwithstanding the want of writs or other defects of form.

If we may be allowed to suppose a possible case, that the whole Royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume that the body of the nation, consisting of Lords and Commons, would have a right to meet and settle the government: otherwise there must be no government at all. But whenever

the throne is full, no national meeting, nor any meeting pretending to be such, can be legal, but the *parliament* assembled by command of the King. See title *Parliament*. and 1 *Comm.* 151, 2.

The Constitution of Great Britain having placed the representation of the nation, and the expression of the national will in the parliament, no other meeting or *Convention* even of every individual in the kingdom, would be a competent organ to express that will; and meetings of such a nature tending merely to sedition, and to delude the people into an imaginary assertion of rights, which they had before delegated to their representatives in parliament, could only tend to introduce Anarchy and Confusion; and to overturn every settled principle of government. An act of parliament was passed in Ireland, in the year 1793 to prevent any such meetings or *Conventions*; and a few ignorant individuals, who in the same year had dared to assemble under that title in Scotland, were quickly dispersed, and their leaders convicted of seditious practices; for which they were sentenced to transportation. See further titles *Parliament*, *Treason*, *Seditious Assemblies*.

CONVENTUALS, Religious men united together in a convent or religious house. *Convel.*

CONVENTUAL CHURCH, A church that consists of regular clerks, professing some order of religion; or of Dean and Chapter, or other societies of spiritual men.

CONVERSION, Is where a person finding or having the goods of another in his possession, converts them to his own use, without the consent of the owner, and for which the proprietor may maintain an action of *Trover* and *Conversion* against him.—And refusal to restore goods is, *prima facie*, sufficient evidence of a conversion, though it does not amount to a conversion. 10 *Rep.* 56: 3 *Comm.* 152. See title *Trover*.

CONVERSOS. The Jews here in England were formerly called *Conversos*, because they were converted to the Christian religion. King Hen. III. built an house for them in London, and allowed them a competent provision or subsistence for their lives; and this house was called *Domus Conversorum*. But by reason of the vast expences of the wars, and the increase of those converts, they became a burden to the Crown; so that they were placed in abbeys and monasteries for their support and maintenance. And the Jews being afterwards banished, King Ed. III. in the 51st year of his reign, gave this house which had been used for the converted Jews, for the keeping of the Rolls; and it is said to be the same which was till lately enjoyed by the Master of the Rolls. *Blount. Hag: Co. Lit.* 271 b.

CONVEYANCE, A deed which passes or conveys land from one man to another. *Conveyance* by *feoffment*, and *livery*, was the general conveyance at Common law; and if there was a tenant in possession, so that livery could not be made, then was the reversion granted, and the tenant always attorned: also upon the same reason, a lease, and release was held to be a good conveyance, to pass an estate; but the lessee was to be in actual possession, before the release. But the lease is now considered as operating so as to give the possession, which it does in point of law.

By the Common law, when an estate did not pass by feoffment, the vendor made a lease for years, and the lessee

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lessee actually entered; and the lessor granted the reversion to another, and the lessee attained afterwards, when a reversion was to be granted, then likewise was a lease for years usually made, and the lessee entered (as before) and then the lessor released to him. But after the *statute of 28*, it became an opinion, that if a lease for years was made upon a valuable consideration, a release might operate upon it without an actual entry of the lessee; because the statute did execute the lease, and raised an use present to the lessee: and *Jessent v. Warr* was the first who pressed this way. 2 *M. 251, 252*.

The most common *uses* now in use are *uses of gift, bargain and sale, lease and release, fines and recoveries, settlements, &c.*

The following further observations on conveyances at Common law and those which derive their effect from the statute of *Uses*, are abridged from the long and learned note on *1 Inst. 271 b*, to which the curious enquirer is referred for a more particular investigation of the subject. See also this *Dict.* titles *Deed; Estate; Lease and Release; Limitation; Trusts; Uses*.

FEOFFMENTS and GRANTS were the two chief modes used in the Common law for transferring property. The most comprehensive definition which can be given of a **FEOFFMENT** seems to be, a conveyance of corporeal hereditaments, by delivery of the possession, upon, or within view of, the hereditaments conveyed. This delivery was thus made, that the lord and the other tenants met it by witnesses to it. No charter of feoffment was necessary, it only served as an authentication of the transaction, and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery which it authenticated. Soon after the Conquest, or perhaps towards the end of the *Saxon* government, all estates were called *fee*, the original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify a grant with livery of seisin of a free inheritance to a man and his heirs, more respect being had to the perpetuity, than to the feudal tenure, of the estate granted. In early times, after the Conquest, charters of feoffment were various in point of form. In the time of *Ed. I.* they began to be drawn up in a more uniform stile. The more ancient of them generally run with the words *ad, cum, et, et de*. It was not till a later period that *homo* came into use. The more ancient feoffments were also usually made in consideration of the homage and service of the feoffee, and to hold of the feoffor and his heirs. But after the *Stat. Quia emptores* (18 *Ed. I.* 1) feoffments were always made to hold to the chief lords of the fee, without the words *pro homine et feodo*. See further, *1 Inst. 6 a. 271 b*.

The proper limitation of a feoffment is to him and his heirs, but feoffments were often made of conditional fees, (or of estates, as they are now called,) and of life estates, to which may be added, feoffments of churches given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists call *Inveiture*. It was often made by symbolical tradition, but it was always made upon or within view of the lands. When the king made a feoffment he issued his writ to the sheriff, or some other person to deliver seisin: other great men did the same, and this gave rise to powers of attorney. See *Mod. Form. p. 5*.

A **GRANT** in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of these, the transfer of them was always made by writing, in order to produce that notoriety, which in the transfer of corporeal hereditaments was produced by delivery of the possession. But in other respects a feoffment and a grant did not materially differ.

Such was the original distinction between a *feoffment* and a *grant*; but from this real difference in their subjects matter only, a difference was supposed to exist in their operation. A *feoffment* visibly operated on the possession; a *grant* could only operate on the right of the party conveying. Now as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had at least an estate of freehold in them, a *conveyance* which was considered as transferring the possession, must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants, their essential quality being that of transferring things which did not lie in possession: they therefore could only transfer the right, that is, could only transfer that estate which the party had a right to convey. It is in this sense the expressions are to be understood, that a feoffment is a *real* and a grant a *rightful* conveyance. See title *Gift*.

This appears to have been the outline of conveyances at Common law. The introduction of *uses* produced a great revolution in this respect. *Uses* at the Common law, were, in most respects what trusts are now. When a feoffment was made to *uses*, the legal estate was in the feoffor. He held the possession, did the feudal duties, and was in the eye of the law the tenant of the fee. The person to whose use he was seized, called the *cestui que use*, had the beneficial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestui que use*, or refused to convey the estate as he directed, the feoffee was without remedy. To redress this grievance the writ of *subpana* was devised, or rather adapted from the Common-law courts, by the court of Chancery, to oblige the feoffee to attend in court and disclose the trust, and then the court compelled him to execute it.

This use, were established: they were not considered as issuing out of, or annexed to the land, as a rent or condition, or a right of common, but as a *trust* reposed in the feoffee, that he should dispose of the lands at the discretion of the *cestui que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. To all other persons except the *cestui que use*, the feoffee was as much the real owner of the fee as if he did not hold it to the use of another. *His* wife was entitled to dower, *his* infant heir was in wardship to the lord, and upon *his* attainder the estate was forfeited.

To remedy these inconveniences, the *Stat. 27 H. 8. c. 10*, was passed; by which the possession was devested out of the persons seized to the use, and transferred to the *cestui que use*. For by that statute it is enacted "that when

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when any person shall be seised of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise; in such case the persons having the use, confidence or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate and possession of and in the lands, in the same quality, manner and form as they had before in the use."—There seems to be little doubt but that the intention of the Legislature in passing this act, was utterly to annihilate the existence of *uses* considered as distinct from the possession. But they have been preserved under the appellation of *trusts*. The courts hesitated much before they allowed them under this new name. And at length secret modes of transferring the possession itself, have been discovered, and have totally superseded that notorious and publick mode of transferring property, which the Common law required, and the statute intended to restore; and many modifications or limitations of real property have been allowed, which the Common law did not admit. See title *Lease and Release*.

A son did give and grant lands to his mother, and her heirs; though this was a defective conveyance at Common law, yet it was adjudged good by way of *use*, to support the intention of the donor, and therefore, by these words, an *use* did arise to the mother by way of *covenant to stand seised* 2 Lev. 225. A feoffment without *livery and seisin*, will not enure as a grant; but where made in consideration of a marriage, &c. it has been adjudged, that it did enure as a *covenant to stand seised to uses* 2 Lev. 213.

Tenant in fee, in consideration of marriage, covenanted, granted, and agreed all that messuage to the use of himself for life, then to his wife for life, for her jointure, then to their first son in tail male, &c. Now by these words, it appeared, that the husband intended some benefit for his wife, wherefore the court supplied other words to make the conveyance sensible. 1 Lutw. 782: 1 Inf. 271 l. n.

A conveyance cannot be fraudulent in part, and good as to the rest: for if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 Lil Abn. 311. Fraudulent conveyances to deceive creditors, defraud purchasers, &c. are void, by Stat. 13 Eliz. cap. 5: 27 Eliz. cap. 1.—See title *Fraud*.

CONVICT AND CONVICTION.

CONVICT, *v. n.* He that is found guilty of an offence by verdict of a jury. Statute P. C. 106. *Compromission* faith. The *conviction* is either when a man is outlawed, or apprehended and confessed, or is found guilty by the verdict; and when a statute excludes from clergy persons found guilty of felony, &c. it extends to those who are convicted by confession. Comp. full. 9. The law implies that there must be a *conviction*, before punishment, though it is not so mentioned in a statute: and where any statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a *conviction* for the first. 1 Hawk. P. C. c. 10 § 9: c. 41. § 3.

Justment amount to *conviction*; though it doth not follow that every one who is *convicted*, is adjudged. A *conviction* at the King's suit may be pleaded to a suit by an informer, on a penal statute; because while in force it

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makes the party liable to the forfeiture, and no one ought to be punished twice for the same offence: but *conviction* may not be pleaded to a new suit by the king. 1 Hawk. P. C. c. 10. A person convicted or attainted of one felony, may be prosecuted for another, to bring accessories to punishment, &c. Fitz. Coram. 373.

Persons convicted of felony by verdict, &c. are not to be admitted to bail, unless there be some special motive for granting it; as where a man is not the same person, &c. for bail ought to be before trial, when it stands indifferent whether the party be guilty, or not. 2 Hawk. P. C. c. 15. § 45, 80. See title *Bail*.—*Conviction* of felony, and other crimes, disables a man to be a juror, witness, &c. In our books, *conviction* and *attainder* are often confounded. See title *Attainder*.

SUMMARY PROCEEDINGS are directed by several acts of parliament for the *conviction* of offenders, and the inflicting of certain penalties imposed by those acts. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge.

Of this summary nature are all trials for offences and frauds contrary to the laws of the *Exchequer*, and other branches of the *Revenue*; which are to be inquired into and determined by the commissioners of the respective departments, or by justices of peace in the country. And experience has shewn that such convictions are absolutely necessary for the due collection of the public money; and are in fact a species of mercy to the delinquents, who would be ruined by the expence and delay of frequent prosecutions by action or indictment.

Another branch of summary proceedings, is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament, for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others subjected to their jurisdiction. See title *Justice of Peace*, and the titles of the various offences throughout this Dict. These offences used formerly to be punished by the verdict of a jury in the court leets, and sheriff's tourn, the King's ancient courts of law; and which were formerly much revered and respected, but are now fallen very much into disuse and contempt.

The process of these summary *convictions* is extremely speedy. Though the courts of Common law have thrown one check upon them, by making it necessary to *summon* the party accused before he is condemned; which is now held an indispensable requisite and is highly consonant to the general principles of justice. See Stat. 261, 678. Salk. 18. 2 Lil. Rep. 1405.—After this summons, the magistrate moves on to examine one or more witnesses, as the statute may require, upon oath; and then make his *conviction* of the offender in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred by distress and sale of his goods, according to the provisions of the several statutes which create the offence, and the punishment; and which usually chalk out a mode by which offenders are to be convicted of such petty offences.

See further this Dictionary title *Justice of Peace*.—Burn's Justice, title *Conviction*; and 4 Comm. c. 20, as to the policy of extending this summary mode of proceeding.

CONVICT RECUSANT, According to the statutes, See titles *Recusant*, *Papist*.

CONVIVIVM, Signifies the same thing among the laity, as *procuratio* doth with the clergy, viz. When the tenant by reason of his tenure is bound to provide meat and drink for his lord once or oftener in the year. *Blount*.

CONVOCATION, *convocatio*.] The assembly of the representatives of the Clergy, to consult of ecclesiastical matters in time of parliament. As there are two houses of parliament, so there are two houses of convocation; the one called the *Higher or Upper House*, where the archbishops and all the bishops sit severally by themselves; and the other, the *Lower House of Convocation*, where all the rest of the clergy sit, i. e. All deans and archdeacons, one proctor for every chapter, and two proctors for all the clergy of each diocese, making in the whole number *one hundred and sixty-six* persons. Each convocation house hath a prolocutor, chosen from among themselves, and that of the lower house is presented to the bishops, &c.

The Archbishop of *Canterbury* is the President of the Convocation, and prorogues and dissolves it by mandate from the King. The convocation exercises jurisdiction in making of canons, with the King's assent: for by the *Stat. 25 H. 8. c. 19*, the convocation is not only to be assembled by the King's writ; but the canons are to have the royal assent: they have the examining and censuring of heretical and schismatical books, and persons, &c. But appeal lies to the King in Chancery, or to his delegates. *4 Inst. 322: 2 Rd. Abr. 225*. But in case the King himself be a party, the appeal lies by *Stat. 24 H. 8. c. 12*, to all the bishops assembled in the Upper House of Convocation. See *3 Comm. 67*.

Mr *Christian*, in his note on *1 Comm. 280*, remarks that from the statement there given, the student would perhaps be apt to suppose that there is only one convocation at a time. But the King before the meeting of every new parliament, directs his writ to each archbishop to summon a convocation in his peculiar province.

Godolphin says, that the convocation of the province of *York*, constantly corresponds, debates and concludes the same matters with the provincial synod of *Canterbury*. *God. 99*. But they are certainly distinct and independent of each other; and when they used to tax the clergy, the different convocations sometimes granted different subsidies. In *22 Hen. 8*, the convocation of *Canterbury* had granted the King 100,000*l.* in consideration of which an act of parliament was passed, granting a free pardon to the clergy for all spiritual offences; but with a proviso, that it should not extend to the province of *York*, unless its convocation would grant a subsidy in proportion; or unless its clergy would bind themselves individually to contribute as bountifully. This statute is recited at large in *Gib Cod. 77*.

All Deans and Archdeacons (as has been already observed) are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each diocese of *Canterbury*, two proctors: but on account of the small number of dioceses in the province of *York*, each archdeaconry elects two proctors. In *York* the convocation consists only of one house; but in *Canterbury* there are two houses, of which the twenty-two bishops form the Upper House; "wherein the Archbishop presides with regal state," (says *Blackstone*, *1 Comm. 279*); and before the reforma-

tion, abbots, priors, and other mitred prelates sat with the bishops. The Lower House of Convocation, in the province of *Canterbury*, consists of twenty-two Deans, fifty-three Archdeacons, twenty-four Proctors for the Chapters, and forty-four Proctors for the Parochial Clergy.—Total 144.

By *Stat. 8 H. 6. c. 1*, the clergy in their attendance on the Convocation, have the same privilege in freedom from arrest as the members of the House of Commons in their attendance on Parliament.

CONUSANCE OF PLEAS, A privilege that a city or town hath to hold pleas. See *Cognisance*.

CONUSANT, *Fr. connoissant*.] Knowing or understanding: as if the son be *conusant*, and agreed to the feoffment, &c. *Co. Lit. 159*.

COOPERS, Shall make their vessels of seasonable wood, and mark them with their own marks, on pain of *3*s.* 4*d.** forfeiture; and the contents of vessels are appointed to be observed under like penalty, as the beer barrel shall contain thirty-six gallons, a kilderkin eighteen, a firkin nine, &c. The wardens of the *Coopers'* company in *London*, with an officer of the mayor, are to search all vessels for ale, beer, and soap to be sold there; and to mark them that are right, and they may burn those that be not so. and if any cooper, &c. diminish a vessel by taking out the head, or a stave thereof, it shall be burnt, and the offender forfeit *3*s.* 4*d.**—*Stat. 23 H. 8. c. 4*.

COOPERTIO, The head or branches of a tree cut down, though *Coopertio Arborum* is rather the bark of timber-trees felled, and the chumps and broken wood. *Covell*.

COOPERTURA, A thicket or covert of wood. *Chart. de Foresta, cap. 12*.

COPARCENERS, *participes*.] Otherwise called *Parceners*, are such as have equal portion in the inheritance of an ancestor; and by law are the issue female, which, in default of heirs male, come in equality to the lands of their ancestors. *Bract. lib. 2. cap. 30*. They are to make partition of the lands; which ought to be made by coparceners of full age, &c. And if the estate of a coparcener be in part evicted, the partition shall be avoided in the whole. *Lit. 243: 1 Inst. 173: 1 Rep. 87*. The Crown of *England* is not subject to coparcenary; and there is no coparcenary in dignities, &c. *Co. Lit. 27. Stat. 25 H. 8. c. 22*—See title *Descent*; *Parceners*.

COPARTNERSHIP. See title *Partners and Partnership*.

COPE, A custom or tribute due to the King, or lord of the soil, out of the lead mines in some part of *Derbyshire*; of which *Man'ove* saith:

*Egrefs and regrefs to the King's highway,
The miners have, and lot and cope they pay:
The third tenth dish of ore within their mine,
To the lord, for lot, they pay at measuring time;
Six-pence a load for cope the lord demands,
And that is paid to the berghmaller's hands, &c.*

See also Sir *John Pettus's Fœdæ Regales*, where he treats on this subject. This word, by *Domesday Book*, as Mr. *Hagor* hath interpreted it, signifies a hill: and *Cope* is taken for the supreme cover, as the cope of heaven. Also it is used for the roof and covering of a house; the upper garment of a priest, &c.

COPIA LIBELLI DELIBERANDA, A writ that lay where a man could not get the *copy of a libel* at the hand of a judge ecclesiastical, to have the same delivered to him. *Reg. Orig.* 51.

COPPA, A cop or cock of grafs, hay or corn divided into titheable portions; as, the tenth cock, &c. This word, in strictness, denotes the gathering or laying up the corn in *copes* or heaps, as the method is for barley or oats, &c. not bound up, that it may be the more fairly and justly tithed: and in *Kent* they still retain the word, a *cop* or *cap* of hay, straw, &c. *Thorn in Chion.*

COPPER AND COPPER ORE. Copper plates and copper fully wrought, to what duties liable, 4 & 5 *W. & M. c. 5. sect. 2*. All copper may be exported paying the lawful duties and customs, 5 *W. & M. c. 17*.—See title *Navigation Acts*.

COPPER-PLATE ENGRAVINGS.—See title *Literary Property*.

COPY, copia.] In a legal sense the transcript of an original writing; as the *copy* of a *patent*, of a *charter*, deed, &c. A clause out of a patent, taken from the chapel of the Rolls, cannot be given in evidence; but there must be a true copy of the whole charter examined: it is the same of a record. And if upon a trial, some part of an office copy is given in evidence to prove a deed, which deed is to prove the party's title to the land in question that gives it in evidence; if that part of the office copy given in evidence, be not so much of it as doth any ways concern the land in question, the court will not admit of it: for the court will have a copy of the whole given, or no part of it shall be admitted. 1 *Lil. Abs.* 312, 313. Where a deed is inrolled, certifying an attested copy is proof of the inrolment; and such copy may be given in evidence. 3 *Lev.* 387. A common deed cannot be proved by a copy or counterpart, when the original may be procured. 10 *Rep.* 92. And a copy of a will of lands, or the probate, is not sufficient; but the will must be shewn as evidence. 2 *Roll. Abr.* 74. Copies of court-rolls admitted as evidence. See at large title *Evidence*.

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TINURA per copiam totius curie] A tenure for which the tenant hath nothing to shew but the *copy* of the *rolls*, made by the steward of the lord's court; on such tenant's being admitted to any parcel of land or tenement belonging to the manor. 4 *Rep.* 25. It is called *base tenure*, because held at the will of the lord: and *Fitzherbert* says, it was anciently *tenure in villnage*, and that *copyhold* is but a new name. See this Dict. title *Tenures* III. 13. Some *Copyholds* are held by the *weige* in *ancient demesne*; and though they are by *copy*, yet are they a kind of freehold; for if a tenant of such *copyhold* commit felony, the King hath the year, day and waite, as in the case of freeholders: some other *copyholds* are such as the tenants hold by common tenure, called *mere copyhold*, whose land, upon felony committed, escheats to the lord of the manor. *Kitch.* 81. But *copyhold* land cannot be made at this day; for the pillars of a *copyhold* estate are, that it hath been *demised time out of mind* by copy of court-roll; and that the tenements are parcel of, or within, the manor. 1 *Infl.* 58: 4 *Rep.* 24.

A copyhold cannot be created by operation of law: and therefore where wastes are severed from the manor, by a grant of the latter, with the exception of the former, VOL. I.

though the copyholders continue to have a right of common in the wastes by immemorial usage: yet if afterwards a grant of the soil of those wastes be made to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold, and not copyhold. 2 *Term Rep.* 415, 705.

A *copyhold* tenant had originally in judgment of law but an estate at will; yet custom so established his estate that by the custom of the manor it was descendible, and his heirs inherited it: and therefore the estate of the copyholder is not merely at the will of the lord, but at the will of the lord, according to the custom of the manor; so that the custom of the manor is the life of copyhold estates; for without a custom, or if copyholders break their custom, they are subject to the will of the lord: and as a *copyhold* is created by custom, so it is guided by custom. 4 *Rep.* 21. A *copyholder*, so long as he doth his services, and doth not break the custom of the manor, cannot be ejected by the lord; if he be, he shall have trespass against him: but if a *copyholder* refuses to perform his services, it is a breach of the custom, and forfeiture of his estate.

It appears that estates held by copy of court roll, but not at the will of the lord, have been deemed freehold by Lord Coke, (See 1 *Infl.* 59 b,) and others; and in order to distinguish them from the ordinary kind, have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of such tenants claimed a right of voting as *freeholders* at the election of knights of the Shire.—This gave occasion to a short treatise on this subject, in which the origin of lands held in this peculiar way is traced, and it is proved that though these tenures in some respects resemble freeholds, they are in truth nothing more than a superior kind of copyhold. Soon after the publication of this treatise, the *Stat. 31 Geo. 2. c. 14*, was passed, declaring that no person holding by copy of court-roll should be entitled to vote at the election of Knights of the Shire.

In some manors where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are titled *Copyholds of inheritance*: in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. For the custom of the manor has in both cases so far superseded the will of the lord, that provided the services be performed, or stipulated for by fealty, he cannot in the first instance refuse to admit the heir of his tenant upon his death; nor in the second can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will. 2 *Comm.* 97, 147.—And see title *Ancient Demesne*.

If the lord refuses to admit he shall be compelled in *Chancery*. 2 *Cro.* 368.—And if the lord refuse to admit a surrenderee, on account of a disagreement about the fine to be paid, the court of *B. R.* will grant a *mandamus* to compel the lord to admit without examining the right to the fine. 2 *Term Rep.* 484.—But that court will not grant a *mandamus* to admit a copyholder by descent, because without admittance he has a complete title against all the world but the lord. 2 *Term Rep.* 198.

Copyholds descend according to the rules and maxims of the Common law, (unless in particular manors, where there are contrary customs, of great antiquity); but such customary inheritances shall not be assets, to charge the heir in action of debt, &c. 4 *Rep.* 22: *Kitch.* Though

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a lease for one year of *copyhold* lands, which is warranted by the Common law, shall be assets in the hand of an executor. 1 *Vent.* 163. *Copyholders* hold their estates free from charges of dower, being created by custom, which is paramount to title of dower. 4 *Rep.* 24. *Copyhold* inheritances have no collateral qualities, which do not concern the descent; as to make them assets; or whereof a wife may be endowed; a husband be tenant by the curtesy, &c. But by particular custom, there may be dower and tenancy by the curtesy. *Cro. Eliz.* 361. There may be an *estate-tail* in *copyhold* lands by custom, with the co-operation of the *Stat. W.* 2. And as a *copyhold* may be tailed by custom, so by custom the tail may be cut off by surrender. 1 *Inst.* 60.

Where by special custom a descent of *copyholds* may be, contrary to the rules of the Common law, such custom shall be interpreted strictly: thus, where there is a custom within a manor, that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter; this shall not extend to an *eldest niece*: but in default of such son, daughter and sister, the lands must descend according to the rules of the Common law. 1 *Term Rep.* 466.

A *copyhold* may be barred by a recovery, by special custom; and a surrender may bar the issue by custom. A fine and recovery at Common law will not destroy a *copyhold* estate; because Common law assurances do not work upon the assurance of the *copyhold*: though *copyhold* lands are within the *Stat.* 4 *H.* 7. c. 24, of fines and proclamations, and five years non-claim, and shall be barred. 1 *Rel. Abr.* 506. See title *Fines*.

A *plaint* may be made in the court of the manor, in the nature of a *real* action, and a recovery shall be had in that *plaint* against tenant in tail, and such a recovery shall be a *discontinuance* to the *estate-tail*. 1 *Brownl.* 121. And the suffering a recovery by a *copyholder* tenant for life in the lord's court is no forfeiture, unless there is a particular custom for it. 1 *Nelf. Abr.* 507. *Copyholders* may entail *copyhold* lands, and bar the *estails* and *remainders*, by committing a forfeiture, as making lease without licence, &c. and then the lord is to make three proclamations, and seize the *copyhold*, after which the lands are granted to the *copyholder*, and his heirs, &c. This is the manner in some places, but it must be warranted by custom. 2 *Danv. Abr.* 191: *Sul.* 314.

Customs ought to be time out of memory; to be reasonable, &c. And a custom in deprivation or bar of a *copyhold* estate, shall be taken strictly; but when for making and maintaining, it shall be construed favourably. *Comp. Cop. s. 33*: *Cro. El.* 879. An unreasonable custom, as for a lord to exact exorbitant fines; for a *copyholder* for life to cut down and fell timber-trees, &c. is void. A *copyholder* for life pleaded a custom, that every *copyholder* for life might, in the presence of two other *copyholders*, appoint who should have his *copyhold* after his death; and that the two *copyholders* might assess a fine, so as not to be less than had been usually paid; and it was adjudged a good custom. 4 *Leon.* 238. But a custom to compel a lord to make a grant, is said to be against law; though it may be good to admit a tenant. *Moor* 788.

By the custom of some manors, where *copyhold* lands are granted to two or more persons for lives, the person first named in the copy may surrender all the lands. 1 *Nelf. Abr.* 497. There are customs *ratione loci*, different from other places: but though a custom may be applied to a

particular place; yet it is against the nature of a custom of a manor to apply it to one particular tenant. 1 *Nelf.* 504: 1 *Lutw.* 126.

There are usually *custom-rolls* of manors, exhibited on oath by the tenants; setting forth the bounds of the manor, the royalties of the lord, services of the *copyhold* tenants, the tenures granted, whether for life, &c. concerning admittances, surrenders, and the rights of the *copyholders*, as to taking timber for repairs, fire-bote, &c. Common belonging to the tenants, payment of rent, suing in the court of the manor, taking heriots, &c. All which customs are to be observed. *Comp. Court Keep.* 21.

When an act of parliament altereth the service, customs, tenure, and interest of land, in prejudice of the lord or tenant, there the general words of such an act shall not extend to *copyholds*. 3 *Rep.* 7.—*Copyholds* are not within the *Stat.* 27 *H.* 8. c. 10, of *jointures*; nor *Stat.* 32 *H.* 8. c. 28, of *leases*, *Copyholds* being in their nature demisable only by copy: they are not within the statute of *uses*; nor are *copyholds* extendible in execution: but *copyholds* are within the statute of *limitation of actions*; and the statutes against *bankrupts*. The lord shall have the custody of the lands of *ideots*, &c. And a *copyholder* is not within the act 12 *Car.* 2. c. 24, to dispose of the *custody* and *guardianship* of the heir; for if there be a custom for it, it belongs to the lord of the manor. 3 *Lev.* 395: 1 *Nelf. Abr.* 492, 522.

Copyholders shall neither *implead* nor be *impleaded* for their tenements by writ, but by *plaint* in the lord's court held within the manor: and if on such *plaint*, erroneous judgment be given, no writ of *false judgment* lies, but petition to the lord in nature of a writ of *false judgment*, wherein errors are to be assigned, and remedy given according to law. *Co. Lit.* 60.

Where a man holds *copyhold* lands in trust to surrender to another, &c. if he refuses to surrender to the other accordingly, he may be compelled by bill exhibited in the lord's court, who, as chancellor, has power to do right. 1 *Leon.* 2. A *copyholder* may have a *formedon* in descender in the lord's court. *Lassie* of a *copyholder* for life for one year, shall maintain an *ejectment*. 4 *Rep.* 26: *Moor* 679. It is every day's practice to bring *ejectments*, to recover the possession of *copyholds*; for defendant by the rule, obliging himself to confess lease, entry, and ouster, the *title* only can come in question on the trial. But the lessor of plaintiff, before he brings his *ejectment* should be admitted. See title *Ejectment*.

A manor is lost when there are no customary tenants or *copyholders*: and if a *copyhold* comes into the hands of the lord in fee, and the lord leases it for one year, or half a year, or for any certain time, it can never be granted by copy after: but if the lord alien the manor, &c. his alienee may re-grant land by copy. If the lord keeps the *copyhold* for a long time in his hand, it is no impediment but that he may after grant it again by copy. 2 *Danv. Abr.* 176, 177. A *copyholder* in fee accepts of a lease, grant, or confirmation of the same land from the lord, this determines his *copyhold* estate. 2 *Cro.* 16: *Cro. Jac.* 253. If a *copyholder* bargains and sells his *copyhold* to a lessee for years, &c. of the manor, his *copyhold* is *extinguished*. 2 *Danv.* 205. A *copyholder* may grant his estate to his lord, by bargain and sale, re-lease, &c. for between lord and tenant the conveyance need not be according to custom. 1 *Nelf.* 504. A *copyholder* in other

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cases cannot alien by deed: though he that hath a right only to a copyhold may release it by deed. And if a copyholder surrenders upon condition, he may afterwards release the condition by deed. 2 *Danv.* 205: *Cro. Jac.* 36. Also one joint copyholder may release to another, which will be good without any admittance, &c. *Ibid.*

A Copyholder cannot convey or transfer his copyhold estate to another, otherwise than by surrender; which is the yielding up of the land by the tenant to the lord, according to the custom of the manor, to the use of him that is to have the estate: or it is in order to a new grant, and further estate in the same.

As to copyhold grants; which are made either in fee, or for three lives, &c. the lord of the manor that hath a lawful estate therein, whether he be tenant for life or years, tenant by statute merchant, &c. or at will, is *dominus pro tempore*, and may grant lands, herbage of lands, a fair, mill, tithes, &c. and any thing that concerns lands, by copy of court-roll, according to custom; and such grants shall bind those in remainder: the rents and services reserved by them shall be annexed to the manor, and attend the owner thereof after their particular estates are ended. 4 *Rep.* 23: 1 *Rep.* 18. And if a lord of the manor for the time being, lessee for life, years, &c. take a surrender, and before admittance he dieth, or the years or interest determine, though the next lord comes in above the lease for life or years, or other particular interest, yet he shall be compelled to make admittance according to the surrender. *Co. Lit.* 50. But a lord at will, of a copyhold manor, cannot licence a copyhold tenant to make a lease for years; though he may grant a copyhold for life according to the custom: if a lord for life gives licence to a tenant to make a lease for years, this lease shall continue no longer than the life of the lord. 2 *Danv. Abr.* 202.

If he that is lord of the manor for the time being admits one to a copyhold, he dispenses with all precedent forfeitures; not only as to himself, but also as to him in reversion; for such grant and admittance amount to an entry for the forfeiture, and a new grant; but a lord by tort cannot by such admittance purge the forfeiture as to the rightful lord. 1 *Lev.* 26. Grants by copy of court-roll by infants, &c. will be binding: and if a guardian in socage grants a copyhold in reversion, according to the custom of the manor, this shall be a good grant; 2 *Rel. Abr.* 41. If baron and feme seised of a manor in right of the feme grant a copyhold, this shall bind the feme notwithstanding her coverture. 4 *Rep.* 23. An executor may make grants of copyhold estates, according to the custom of the manor, where a devise is made that the executor shall grant copies for payment of debts. 2 *Danv.* 178.

A manor may be held by copy of court-roll, and the lord of such manor may grant copies; and such customary manor may pass by surrender and admittance, &c. A customary manor may be holden of another manor, and such customary lord may grant copies and hold courts: but a copyholder, lord of such a manor, cannot hold a court baron to have forfeitures, and hold pleas in a writ of right, &c. 1 *Nelf. Abr.* 524.

All grants of copyhold estates are to be according to the custom of the manor; and rents and services customary must be reserved; for what acts of the lord in granting copyholds are not confirmed by custom, but only strengthened by the power and interest of the lord, have no longer

duration than the lord's estate continueth. *Comp. Court-Keeper* 421. If by the custom, a copyhold may be granted for three lives, and the lord grants it to one for life, remainder to such woman as he shall marry, and to the first son of his body; both these remainders are void: and a remainder limited upon a void estate in the creation, will be likewise void. But if by custom it is demisable in fee, a surrender may be to the use of one for life, remainder in tail, remainder in fee. 2 *Danv. Abr.* 203: *Cro. Eliz.* 373. It is held, where by the custom of a manor the lord can grant a copyhold for three lives, he may grant it for an estate coming within the intent of the custom; as to A. B. and his assigns, to hold to him and his assigns for the lives of three others, and of the longer liver of them successively, &c. 2 *Ld. Raym.* 994, 1000.

The lord of a manor may himself grant a copyhold estate at any place out of the manor; but the steward cannot grant a copyhold at a court held out of the manor. 4 *Rep.* 26. Though the steward may take surrenders out of the manor, as well as the lord. 2 *Danv. Abr.* 181. A steward is in place of the lord, and without a command to the contrary may grant lands by copy, &c. But if a lord command a steward that he shall not grant such a copy, if he grants it, it is void: and if the steward diminishes the ancient rents and services, the grant will be void. *Cro. Eliz.* 699.

Things of necessity done by a steward, who is but in reputed authority, are good if they come in by presentment of the jury; as the admittance of an heir upon presentment, &c. Though acts voluntary, as grants of copyhold, &c. are not good by such stewards. *Cro. Eliz.* 699. If an under-steward hold a court without any disturbance of the lord of the manor, though he hath no patent nor deputation to hold it, yet it is good; because the tenants are not to examine what authority he hath, nor is he bound to give them an account of it. *Moo.* 110. A deputy steward may authorise another to do a particular act; but cannot make a deputy to act in general. 2 *Salk.* 95.

In admittances, in court upon voluntary grants, the lord is proprietor; in admittances upon surrenders, the lord is not proprietor of the lands, but only a necessary instrument of conveyance; and in admittances by descent the lord is a mere instrument, not being necessary to strengthen the heir's title, but only to give the lord his fine. 4 *Rep.* 21, 22. The heir of a copyholder may enter, and bring trespass, before admittance, being in by descent; and he may surrender before admittance: but he is not compleat tenant to be sworn of the homage, or to maintain a plaint in the lord's court. And if the heir do not come in and be admitted, on the death of his ancestor, where the same is presented and proclamation made, he may forfeit his estate. *Cro. El.* 90: 4 *Rep.* 22, 27.

On surrender of a copyhold, the surrenderor or person making the same, continues tenant till the admittance of the surrenderee; and the surrenderee may not enter upon the lands, or surrender before admittance, for he hath no estate till then; though it is otherwise of the heir by descent, who is in by course of law, and the custom calls the possession upon him. *Comp. Court-Keep.* 436. A surrender is not of any effect until admittance, and yet the surrenderee cannot be defrauded of the benefit of the surrender; for the surrenderor cannot pass away the land to another or make it subject to any other incumbrances; and if the

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lord refuse the surrenderee admittance, he is compellable in *Chancery. Comp. Cop. sect. 39.* A grantee hath no interest vested in him till he is admitted: but admittance of a copyholder for life is an admittance of him in remainder, for they are but one estate; and the remainderman may, after the death of tenant for life, surrender without admittance. 3 *Lev.* 308: *Cro. El.* 504.

Every admittance upon a descent or surrender may be pleaded as a grant; and a person may allege the admittance of his ancestor as a grant; and shew the descent to him, and that he entered, &c. But he cannot plead that his father was seised in fee, &c. and that he died seised, and the land descended to him. 2 *Danv.* 208. Admittance on surrenders must, in all respects, agree with the surrender; the lord having only a customary power to admit *secundum formam effectum sursum redditum.* 4 *Rep.* 26. If any are admitted otherwise, they shall be seised according to the surrender: yet where a voluntary surrender is general, without saying to whose use, a subsequent admittance may explain it. 2 *Danv.* 187, 204.

In voluntary admittances, if the lord admits any one contrary to custom, it shall not bind his heir or successor. If a copyholder surrender to the use of another, and after the lord, having knowledge of it, accepts the rent of such other out of court, this is an admittance in law: and any act, implying the consent of the lord to the surrender, shall be adjudged a good admittance. 1 *Nelf. Abr.* 493. If the steward accept a fine of a copyholder, it amounts to an admittance. 2 *Danv.* 189. But delivering a copy is no admittance.

Where a widow's estate is created by custom, that shall be an admittance in law: and her estate arising out of that of her husband's, his admittance is the admittance of her. *Hut.* 18. And she who hath a widow's estate by the custom of the manor, upon the death of her husband, need not pay a fine to the lord for the estate; for this is only a branch of the husband's. *Hob.* 181. When a custom is, that the wife of every copyholder for life shall have her free bench, after the death of the baron, the law casts the estate upon the wife, so that she shall have it before admittance, &c. 2 *Danv.* 184. But if a wife is entitled to her free bench by custom, and a copyholder in fee surrenders to the use of another, and then dies; it has been adjudged, that the surrenderee should have the land, and not the wife; because the wife's title doth not commence till after the death of her husband; but the plaintiff's title begins with the surrender, and the admittance relates to that. 1 *Inst.* 59: 1 *Salk.* 185.

The widow's title commenceth not by the marriage; if it did, then the husband could do nothing in his lifetime to prejudice it: but it is plain he may alien or extinguish his right, so as to bind the estate of the widow: the free bench grows out of the estate of the husband; and it is his dying seised which gives the widow a title, and as the husband has a defeasible estate, so the wife may have her free-bench defeated. 4 *Mal. Rep.* 452, 453.

Admittances are never by attorney, for the tenant ought to do fealty: though surrenders are oftentimes by attorney. 2 *Danv.* 189. A copyholder in fee may surrender in court, by letter of attorney: but not out of court, without a special custom. 9 *Rep.* 75, 76. If one cannot come into court to surrender in person, the lord may appoint a special steward to go to him, and take the surrender. 1 *Lon.* 36. A copyholder being in Ireland,

the steward of a manor here made a commission to one to receive a surrender from him there, and it was held good. 2 *Danv.* 181.

The intent of surrenders is, that the lord may not be a stranger to his tenant, and the alteration of the estate. As a Copyholder cannot transfer his estate to a stranger by any other conveyance than surrender; so if one would exchange a copyhold with another, both must surrender to each other's use, and the lord admit accordingly: and if any person would devise a copyhold estate, he cannot do it by his will: but he must surrender to the use of his last will and testament, and in his will declare his intent. *Comp. Cop. sect. 39.* Also where a copyholder surrenders to the use of his will, the lands do not pass by the will, but by the surrender; the will being only declaratory of the uses of the surrender. 1 *Bulst.* 200.

In case of a will, the Chancery will supply the defect of a surrender, in the behalf of children, if not to disinherit the eldest son; and for the benefit of creditors, where a copyhold estate is charged by will with the payment of debts, though there is no surrender to those uses, it will be good in equity. 4 *Rep.* 25: 1 *Salk.* 187: 3 *Salk.* 84. Yet it is held, that equity shall not supply the want of such surrender in favour of a grandchild; or bastard, who is not considered as a child; or a wife against the heir; nor in behalf of legatees: but where the surrender is refused, a will of copyhold may be sufficient without it. *Abr. Cas. Fq.* 122, 124.

There is no doubt but that the Courts of Equity will supply the surrender of a copyhold. It is said however to be now settled that, unless there be a valuable consideration, they will not interpose for such purpose, but in favour of three descriptions of persons only; Creditors, Wife and Children; and even in such cases they proceed subject to several restrictions. For though they will supply the surrender of copyholds in favour of creditors, if the other estates, liable to the payment of debts, are not sufficient; (*Drake v. Robinson*, 1 *P. Wms.* 444: *Bixby v. Ely*, 2 *Bro. C.R.* 325:) Yet if there be both freehold and copyhold estates devised for the payment of debts, and the freehold be sufficient for such purpose, they will not supply the surrender of the copyhold. *Rastor v. Stock*, 1 *Eq. Ab.* 123, 4: *Hillier v. Fantant*, *Exc.* *Trin.* 1791; and see 3 *P. Wms.* 98. *in n.*

In supplying a surrender in favour of a wife, or younger children, courts of Equity, as has been already observed, respect the claims of the heir at law; and therefore will not interpose, if the heir would thereby be left unprotected. *Kettle v. Townshend*, 1 *Salk.* 187: *Hawkins v. Leigh*, 1 *Atk.* 387.—But the heir whose claim is to be thus respected, must be one for whom the testator was under as strong a moral obligation to provide, as for the devisee. *Chapman v. Gibson*, 3 *Bro. C.R.* 229. And if the supplying of the surrender would not disinherit such heir, courts of Equity will supply it in favour of the wife, though she be otherwise provided for. *Smith v. Baker*, 1 *Atk.* 386.—But it was held in *Ross v. Ross*, 1 *Eq. Ab.* 124, that they ought not to supply a surrender for younger children against an elder, to make them in a better situation than the elder.—Yet see *Cook v. Arnham*, 3 *P. Wms.* 283: *Forrester* 35.

In those cases in which the Court will supply a surrender, it is to be understood that the effect of the surrender is bounded by the motive which induces the court

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to supply it; therefore where the testator devised a copyhold to trustees, in trust, to sell and to pay the interest of the produce to the wife during her life, and after her death to a stranger; the Court, though it supplied the surrender in favour of the wife, decreed that the customary heir should be at liberty to apply after her death. *Marston v. Gowen*, 3 Bro. C. R. 170.—Courts of Equity will in supplying the surrender of a copyhold estate in favour of a purchaser for a valuable consideration, go still further; for they will not only supply it against the party himself and his heir; (*Barker v. Hill*, 2 Ch. Rep. 113;) but will also supply it against his assignees and creditors, if he become a bankrupt. *Taylor v. Wheeler*, 2 Vern. 565.

In the case of copyholds devised to charitable uses, the want of surrender in such cases is made good, not by the discretion of the court, but by the strong and general words of Stat. 43 Eliz. c. 4. *Attorney General v. Burdett*, 2 Vern. 755: *Duke's Char. Uses* 84: *Attorney General v. Andrews*, 1 Ves. 225.

A *cestui que trust* may devise an interest in land, &c. without surrender; and if copyhold lands are in mortgage, the mortgagor can dispose of the equity of redemption by will, without any surrender made; because he hath at that time no estate in the land, whereof to make a surrender. *Preced. Canc.* 320, 322. One jointenant may surrender his part in the lands to the use of his will, &c. And where there are two jointenants of a copyhold in fee, if one of them make a surrender to the use of his will, and die, and the devisee is admitted, the surrender and admittance shall bind the survivor. 2 Cro. 100.

A surrender may not be to commence *in futuro*; as after the death of the surrenderor, &c. though copyholds may be surrendered to the use of a man's will. *March* 177. A copyholder cannot surrender an estate absolutely to another, and leave a particular estate in himself, though he may surrender to uses, &c. A copyholder surrendered to the use of his wife and younger son, without intentioning what estate: and adjudged, that they had an estate for life 4 Rep. 29. If a man having bought a copyhold to himself, his wife and daughter, and their heirs, afterwards surrenders it to another and his heirs, for securing a sum of money; after his death, the surrenderee shall not be entitled to the land, it being an advancement for the wife and daughter. 2 Vern. 120.

A feme covert may receive a copyhold estate, by surrender from her husband, because she comes not in immediately by him, but by the admittance of the lord, according to the surrender. 4 Rep. 29 b. A feme covert is to be secretly examined by the steward, on her surrendering her estate. Co. Lit. 59. An infant surrendered his copyhold, and afterwards entered at full age, and it was held lawful, though the surrenderee was admitted. *Atton* 597.

By the general custom of copyhold estates, copyholders may surrender in court, and need not allege any particular custom to warrant it: but where they surrender out of court, into the hands of the lord by customary tenants, &c. custom must be pleaded. 9 Rep. 75: 1 Rol. Abr. 500. Surrenders out of court are to be presented at the next court; for it is not an effectual surrender till presented in court. Where a copyholder in fee surrenders out of court, and dies before it is presented, yet the sur-

render, being presented at the next court, will stand good, and *cestui que use* shall be admitted: so if *cestui que use* dies before it is presented, his heir shall be admitted. But if the surrender be not presented at the next court, it is void. Co. Lit. 62: 2 Danv. 188. If the tenants by whose hands the surrender was made shall die, and this upon proof is presented in court, it is well enough. 4 Rep. 29.

Tenants refusing to make presentment, are compellable in the lord's court. And by surrender of copyhold lands to the use of a mortgagee, the lands are bound in equity, though the surrender be not presented at the next court. 2 Salk. 449. When a copyholder surrenders upon condition, and this is presented absolutely, the presentment is void; but where a conditional surrender is presented, and the steward omits entering the condition, on proof thereof the condition shall not be avoided; but the rolls shall be amended 4 Rep. 25. A copyholder may surrender to the use of another, reserving rent with a condition of re entry for non payment, and in default of payment may re-enter. *lord* 21.

If a copyholder of inheritance takes a lease for years of his copyhold estate, it is a surrender in law of his copyhold. Where there is a tenant for life, and remainder in fee, he in remainder may surrender his estate, if there be no custom to the contrary. 3 Leon. 329. If a surrender is made with remainders over, care lies, for him in remainder against a copyholder for life, who commits waste, &c. 3 Lev. 128. A surrenderee of a reversion of a copyhold is an assignee within the equity of the Stat. 32 H. 8. c. 34, to bring action of debt or covenant against lessee, &c. 1 Salk. 185. A copyholder in fee surrenders to the use of one for life, with remainder to another for life, remainder to another in fee; as the particular estates and remainders make but one estate, there is but one fine due to the lord. 2 Danv. 191.

The *fruits* and *appendages* of a copyhold tenure, that it hath in common with free tenures are *Fealty*, *Services*, (as well in rents as otherwise,) *Reliefs*, and *Incumbents*. The two latter belong only to copyholds of inheritance: the former to those for life also. But besides these, Copyholds have also *Heriots*, *Wardship* and *Fines*. Heriots are incident to both species of copyhold; but wardship and fines to those of inheritance only.—Wardship in copyhold estates partakes both of that in chivalry, and that in socage. Like that in chivalry the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead: and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of *primer seisin* due on the death of each tenant; others are mere fines for the alienation of the lands. In some manors only one of these sorts can be demanded; in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but even when arbitrary, the courts of law, in favour of the liberty of copyholders have tied them down to be *reasonable* in their extent: otherwise they might amount to a disinheritance of the estate. No fine therefore is allowed to be taken upon descents or alienations (unless in particular circumstances) of more than two years' improved value of the estate. 2 Ch. Rep. 134. See 2 Comm. 97.

Fines are paid to the lord on admittances; and may be due on every change of the estate by lord or tenant: The lord may have an action of debt for his fine, or may distrain by custom. 4 *Rep.* 27: 13 *Pep.* 2.

An *heriot* is a duty to the lord, tendered at the death of the tenant, or on a surrender and alienation of an estate: and is the best beast or goods, found in the possession of the tenant deceased, or otherwise, according to custom. And for heriots, reliefs, &c. the lord may distrain, or bring action of debt. 1 *And. 96.* See title *Heriot*.

Relief is a sum of money which every copyholder in fee, or freeholder of a manor pays to the lord, on the death of his ancestor; and is generally a year's profits of his land. See titles *Tenure*; *Relief*.

Services signify any duty whatsoever accruing unto the lord from tenants; and are not only annual, and accidental; but corporal, as homage, fealty, &c. *Corp. Court Keep.* 7, 8, 9, &c.

Copyholds escheat, and are forfeited in many cases; *escheat* of a copyhold estate, is either where the lands fall into the hands of the lord for want of an heir to inherit them; or where the copyholder commits felony, &c. But before the lord can enter on an estate escheated, the *homage jury ought to present it*. Forfeitures proceeding from treasons, felonies, alienation by deed, &c. a *presentment* of them must be also made in court, that the lord may have notice of them. A copyholder refusing to do suit of court, being sufficiently warned, is a forfeiture of his estate; unless he be prevented by sickness, inundations of water, &c. If the lord demandeth his rent, and the copyholder being present, denies to pay it at the time required, this is a forfeiture; but if the tenant be not upon the ground when demanded, the lord must continue his demand upon the land, so that by continual denial in law, it may amount to a denial in fact: though it is said there must be a demand from the person of the copyholder, and a wilful denial, to make a forfeiture.

If a Copyholder do not perform the services due to his lord; or if he sue a replevin against the lord, upon the lord's lawful distress for his rent or services, these are forfeitures. If the lord upon admittance of a copyholder, the fine by the custom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand, this is a forfeiture.

Upon the descent of any copyhold of inheritance, the heir by the general custom is tied, upon three solemn proclamations, made at three several courts, to come in and be admitted to his copyhold; or if he faileth therein, this failure worketh a forfeiture; but if an infant come not in to be admitted at three proclamations, it is no forfeiture: so of one beyond sea, &c.

An idiot, lunatick, &c. though able to take copyholds, they yet are unable to forfeit them: and in respect to others, forfeitures may be mitigated by custom, and the copyholder only amerced. By *Stat. 9 Geo. 1. c. 23*, On default of infants and feme coverts appearing to be admitted tenants to copyhold lands, the lord or his steward may name a person to be guardian or attorney for them, and by such guardian, &c. admit them: and if the usual fine thereon be not paid in three months, being demanded in writing, the lord may enter on the copyhold, receive the rents, &c. till the fine is paid with all charges. And by this statute no infant or feme covert shall forfeit

any copyhold lands for their neglect to come to court to be admitted, or refusal to pay any fine.

The general custom of copyholds allows a copyholder to make a lease for one year of his copyhold estate, and no more, without incurring a forfeiture: but a copyholder may make a lease for one year, and covenant with the lessee, that, after the end of that year, he shall have the same for another year, and so from year to year during the space of seven years, &c. and be no forfeiture. *Cro. Jac.* 300. For this does not amount to a lease, but is only a covenant, subjecting the covenantor to an action for damages. Though a copyholder may not make a lease to hold for one year, and so from year to year during his life, excepting one day yearly, &c. which will be a forfeiture, bring a mere evasion. But a licence to lease may be had. A woman who was a copyholder in fee married, her husband made a lease for years, not warranted by the custom, which was a forfeiture; the husband died; and adjudged that the lord shall not take advantage of this forfeiture after his death, but the wife shall enjoy the estate. *Cro. Car.* 7. And see 4 *Rep.* 21 to 25, &c.

Livery upon any conveyance of a copyhold estate amounts to a forfeiture. And yet if a copyholder for life surrender to another in fee, this is no forfeiture; for it passeth by the surrender to the lord, and not by livery.

If copyholder for life cut down timber-trees, it is a forfeiture of his copyhold; though such copyholder may take house-bote, hedge bote, and plough-bote, upon his copyhold, of common right, as a thing incident to the grant; if he be not restrained by custom, to take them by the assignment of the lord or his bailiff. Where a copyholder for life sells timber-trees, the lord may take them, and the estate is forfeited; but if under-lessee for years of a copyholder cut down timber, this shall not be a forfeiture of the copyhold estate, but the lord is put to his action on the case against the lessee. 1 *Bull.* 150: *Style* 233. A copyhold granted to two for their lives successively, where the custom of the manor is, that they shall not fell trees; if the first copyholder for life cut down trees, &c. it is not only a forfeiture of his own estate for life, but of him in remainder. *Moor* 49.

In other cases, a copyholder for life, committing waste, shall not forfeit the estate of him in remainder. *Cro. Eliz.* 880. If copyholder for life, where the remainder is over for life, commits a forfeiture by waste, &c. he in remainder shall not enter, but the lord. 2 *Danv.* 198. A copyholder committing waste voluntary, or permissive, this is a forfeiture: voluntary, as if he pull down any house, though built by himself; lop trees, and sell them, plough up meadow, whereby the ground is made worse, &c. Permissive, if he suffer the roof of the house to let in rain, or the house to fall; or if he permit his meadow ground to be surrounded with water, so that it becomes marshy, or his arable land to be thus surrounded and become unprofitable, &c. these and the like are forfeitures. See 2 *Danv. Abr.* 192, 193, 196, &c.: 1 *Nelf. Abr.* 509, 510, &c.

If a feme copyholder for life takes husband, who commits waste and dies, the estate of the feme is forfeited: Though not if a stranger commit the waste, without the assent of the husband. 4 *Rep.* 37. *Sed. qu.* the difference between

between copyholder for life, and copyholder in fee, in this respect; unless waste is distinguished from other forfeitures?

Most forfeitures are caused by acts contrary to the tenure: But a succeeding lord of a manor, shall not have any advantage of a forfeiture, by waste done by a copyholder in the time of his predecessor. 2 *Sid.* 8. And if a present lord doth any thing whereby he acknowledges the person to be his tenant after forfeiture, this acknowledgment is a confirmation of his estate, *Coke's Cop.* 61.

The court of Chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given where the waste is committed, through ignorance; or where the waste is merely permissive, and there has not been an obstinate perseverance, in neglecting to repair after notice. 1 *C. C.* 95: *Pre. Ch.* 568. Another instance in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. *1oth.* 237. But in this latter case it may be doubted whether the waste is a forfeiture. See *Mo* 49.

Also, When the estate is forfeited for non-payment of rent, a fine, or such things, where a value may be set on them, and compensation made the lord on any laches of time, the tenant may be relieved; for there the land is but in nature of a security for those sums. *Preced. Chan.* 569, 572.

In case of making a lease for years, without licence, and not warranted by custom, found to be a forfeiture at law, equity has nothing to do with it, to give any remedy; it is like to a feoffment made, or fine levied by particular tenants, against which there can be no relief. *Ibid.* 574. Where copyhold lands are purchased in fee, in trust for an alien, the lands are not seizable by the king; nor is the trust forfeited to him; for if the lands were forfeited as purchased for such alien, then the lord of the manor would lose his fines and services, &c. *Hud.* 436.

By *Stat.* 10 *Geo.* 2. c. 26, Copyhold estates of poor prisoners, may be assigned to creditors, and the assignees admitted by the lord, on paying the usual fine due on a surrender, &c. and see *Stat.* 1 *Geo.* 3. c. 17 § 14, as to *Infelents*.

By *Stat.* 31 *Geo.* 2. c. 14. § 1, already mentioned, copyholders are not to vote for Knights of the Shire.—The admission of infants and feme coverts entitled by descent, or surrender to the use of a will is regulated by *Stat.* 9 *Geo.* 1. c. 29.—And the *Stat.* 5 *Geo.* 3. c. 46, (explained by 6 *Geo.* 3. c. 49.) compels the steward to receive the stamp duty on admission, &c. at the same time he receives the fees of court.

See further as to Copyholds in general *Com. Dig.* title *Copyhold*. See *Comp. Court Keeper*, throughout *Nelson's Lex Mancion*, 2d edit. *Coke's Complicat Copyholder*. And 4 *Rep.* 21 to 25, &c.

COPY-RIGHT. The exclusive right of printing and publishing copies of any literary performance; extended also to music, engravings, &c. See tit. *Literary Property*.

CORAGE, *Coragium*. A kind of extraordinary imposition, growing upon some unusual occasion, and seems to be of certain measures of corn: for *corn tithe* is a measure of wheat. See *Barb. lib.* 2. c. 116: *Numb.* 6. *Numb.* 8. Blount.

CORACLE, A small boat used by fishermen on some parts of the river *Severn*, made of an oval form, of split fallow twigs interwoven, and on that part next the water covered with leather, in which one man, being seated in the middle, will row himself swiftly with one hand, while with the other he manages his net or fish-tackle: and coming off the water, he will take the light vessel on his back, and carry it home. This boat is of the same nature as the Indian *canoes*: though not of the same form, or employed to the like use. But *quere* if not long out of use?

CORAM NON JUDICE, Is when a cause is brought and determined in a court whereof the judges have not any jurisdiction; then it is said to be *coram non judice*, and void. 2 *Cro.* 351.

CORBEL STONES, Are stones wherein images stand: the old *English corbel*, was properly a nich in the wall of a church, or other structure in which an image was placed for ornament or superstition; and the *corbel* stones were the smooth polished stones, laid for the front and outside of the *corbels* or niches. The niches remain on the outside of very many churches and steeples in *England*, though the little statues and reliques are most of them broken down. *Paroch. Antiq.* 575.

CORD OF WOOD, Is a quantity of wood eight feet long, four feet broad, and four feet high, ordained by the statute.

CORDAGE, *Fi.* Is a general appellation for all stuff to make ropes, and for all kind of ropes belonging to the rigging of a ship: it is mentioned in 15 *Car.* 2. c. 13. and see *Stat.* 25 *Geo.* 3. c. 56, against frauds in the manufacture of cordage for shipping.

CORDINER, See *Cordwainer*.

CORDUBANARIUS, A Cord-wainer; A shoemaker. *Corbel.* from the *Fr. Corduaner*, a shoemaker, we call him vulgarly a *Cordwainer*; and to this word is used in divers statutes; as 3 *H.* 8. c. 10: 5 *H.* 8. c. 7: 27 *H.* 8. c. 14: 5 and 6 *Ed.* 6. c. 13: 1 *Jac.* 1. c. 22, &c. By which last statutes the Masters and Wardens of the *Cordwainers' Company* in *London*, &c. are to appoint searchers and triers of leather; and leather is not to be sold before searched and sealed, &c.

CORETES, from the *Brit. Cored*, pools, ponds, &c. —*Et cum suis piscibus et coretibz anguillarum et cum toto territorio suo.* Du Fresne.

CORIUM FORISFACERE, Was where a person was condemned to be whipped; which was anciently the punishment of a servant. *Cor in perire*, the same: and *corium redimere* is to compound for a whipping.

CORN. As to the general provisions relative to the importation and exportation of *Corn*, See title *Navigat. et Affs.*—And as to the exportation of *Corn* to enemies in time of war. See *Stat.* 33 *Geo.* 3. c. 27; and tit. *Trafscn.*

No *corn* was formerly to be exported, without the King's licence: except for the victualling of ships, and in some special cases, from some ports only: and none might by *Stat.* 5 *Eliz.* c. 12. buy *corn* to sell again, without licence from justices. But now *corn*, as wheat, barley, oats, &c. may be exported to States in amity when they exceed not certain prices, regulated by many statutes: and the exporters of it shall pay no duty or custom, but be intitled to bounty-money or a certain allowance for exportation.

By *Stat.* 11 *Geo.* 2. c. 22, If any person use violence on another person to hinder him from buying or carrying off

to any sea-port town to be transported, &c. he shall be imprisoned by two justices, for not more than exceeding three months, and be publicly whipped, &c. and committing a second offence, or destroying granaries, or corn in any boat or vessel, to be adjudged a felon, and transported for seven years: and the hundred to make good the damage, if not above 100 l. as in cases of robbery; where an offender is not apprehended and convicted within twelve months; but notice must be given to the constable in two days.—*Stat. 24 Geo. 2. c. 56*, ordains the bounty, on ground corn to be regulated by weight; and *Stat. 26 Geo. 2. c. 15*, appoints interest to be paid on debentures for the bounty of corn exported. A corn-market established at *Westminster* by *Stat. 31 Geo. 2. c. 25. § 1*. Forms of the certificates of prices of grain, to regulate the price of bread are settled by *Stat. 31 Geo. 2. c. 29*. See title *Erard*.

The last acts now in force to regulate the returns of the prices of grain are *Stats. 31 Geo. 3. c. 30: 33 Geo. 3. c. 65*, by the former of which, *Stats. 1 Jac. 2. c. 19: 1 W. & M. c. 12: 5 Geo. 2. c. 12: 10 Geo. 3. c. 39: 13 Geo. 3. c. 43: 21 Geo. 3. c. 50. & 29 Geo. 3. c. 58*, are all repealed; as also every provision in any other act for regulating the importation of wheat, &c. except such as relate to the making of malt for exportation and the exportation thereof.—So much of *Stat. 15 Car. 2. c. 7*, as prohibits the buying of corn to sell again, and the laying it up in granaries is also repealed.

By these *Statutes 31 Geo. 3. c. 30: 33 Geo. 3. c. 65*, bounties are granted on exportation at certain prices, and the exportation prohibited when at higher prices,—the quantity of corn to be exported to foreign countries is settled.—The maritime counties of *England* are divided into districts.—The exportation of corn to be regulated in *London, Kent, Essex and Suffolk* by the prices at the Corn-Exchange, the proprietors of which are to appoint an Inspector of corn returns, to whom weekly returns are to be made by the factors and he is to make up weekly accounts, and transmit the average price to the Receiver of the returns, to be transmitted to the officers of the customs, and inserted in the *London Gazette*—The exportation in other districts, and in *Scotland*, to be regulated by the prices at different appointed places, for which mayors justices, &c. are to elect Inspectors—Declarations are to be truly made by factors of the corn sold by them:—Orders of council may be made to regulate importation or exportation, from time to time. Such orders to be laid before parliament.—See also *Stat. 32 Geo. 3. c. 50*, and *33 Geo. 3. c. 3*, as to the exportation of wheat, and as to transshipping of corn brought coastwise.

[The above is a short abstract of the law on a very fluctuating subject; at the time this part of the work was passing through the press. *January 1, 94*]

CORN RENT, *Cornagium*, from the Lat. *Cornu* a horn] A kind of tenure in grand serfdom; the service of which was to blow a horn when any invasion of the *Scots* was perceived, and by this tenure many persons held their lands Northward, about the wall commonly called the *Picts Wall*. *Cumb. Britan. 60*. This old service of horn blowing was afterwards paid in money, and the sheriffs accounted for it under the title of *Cornagium*.—*Sir E. Coke* in his first Institute, pag. 107. says *cornage* is also called in the old books *Horngeld*; but they seem to differ much. See *Ho. negeld*.

CORNARE, To blow in the horn.—*Mat. Paris p. 181*.

CORN RENTS, By *Stat. 18 El. c. 6*, on college leases, one third of the old rent to be reserved in wheat or malt, &c. The invention of Lord Treasurer *Burleigh*, and Sir *Tho. Smith*, who observed the value of money to sink much, and the price of provisions to rise greatly, on our communication with the *Indies*; and therefore devised this method for upholding the revenues of the colleges. *2 Comm. 322*.

CORNWALL, A royal duchy belonging to the Prince of *Wales* abounding with mines, and having *Stannary* courts, &c. It yields a great revenue to the Prince. How leases are to be made of lands in the duchy of *Cornwall*, for three lives, or thirty one years, under the ancient rents, &c. See *Stat. 13 Car. 2. c. 4. and 12 Ann. c. 22: 24 Geo. 2. c. 50: and 1 Geo. 3. c. 11*. Affizes for *Cornwall* not confined to *Launceston*. *1 Geo. 1. c. 45*. Leases by Prince of *Wales* of lands in *Cornwall* where good. *10 Geo. 2. c. 29. sect. 9, 10 & 11*. What leases and grants by the king shall be good *33 Geo. 2. c. 10*. See title *King*.

CORODY, *Corodum*.] Signifies a sum of money or allowance of meat, drink, and clothing due to the King from an abbey, or other house of religion, whereof he was founder towards the sustentation of such a one of his servants as he thought fit to bestow it upon. The difference between a *corody* and a *pension* seems to be, that a *corody* was allowed towards the maintenance of any of the King's servants in an abbey: a *pension* is given to one of the King's chaplains, for his better maintenance, till he may be provided of a benefice: And as to both these, See *Fitz. Nat. Br. fol. 250*; where are set down all the *Corodies* and pensions that our abbies, when they were standing were obliged to pay to the King.

Corody is ancient in our laws: And it is mentioned in *Staundf. Prærog. 44*. And by the *Stat. of Wilm. 2. c. 25*, it is ordained, that an assize shall lie for a *corody*. It is also apparent by *Stat. 34 & 35 H. 8. cap. 26*, that *corodies* belonged sometimes to bishops, and noblemen, from monasteries: And in the *New Terms of Law*, it is said that a *corody* may be due to a common person, by grant from one to another, or of common right to him that is a founder of a religious house, not holden in *Frank-almoigne*; for that tenure was a discharge of all *corodies* in itself: By this book it likewise appears, that a *corody* is either certain or uncertain, and may be not only for life or years, but in fee. *Term. d. Ley: 2 Inst. 630*. See the *Monasticon Anglicanum*, for the form of a grant of a *corody*.

CORODIO HABENDO, A writ to exact a *corody* of an abbey or religious house. *Reg. Orig. 264*.

CORONA MALA, or MALA CORONA, The clergy who abused their character, were formerly so called. *Blount*.

CORONARE FILIUM, to make one's son a priest. Anciently lords of manors, whose tenants held by *villengage*, did prohibit them *coronare filios*, lest such lords should lose a villein by their entering into holy orders: For ordination changed their condition, and gave them liberty, to the prejudice of the lord, who could before claim them as his *natives* or *born servants*.—*Homo Coronatus* was one who had received the first tonsure, as preparatory to superior orders; and the tonsure was in form of a coronet, or crown of thorns. *Cowel*.

CORONER I.—II.

CORONER. CORONATOR, *d. Corona.* An ancient officer at the Common law. Mention is made of him in King *Athelstan's* charter to *Beverly*, Anno 925.

He is called Coroner, *Coronator*—because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned, 2 *Inft.* 31: 4 *Inft.* 271. And in this light the Lord Chief Justice of the King's Bench is the principal Coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm. 4 *Rep.* 57. But there are also particular coroners for every county of *England*; usually four, but sometimes six, and sometimes fewer. *F. N. B.* 163. 'This office is of equal antiquity with that of sheriff, and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. *Mirror* c. 1, § 3.

I. His Election; and Removal.

II. 1. His Power and Duty; 2. His Fees for the Execution of his Duty; and 3. His Punishment for the Breach of it.

I. HE IS STILL CHOSEN by all the freeholders in the county court; and by the policy of our antient laws, the sheriff and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people. 2 *Inft.* § 58. And as verderors of the forest still are, whose business it is to stand between the Prerogative and the Subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo* *F. N. B.* 163. in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" See *post.* And, in order to effect this the more surely, it was enacted by *Stat. Westm.* 1, 3 *Ed.* 1. c. 10, that none but lawful and discreet knights should be chosen; and there was an instance in the 5 *Ed.* III. of a man being removed from this office because he was only a merchant. 2 *Inft.* 32. But it seems it is now sufficient if a man hath lands enough to be made a knight; (which by the *statutum de militibus*, 1 *Ed.* II. were lands to the amount of 20 *l. per annum*;) whether he be really knighted or not, *F. N. B.* 163, 4. For the Coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour. *Ibid.* And if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer. *Mirror*, c. 1. § 3: 2 *Inft.* 175. Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands; so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid *Stat. Westm.* 1, expressly forbidden to take a reward, under pain of great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance. See *post.* II. 2.

By *Stat.* 28 *Ed.* 3. c. 6. it is enacted, "That all coroners of the counties shall be chosen in the full counties of the most mete and lawful people that shall be found in the same counties, to execute the said office; saved always to the King, and other lords, who ought to make such coroners, their seignories and franchises."

VOL. I.

The oaths of allegiance, supremacy, and abjuratioⁿ, are to be taken, and then the oaths of office; when the coroner is elected, and sworn into his office, he is to remember the qualification^s, and in due time, to take the sacrament, and oaths of abjuration. *Impey's Sheriff.*

In the case of election by freeholders, where the majority cannot be determined by the view, upon the holding up of hands, the Sheriff upon the demand of a poll to be taken of the numbers, ought not to deny it; nor ought he to deny a scrutiny into the polls, when properly required, upon a suggestion that non-freeholders have polled: for how otherwise can the majority of freeholders be ascertained? It is an election at common law, and this scrutiny is as incident to enquire into the polls, as numbering of the polls is incident to the holding up of hands; nor can the just majority be otherwise duly discovered or declared. *Freem.* 17: 2 *Vent.* 25: 1 *Vent.* 206: 2 *Lev.* 50.

The Coroner is chosen for life: but may be removed, by either being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the King's writ *de coronatore evocando*, for a cause to be therein assigned; as that he is engaged in other business, is incapacitated by years, or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. *F. N. B.* 163, 4: See *post.* And by *Stat.* 25 *Geo.* II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal. See *post.* II. 3.

There are Special Coroners, within divers liberties, as well as the ordinary officers in every county; as the Coroner of the *Verge*, which is a certain compass about the King's court; who is likewise called Coroner of the King's household. *Crompt. Jurif.* 102.

The King's coroner shall execute his office within the verge. *Stat.* 32 *H.* 8. c. 20. *sect.* 7. Some corporations and colleges are licensed by charter to appoint their coroners within their own precincts. 4 *Inft.* 271. For what arises on the high sea, we read of coroners appointed by the King or his admiral. 2 *Hale's Hist. P. C.* 53. See *post.* Coroner of the King's Household.

It is said Coroners are of three kinds. 1, By virtue of an office. 2, By charter or commission. 3, By election.

1. The Chief Justice of *K. B.*—2. The Lord Mayor of *London* is by charter 18 *E.* 1V. Coroner of *London*. See *post.*—The Bishop of *Ely* also hath power to make coroners, by a charter of *Hen.* VII: and there are coroners of particular lords of franchises and liberties who by charter have power to create their own coroners, or to be coroners themselves, especially the jurisdiction of the Admiralty, as well as that of the verge above referred to.—3. The general coroners of counties.—See 1 *Hale* 52: 4 *Rep.* 57: 1 *Comm.* 384.

The Coroner of *Portsmouth* has jurisdiction on board a man of war lying in *Portsmouth* harbour: for though the Admiralty have a coroner of their own, he never takes inquisitions of *jelo de jci.* *Sta.* 1097: *Andr.* 231.

II. THE OFFICE OF CORONERS especially concerns the plea of the crown; and they are conservators of the peace in the county where generally elected. Their authority is judicial and ministerial: Judicial, where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And to inquire of lands and goods, and escapes of murderers, treasure-trove, wreck of the sea, deodands, &c. The ministerial power

R r

CORONER II.

power is where the coroners execute the King's writs, on exception to the sheriff, as by his being party to a suit, kin to either of the parties, on default of the sheriff, &c. 4 *Inst.* 271: 1 *Plowd.* 73. And the authority of coroners does not determine by the demise of the King. 2 *Inst.* 174.

Where Coroners are empowered to act as judges, as in taking an inquisition of death, or receiving an appeal of felony, &c. the act of one of them is of the same force as if they had all joined; but after one of them has proceeded to act, the act of another of them will be void: And where they are authorised to act only ministerially, in the execution of a process directed to them upon the incapacity of the sheriff, their acts are void, if they do not all join. 2 *Hawk. P. C. c. 9. § 45. Hob.* 70.

So that Coroners as *ministers* must all join; but as *judges*, they may divide. But two coroners ought to be judges in re disseisin; and though one serves to pronounce an outlawry, the entry ought to be in the name of all of them. And so of all processes directed to the coroners. *Stamf.* 53: *Fenk. Cent.* 85.

If the sheriff is either plaintiff or defendant, or one of the cognitees, the writ must be directed to the coroner, *Cio Car* 300. But the coroner is not the officer of B. R. but where the sheriff is improper; not where there is no sheriff, for if the sheriff die, the coroner cannot execute a writ. In case of two coroners, if one is challenged, the other may execute the writ, &c. yet both make but one officer: It is the same with two sheriffs of a city, &c. 1 *Salk.* 144. A *vennefactus* shall go to the coroner, where the sheriff is a party, or the defendant is a servant to the sheriff, &c. but it ought to be on a principal challenge to the favour. *Moor* 470.

On defaults of sheriffs, coroners are to impanel juries, and return issues on juries not appearing, &c. As the sheriff in his torn might enquire of all felonies by the Common law, saving the death of a man, so the coroner can enquire of no felony but of the death of a person, and that *super visum corporis* 4 *Inst.* 271. But in *Northumberland* the coroner by custom, may enquire of other felonies 35 *H. 6* 27. But without custom no coroner is authorised to take any other inquisition than on death 2 *Hale* 65 See *Leach's Hawk. P. C. c. 9. § 35.* By *Magna Charta*, cap. 17. no sheriff, &c. or coroner shall hold pleas of the crown. But by *Stat. Westm.* 1. 3 *Ed.* 1. c. 10, it is enacted, that the coroners shall lawfully attach and present pleas of the crown; and that sheriffs shall have counter-rolls with the coroners, as well of appeals, as of inquests, &c.

Coroners, before the *Stat. Magna Charta*, might not only receive accusations against offenders, but might try them: But since that statute, they cannot proceed to try, and appeals before them, are removable into B. R. &c. by *certiorari*, directed to the coroners and sheriffs, &c. Though process may be awarded by the sheriff and coroner, or the coroner only, in the county court on appeals, till the exigent, &c. 2 *Hawk. P. C. c. 9. § 41.*

By the *Stat. De officio coronatoris*, 4 *Ed.* 1. c. 2, The Coroner is to go to the place where any person is slain or suddenly dead, and shall by his warrant to the bailiffs, constables, &c. summon a jury out of the four or five neighbouring towns, to make enquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumstances that occasioned

the party's death; who were present, whether the dead person was known, where he lay the night before, &c. Examine the body if there be any signs of strangling about the neck, or of cords about the members, &c. Also all wounds ought to be viewed, and inquiry made with what weapons, &c. And the coroner may send his warrant for witnesses, and take their examination in writing; and if any appear guilty of the murder, he shall inquire what goods and lands he hath; and then the dead body is to be buried. A coroner may likewise commit the person to prison who is by his inquisition found guilty of the murder; and the witnesses are to be bound by recognisance to appear at the next assizes, &c.

When the jury have brought in their verdict, the coroner is to inroll and return the inquisition, whether it be brought in murder, manslaughter, &c. to the justices of the next gaol-delivery of the county, or certify it into B. R. where the murderers shall be proceeded against. 2 *Rol. Abr.* 32. Upon an inquisition taken before the coroner, he must put into writing the effect of the evidence given to the jury before him, and bind them to appear, &c. which is to be certified to the court with the inquisition; and neglecting it, the coroner shall be fined. 1 & 2 *P. & M. c. 13. 1 Lil. Abr.* 327.

The word *Murder* is not necessary in a coroner's inquisition; though it is in an indictment for killing another person 1 *Salk.* 377. It is not necessary that the inquisition be taken in the place where the body was viewed. 2 *Hawk. P. C. c. 9. § 25.* But a coroner has no authority to take an inquisition of death without a view of the body; and if the inquest be taken by him without such view, it is void. 2 *L. v.* 140.

The coroner may in convenient time take up a dead body that hath been buried, in order to view it but if it be buried so long that he can discover nothing from the viewing it, or if there be danger of infection, the inquest ought not to be taken by the coroner, but by justices of peace, by the testimony of witnesses; for none can take it *on view*, but the coroner *Bio Cin* 167, 173. If the body is buried, the town shall be amerced, as it shall be if the body is sufficed to lie so long that it stinks. 2 *Dan. Abr.* 709, &c. Where the body hath lain for some time, that it cannot be judged how it came by its death, that must be recorded, that at the coming of the justices of assize, the town where, &c. may be amerced on sight of the coroner's rolls.

A coroner may find any nuisance by which the death of a man happens, and the township shall be amerced on such finding 1 *Nelf. Abr.* 536. If one is slain in the day and the murderer escapes, the town where he shall be amerced, and the coroner is to inquire thereof on view of the body, *Stat.* 3 *Hin.* 7. c. 1. A coroner may take an indictment upon view of the body; as also an appeal, within a year after the death of one slain. *Westm. Inst.* 491. But a coroner, *super visum corporis*, cannot make an inquisition of an accessory after the murder; though he may of accessories before the fact *M. n.* 29.

Coroners ought to sit and inquire on the body of every prisoner that dies in prison. They have no jurisdiction within the verge of the King's courts; nor of offences, committed at sea, or between high and low water mark when the tide is in; though they have in arms and crews of the sea 3 *Inst.* 134 See *ant. l. a. finem.* If a body is drowned,

drowned, and cannot be found to the view, the inquisition must be taken by justices of peace, on the examination of witnesses, &c. 5 Rep. 110.

Where a coroner's inquest is quashed, he must make a new one *super visum corporis*: And a coroner may attend and amend his inquisition in matters of form: But if he misbehaves himself, and a *melius inquirendum* is granted upon it, that inquisition must be taken by the sheriffs or commissioners, upon affidavits, and not *super visum corporis*; because none but a coroner can take inquisition *super visum*, &c. and he is not to be trusted again. 1 Salk. 190: 2 Durr. Adv. 210.

A coroner's inquisition being final, the coroner ought to hear counsel and evidence on both sides. 2 Sid. 90, 101. The coroner must admit evidence, as well against the King's interest, as for it; but it hath been held, that if a person be killed by another, and it is certainly known that he did it, the coroner's jury are to hear the evidence only for the King; and inquire whether the killing were by malice, or without malice, &c. Per Hale, Ch. Just. Where a coroner would not admit of evidence against the King, to prove a *felo de se* to be *non compos mentis*, his inquisition was set aside; and a new inquisition taken, whereby it was found that the party was *non compos*. 2 Hale's Hist. P. C. 60. If there be an inquisition of manslaughter or murder, and also an indictment by the grand jury against one, and he is arraigned, and found Not Guilty on the indictment; here it is necessary to quash the coroner's inquisition, or to arraign the party upon it, and acquit him on that also: For otherwise it stands as a record against him, whereon he may possibly be outlawed. 2 Hale 65. And where a person found guilty by the coroner's inquest, pleads, and is acquitted by the petit jury; they must give in who it was that killed the man, which serves as an indictment against that other person; and if they cannot tell who, they may mention some fictitious name. *Ibid.*

2 By the Stat. 3 Ed. 1. cap. 10, Coroners shall demand or take nothing for doing their offices. And by the ancient law of England, none having any office concerning the administration of justice, could take any fee for doing his office; and therefore this statute was only in affirmance of the Common law. By Stat. 3 Hen. 7. cap. 1, upon an inquisition taken on view of the body, the coroner shall have 13s. 4d. fee of the goods of the murderer; and if he be gone, then out of the amercement of the town for the escape. Though Stat. 1 H. 8. c. 7, enacts, that where a person is slain by misadventure, the coroner is to take no fee, on pain of 40s. Justices of assize and of peace have power to enquire of and punish extortions of coroners, and also their defaults Stat. *Ibid.*

By the Stat. 25 Geo. 2. c. 29, for every inquisition, not taken upon the view of a body dying in gaol, which shall be taken by any coroner in any township or place contributory to the rates directed by Stat. 12 Geo. 2. c. 29, the sum of 20s. and for every mile which he shall travel from the place of his abode, the further sum of 9d. shall be paid him out of the money arising by the said rates. And for every inquisition taken upon the view of a body dying in gaol, so much money not exceeding 20s. shall be paid him as the justices at sessions shall think fit to allow, out of the money arising from the said rates. Provided that over and above the recompence by the statute appointed, the coroner who

shall take an inquisition upon the view of a body slain or murdered, shall have the fee of 13s. 4d. payable by Stat. 3 Ed. 7. c. 1, out of the goods of the slayer or murderer, or out of the amercements upon the township, if the slayer or murderer escape. Coroners taking further fees guilty of extortion.

Provided that no Coroner of the King's household, and of the verge of the King's palaces, nor any coroner of the Admiralty, nor of the County Palatine of Durham, nor of the city of London and borough of Southwark, or of any of the franchises belonging to the said city, nor any coroner of any city, borough, town, liberty or franchise not contributory to the rates directed by Stat. 12 Geo. 2. c. 29, or within which such rates have not been usually assessed, shall be intitled to any fee, recompence or benefit given by this act.

3. If a Coroner be remiss in coming to do his office, when he is sent for, &c. he shall be amerced by virtue of the above mentioned statute *De coronatoribus*. S. P. C. 51: Salk. 377: H. P. C. 170.

If a Coroner hath been guilty of any corrupt practices, bribery, &c. in taking the inquisition, a *melius inquirendum* may be awarded for taking a new one by special commissioners, &c. Coroners concealing felonies, &c. are to be fined, and suffer one year's imprisonment. 3 Ed. 1. cap. 9. Also for mismanagement in the coroner, the filing of the inquisition may be stopped. 1 Mod. 82. A coroner's inquisition is not traversable: If it be found before the coroner *super visum corporis*, that one was *felo de se*, the executors or administrators of the deceased, it is said, cannot traverse it. 3 Inst. 55. But it has been held that the inquest being moved into B. R. by *certiorari*, may be there traversed by the executor or administrator of the deceased. 2 Hawk. P. C. c. 9. § 54. And it hath been adjudged, that the inquisition of *felo de se* is traversable; though *fugari fecit* is not. 2 Leo. 152.

If a Coroner be convicted of extortion, wilful neglect of duty or misdemeanor in his office, the court before whom he shall be so convicted, may adjudge that he shall be removed from his office.—See Stat. 25 Geo. 2. c. 29.—For further matter on this subject, see 2 Hawk. P. C. c. 9, throughout.

CORONER OF THE KING'S HOUSEHOLD, Hath an exempt jurisdiction within the verge, which the Coroner of the County cannot intermeddle with; as the Coroner of the King's House may not intermeddle within the county out of the verge. 2 Hawk. P. C. c. 9. § 15.—If an inquisition be found before the coroner of the county, and the coroner of the verge, where the homicide was committed in the county, and it is so entered and certified, it will be error. 4 Rep. 45. But if murder be committed within the verge, and the King removes, before any indictment taken by the Coroner of the King's Household; the coroner of the county, and the Coroner of the King's House shall inquire of the same: And according to Sir Edw. Coke, the coroner of the county might inquire thereof at the Common law. 2 Hawk. P. C. c. 9. § 15: 2 Inst. 550. If the same person be coroner of the county, and also of the King's House, an indictment of death taken before him as coroner, both of the King's House, and of the county, is good. 4 Rep. 461 & Inst. 134.

By the Stat. 33 H. 8. c. 32. §§ 1, 2, It is ordained, That all inquisitions made upon the view of persons slain, within any of the King's palaces or houses, or any other house or

CORONER, &c.

houses wherein his Majesty shall happen to be abiding in his royal person, shall be taken by the Coroner for the time being of the King's Household, without any affixing of another coroner of any shire within this realm; by the oaths of twelve or more of the yeoman officers of the King's Household, returned by the two Clerks Controllers, the Clerks of the Cheque, and the Clerk Marshal, or one of them, of the said Household, to whom the said Coroner of the Household shall direct his precept; and the said Coroner shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the Master or Lord Steward of the Household; who hath the appointment of such coroner, &c.

CORONER OF LONDON. By the charter of King Ed. IV, the mayor and commonalty of London may grant the office of coroner to whom they please; and no other coroner but he that belongs to the city, shall have any power there: Also the Lord Mayor, &c. may chuse two coroners in Southwark. When any one is killed, or comes to an untimely death in London, the coroner upon notice shall attend where the body is, and forthwith cause the headles of the ward to summon a jury to make the necessary inquiry, how such person came by his death: And after inquisition taken, he shall give a certificate to the church-warden, clerk or sexton of the parish, to the intent the corpse may be buried: The coroner's fees here formerly amounted to 25 s. now to above double that sum; unless the friends of the deceased are poor, and then he shall execute his office for nothing. *Cit. Lib.* 46, 47. The Coroners in London and Middlesex, and in other cities, &c. may bail felons and prisoners, in such manner as hath been heretofore accustomed. *Stat. 1 & 2 P. & M. c. 13. f. 6: 1 Lil. Abr.* 327.

What anciently belonged to Coroners, you may read at large in *Bracton, lib. 3. tract. 2. cap. 5, 6, 7 & 8: Britton, cap. 1. and Plea, lib. 1. c. 18.*

CORONATORE ELIGENDO. A writ which lies on the death or discharge of any Coroner, directed to the Sheriff out of the Chancery, to call together the freeholders of the county, for the choice of a new coroner; and to certify into the Chancery, both the election and the name of the party elected, and also to give him his oath, &c. *Reg. Orig.* 177: *F. N. B.* 163. See title *Coroner*.

CORONATORE EXONERANDO. A writ for the discharge of a coroner, for negligence, or insufficiency in the discharge of his duty: and where coroners are so far engaged in any other public business, that they cannot attend the office; or if they are disabled by old age or disease, to execute it; or have not sufficient lands, &c. they may be discharged by this writ. *2 Infl.* 32: *2 Hawk. P. C. c. 9. § 12.* But if any such writ be grounded on an untrue suggestion, the coroner may procure a commission from the Chancery to enquire thereof; and if the suggestion be disproved, the King may make a *superjudeus* to the sheriff, that he do not remove the coroner; or if he have removed him, that he suffer him to execute the office. *Reg. Orig.* 177, 178: *P. N. B.* 164. See title *Coroner*. As also the coroner's is an office of freehold, the court of Chancery, with whom the power of granting this writ resides, will not suffer it to issue, unless on affidavit, that the defendant has been served with notice of the petition for it. *3 Ark.* 184. And on an election of a new coroner by a majority of the freeholders, the power and authority of the old one is *ipso facto* extinguished. See title *Coroner*.

CORPORATION.

CORONE, Fr.] All matters of the crown, were heretofore reduced to this law head or title; they are the things that concern treason, felony, and diverse other offences, by the Common law, and by statute. *Shep. Epit.* 367.

CORPORAL OATH, And how it is administered. See title *Oath*.

CORPORATION.

[CORPORATIO.] A Body politic or incorporate; so called as the persons composing it are made into a body, and of capacity to take and grant, &c. Or, it is an assembly and joining together of many into one fellowship and brotherhood, whereof one is head and chief, and the rest are the body; and this head and body knit together, make the Corporation: also it is constituted of several members like unto the natural body, and framed, by fiction of law, to endure in perpetual succession.

With respect to Corporations, or communities of old, the forming of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more than any other cause to introduce regular government, police and arts, and to diffuse them over Europe. Louis the Great, in France, to counterbalance his potent vassals, conferred new privileges on the towns situated within his domaine, called *Charters of community*, and formed the inhabitants into corporations, or bodies politic, to be governed by a council and magistrates of their own nomination. About the same period the great cities in Germany began to acquire like immunities; and the practice quickly spread over Europe, and was adopted in Spain, England, Scotland, and all the other feudal kingdoms. *Robertson's Hist. Emp. C. V. v. 32, 34, &c.*

Of Corporations some are sole, some aggregate; sole, when in one single person, as the King, a Bishop, Dean, &c. Aggregate, which is the most usual, consisting of many persons, as Mayor and Commonalty, Dean and Chapter, &c. Likewise corporations are spiritual or temporal; spiritual, of Bishops, Deans, Archdeacons, Parsons, Vicars, &c. Temporal, of Mayors, Commonalty, Bailiffs and Burgesses, &c. Some Corporations are of a mixt nature, composed of spiritual and temporal persons, such as heads of colleges and hospitals, &c. All corporations are said to be Ecclesiastical, or Lay.

Lay Corporations are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The King, for instance, is made a corporation to prevent in general the possibility of an interregnum, or vacancy of the throne, and to preserve the possessions of the Crown entire; for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like; some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of Physicians and company of Surgeons in London, for the improvement of the medical science; the Royal Society, for the advancement of natural knowledge; and the Society of Antiquaries for promoting the study of antiquities. And among these general corporate bodies, the Universities of Oxford and Cambridge must be ranked. *3 Burn.* 1656.

CORPORATION I.—II.

The eleemosynary sort are, such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both in our Universities, and out of them. Such as at *Westminster, Eaton, Winchester, &c.* which colleges are founded for two purposes; 1. For the promotion of piety and learning, by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, *lay*, and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. 1 *Lil. Raym.* 6. They are, in fact, lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitations of the Ordinary or Diocesan in their spiritual characters. 1 *Comm.* 471.

- I. How Corporations are created.
- II. Their Interest and Jurisdiction.
- III. How far their Acts are binding.
- IV. How they are visited.
- V. How they are dissolved.

I. BODIES POLITICAL or incorporate may commence and be established three manner of ways, *viz.* by prescription, by letters patent, or by act of parliament; but most commonly begin by patent or charter. 1 *Inst.* 250: 3 *Inst.* 202: 3 *Rep.* 73.

In making aggregate corporations, there must be, 1. Lawful authority. 2. Proper persons to be incorporated. 3. A name of incorporation. 4. A place, without which no corporation can be made. 5. Words sufficient in law to make a corporation. 10 *Rep.* 29, 123: 3 *Rep.* 73. The words *incorpora, funla, &c.* are not of necessity to be used in making corporations; but other words equivalent are sufficient: and of ancient time, the inhabitants of a town were incorporated, when the King granted to them to have *Guillam Mercatoriam*. 2 *Dan.* 114. He that gave the first possessions to the corporation, is the founder. The parishioners or townsmen of a parish or town; and tenants of a manor, are to some purposes a corporation. *Co. Lit.* 95, 342.

If the King grants lands to the inhabitants of *B.* their heirs and successors, rendering a rent, for any thing touching these lands, this is a corporation; though not to other purposes: but if the King grants lands to the inhabitants of *B.* and they be not incorporated before, if no rent be reserved to the King, the grant is void. 2 *Danv.* 214. If the King grants to the men of *Islington* to be discharged of toll, this is a good corporation to this intent; but not to purchase, &c. And by special words the King may make a limited corporation, or a corporation for a special purpose. *Ibid.*

London is a Corporation by prescription: but though a corporation may be by prescription, it shall be intended that it did originally derive its authority by grant from the King; for the King is the head of the commonwealth, and all the commonwealth, in respect of him, is but one corporation; and all other corporations are but limbs of the greater body. 1 *Lil. Abs.* 330. A mayor and com-

monalty or corporation, cannot make another corporation, or commonalty. 1 *Sid.* 290. The city of *London* cannot make a corporation, because that can only be created by the crown; but *London*, or any other corporation, may make a fraternity. 1 *Salk.* 193.

The parliament, by its absolute and transcendent authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by *Stat.* 39 *Eliz.* c. 5; which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the Crown; and the King may prevent it when he pleases. And, in the particular instance before mentioned, it was done, as *Sir Edward Coke* observes, 2 *Inst.* 722, to avoid the charges of incorporation and licences of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

The King (it is said) may grant to a Subject the power of erecting corporations; (*Bro. Abr.* tit. *Prærog.* 53: *Prærog.* 88. pl. 16. though the contrary was formerly held. *Year Book.* 2 *Hen.* 7. 13;) that is, he may permit the Subject to name the persons and powers of the corporation at his pleasure; but it is really the King that erects, and the Subject is but the instrument: for though none but the King can make a corporation, yet *qui facit per alium, facit per se.* 20 *Rep.* 33. In this manner the Chancellor of the University of *Oxford*, has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

When a Corporation is erected, a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation therein is not material. 10 *Rep.* 122. Such name is the very being of its constitution; and, though it is the will of the King that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. *Gilb. Hist. C. P.* 182. The name of incorporation, says *Sir Edward Coke*, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the King baptises the Corporation. 10 *Rep.* 28.

And it may change its name, as corporations frequently do in new charters, and will still retain its former rights and privileges. 4 *Co.* 87.

No persons shall bear office in any corporation, &c. but such as have received the sacrament of the church, and taken the oaths. *Stat.* 13 *Car.* c. 1. But see the *Stat.* 5 *Geo.* 1. c. 6, confirming officers in corporations. See title *By Laws. Oaths, Nonconformists.*

What persons are capable of being elected members of a corporation, See *Hardw.* 23.

II WHEN a Corporation is duly created, all incidents, as, to purchase and grant, sue and be sued, &c. are tacitly annexed to it; and although no power to make laws, statutes or ordinances, is given by a special clause to a corporation, it is included by law in the very act of incorporating. *Co. Lit.* 264. A new charter doth not merge

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or extinguish any of the ancient privileges of the old charter. And if an ancient corporation is incorporated by a new name, yet their new body shall enjoy all the privileges that the old corporation had. *Revm.* 439: 4 *Rep.* 37.

There are usually granted in charters to corporations, divers franchises; as felons' goods, wails, estrays, treasure-trove, deodands, courts, and cognisance of pleas, fairs, markets, assise of bread and beer, &c. 4 *Rep.* 65. Actions arising in corporations may be tried in the corporation courts; but if they try actions which arise not within their jurisdictions, and encroach upon the Common law, they shall be punished for it. *Lutw.* 1571, 1572. Actions triable there, must, in general, mean, those actions wherein the corporation is not interested.

There may be a corporation without a head: but where there is a head, all acts ought to be by and to the head; nor can they sue without such head: and if he dies, nothing can be done in the vacancy. 10 *Rep.* 30, 32: *Co. Lit.* 264. If land be given to a mayor and commonalty for their lives, they have an estate by indentment not determinable: so it is, if a feoffment be made of land to a dean and chapter, without mention of successors.

In a case of *Sole Corporation*, as bishop, dean, parson, &c. no chattel, either in action or possession, shall go in succession; but the executors or administrators of the bishop, parson, &c. shall have them: but it is otherwise of a corporation aggregate, as a dean and chapter, mayor and commonalty, and the like: for they in the judgment of law never die. But the case of the *Chamberlain of London* differs from all these; his successor, in his own name, may have execution of a recognisance acknowledged to his predecessor for *orphans' money*; and the reason is, because the corporation of the chamberlain is by custom, which hath enabled the successor to take and have such recognizances, obligations, &c. that are made to his predecessor. *Terms de Ley.*

Though a *Sole Corporation* cannot generally take in succession goods and chattels, &c. yet it may take a *feoffment* in succession, by the word Successors. *Co. Lit.* 8, 9, 46. Aggregate corporations may take not only goods and chattels, but lands in fee-simple, without the word Successors, for the reason before-mentioned. 4 *Inlt.* 249. Succession in a body politic, is an inheritance in a body private. If a lease for years be made to a bishop and his successors, it is said his executors shall have it *in autre droit*; for regularly no chattel can go in succession in case of a sole corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs. *Co. Lit.* 46.

Grants of corporations are to be by deed, under their common seal, and are good without delivery; for the common seal gives perfection to corporation deeds. *Dial.* 44. An obligation sealed with the common seal of a corporation, if the mayor signs it, he is suable, if the corporation be dissolved: but if two of the members sign it, the particular persons are not bound by it. 2 *Lev.* 137: *Raym.* 152. A release of a mayor for any sum of money due to the corporation, made in his own name, is not good in law; the corporation must join and do it by their common seal. *Terms de Ley.*

A Corporation which hath a head, may make a personal command without writing; but a corporation aggregate without a head cannot. *Lutw.* 1497. A corporation aggregate may employ any one in ordinary services, without deed; though not to appear for them, in any act

which concerns their interest or title. 1 *Term.* 47, 48. Such a corporation may appoint a bailiff to take a distress, without deed or warrant. 1 *Salk.* 191. But cannot without deed command a bailiff to enter into lands for a condition broken; for such command without deed is void. *Cro.* 815.

Though a Corporation cannot do an act *in pais* without their common seal, they may do an act upon record; and the reason is, because they are elopped by the record to say it is not their act. 1 *Salk.* 192. A promise to a corporation is good without deed. 2 *Lev.* 252. The head of a corporation aggregate may not be charged with the act of his predecessor if it be not by common seal, or for such things as come to the use of the whole body or society. 1 *And.* 23, 195.

A Corporation may do an act in that capacity, to one of themselves in his natural capacity; and any member in his natural capacity may perform an act to the corporation in his politic capacity; and so they may sue one another, in their distinct capacities. 1 *Shup. Abr.* 436. Trespass for an assault and battery, &c. will not lie against a corporation, but it must be brought against the persons that do the trespass by their proper names: though if the heads of the corporation trespass on a man in his ground, action of trespass lies against them for this. Process of outlawry will not lie against a corporation; nor *capias* or exigent, but distress. 22 *Aff.* 67: 39 *Ed.* 3: 13: 21 *Ed.* 4.

A Corporation cannot sue, or appear in person, but by attorney: they cannot commit treason or felony, or be excommunicate, &c. They may not be executors, or administrators, be jointenants, trustees, &c. Nor shall the members of a corporation be regularly witnesses for the corporation. 10 *Rep.* 32: 11 *Rep.* 98: *Co. Lit.* 134. But they may be disfranchised, and then be witnesses; though not surrender by consent. Yet in some cases the judges now admit their testimony without disfranchisement, where the interest is remote. Attachment doth not lie against a corporation. *Raym.* 152.

Corporations may have power not only to infranchise freemen but to disfranchise a member, and deprive him of his freedom; if he doth any act to the prejudice of the body, or contrary to his oath, &c. Though for conspiring to do any thing contrary to his duty, or for words of contempt against the chief officer, he may not be disfranchised; but he may be committed till he find sureties for his good behaviour. 11 *Rep.* 98: 5 *Mod.* 257. A corporation cannot disfranchise for breach of a by-law. 1 *Lil.* 331. And one wrongfully disfranchised may be restored, and have his remedy by *mandamus*, &c. in *B. R.* An alderman or freeman of a corporation cannot be removed from his freedom or place without good cause, and a custom to remove them *ad libitum* is void, because the party hath a freehold therein. *Cro. Jac.* 547.

A person may be bound to the good behaviour for words spoke against mayors, &c. but he may not be indicted for it: and if justices of a corporation deny to do right, it is a forfeiture of their exemption from the inquiry of the justices of the county. *Mod. Caf.* 125, 164. Head officers of corporations are to redress abuses of merchant-strangers, &c. or the franchise shall be seized, *Stat. 9 Eliz. c. 3. sect. 1*; and have authority in many cases by statute; for which see title *Mayors*.

No strangers shall sell by retail any woollen or linen cloth, or mercery wares, in corporate towns, except at fairs,

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fairs, on pain of forfeiture, &c. But such persons may sell wares by wholesale, and cloth of their own making by retail. 1 & 2 P. & M. cap. 7. Bodies politic ecclesiastical may make leases for three lives, or twenty-one years, under the restrictions in the acts 1 Eliz. c. 19: 13 Eliz. c. 20.—See title *Leases*. If land is given in fee to a dean and chapter, or to a mayor and commonalty, &c. and after, such body politic or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. Co. Lit. 31.

The Corporation of the city of London is to answer for all particular misdemeanors, which are committed in any of the courts of justice within the city; and for all other general misdemeanors committed within the city; so it is conceived of all other corporations. 1 Lil. Abr. 329. If a common officer of a town doth any thing for their common use, it is reasonable the corporate town should be answerable for it. 1 Leon. 215.

III. A CORPORATION is properly an investing the people of the place with the local government thereof, and therefore their laws shall be binding to strangers; but a Fraternity is some people of a place united together in respect of a mystery and business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power. Salk. 193.

No masters and wardens, &c. of any mystery, or other corporation, shall make any by-laws or ordinances in diminution of the King's prerogative, or against the common profit of the people; except the same be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l*. And such bodies corporate shall not make any acts or ordinances for the restraining persons to sue in the King's courts for remedy, &c. under the like penalty. Stat. 19 Hen. 7. cap. 7. Ordinances made by corporations, to be observed on pain of imprisonment, or of forfeiture of goods, &c. are contrary to *Magna Charta*. 2 Inst. 4, 54.

But penalties may be inflicted by by-laws, which may be recovered by distress or action of debt: and a custom for the Lord Mayor and Aldermen of London, to commit a citizen for not accepting of the livery, &c. was held a good custom, being for the good government of the city. 5 Mod. 320.

Corporations may not, by bond, or otherwise, restrain any apprentice, &c. from keeping shop in the corporation, under the penalty of 40*l*. Stat. 28 H. 8. c. 5.—See title *By-Laws*.

In acts done by corporations, the consent of the major part shall be binding. Stat. 33 H. 8. c. 27.

This act clearly vacates all private statutes, both prior, and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. Blackstone, (1 Comm. 478,) is of opinion, that it has not affected the negative given by the statutes to the Head of any society; but it seems that this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *guardians & major pars sociorum*, or *magister*, or *procurator et major pars*; and it has been determined by the Court of King's Bench, (Corp. 377) and by the visitor of *Clare-Hall, Cambridge*, and also by the visitors of *Dublin college*, that this expression does not

confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and he is concluded by a majority of votes against him.

IV. CORPORATIONS being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole, or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the Ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The Pope formerly, and now the King, as supreme Ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses, are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation, the Ordinary neither can nor ought to visit. 10 Rep. 31.

The founder of all corporations in the strictest and original sense is, the King alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the King is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. 10 Rep. 33. But here the King has his prerogative; for, if the King and a private man join in endowing an eleemosynary foundation, the King alone shall be the founder of it. And, in general the King being the sole founder of all civil corporations, and the endower the *perficiens* founder of all eleemosynary ones, the right of visitation of the former, results, according to the rule laid down, to the King; and of the latter to the Patron or endower.

The King being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the Court of King's Bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. However though the Court of King's Bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; it is not the language of the profession, to call that part of their authority a visitatorial power. 1 Comm. 481. n.

As to eleemosynary corporations, by the dotation, the founder and his heirs are of common right the legal visitors; but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his

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his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the Universities; these were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held, (*Y. B. 8 Ed. 3. 28. 8 Aff. 293*) that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by *Stat. 2 Hen. 5. c. 1*; which ordained, that the Ordinary should visit *all* hospitals founded by Subjects; though the King's right was reserved, to visit by his commissioners such as were of royal foundation. But the Subject's right was in part restored by *Stat. 14 Eliz. c. 5*; which directs the bishop to visit such hospitals only, where no visitor is appointed by the founder thereof: and all hospitals founded by virtue of the *Stat. 39 Eliz. c. 5*, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit. *2 Inst. 275.*

Colleges in the Universities, (whatever the common law may now, or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical* corporations; and therefore the right of visitation was claimed by the Ordinary of the diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull, to exempt them from the jurisdiction of the Ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which *Oxford* was formerly comprised, has immemorially exercised visitatorial authority; (that is, the Bishop of *Lincoln*, from whose diocese that of *Oxford* was taken;) which can be ascribed to nothing else, but his supposed title as Ordinary to visit this, among other ecclesiastical foundations.

But, whatever might be formerly the opinion of the Clergy, it is now held as established Common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons, and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. *Ld. Raym. 8.* And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips v. Bay*. (*Ld. Raym. 5: 4 Mod. 106*) In this the main question was, whether the sentence of the Bishop of *Exeter*, who, (as visitor) had deprived Doctor *Bay*, the Rector of *Exeter* college, could be examined and redressed by the Court of King's Bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But Lord Chief Justice Holt was of a contrary opinion; and held, that by the common law, the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party aggrieved ought to have redress: the Founder having reposed in him so entire a confidence, that he will admin-

ister justice impartially, that his determinations are final, and examinable in no other court whatever. And, upon this, a writ of error being brought into the House of Lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the Court of King's Bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the Court of King's Bench will interpose, to prevent a defect of justice. *Sira 797.* Also it is said, (*2 Inst. c. 1566.*) that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

No particular form of words is necessary for the appointment of a visitor. *Sit visitor*, or *visitatorem commendamus*, will create a general visitor, and confer all the authority incidental to the office; (*1 Burr. 199*;) but this general power may be restrained and qualified, or the visitor may be directed by the statutes to do particular acts, in which instance he has no discretion as visitor; as where the statutes direct the visitor to appoint one of two persons, nominated by the fellows, to be the Master of a college, the Court of King's Bench will examine the nomination of the fellows, and if correct, will compel the visitor to appoint one of the two. *2 Term Rep. 290.* New ingrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, and are subject to the same discipline and jurisdiction. *1 Burr. 203.* It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes, and the nature of the institution; and in the exercise of this jurisdiction, he is free from all control. Lord Mansfield has declared, that the visitatorial power, if properly exercised, without expence or delay, is useful and convenient to colleges; and it is now settled and established, that the jurisdiction of a visitor is summary, and without appeal from it. *1 Burr. 200.*—See *1 Comm. 479, &c.*

V. A CORPORATION may be dissolved, for it is created upon a trust; and if that be broken it is forfeited. *4 Mod. 58.*

Corporations are dissolved by forfeiture of their charter, misuser, &c. upon the writ *quo warranto* brought; by surrender, or by act of parliament; and if they neglect to choose officers, or make false elections, &c. it is a forfeiture of the corporation. *4 Rep. 77.*

Corporations may be dissolved in several ways, which, dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. *Co. Lit. 13.* The grant is indeed only during the life of the corporation; which may endure for ever; but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities. *1 Lev. 237.*

A Corporation may be dissolved, 1. By act of parliament; which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchise: in which case the law judges that the body politic has broken the condition upon which it was incorporated, and therefore the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporative power, having forfeited it by such and such proceedings: The exertion of this act of law, for the purposes of the State, in the reign of King Charles and King James the Second, particularly by seizing the charter of the City of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament. *Stat. 2 W. & M. c. 8*, after the Revolution; and by the same *Stat.* it is enacted, that the franchises of the City of London shall never more be forfeited for any cause whatsoever. And, because by the Common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter, or established by prescription, it is now provided by *Stat. 11 Geo. 1. c. 4*, that no corporation shall be dissolved, for any default to choose a mayor, &c. but the electors are still to proceed to election; and if no election be made, the court of King's Bench shall issue a *mandamus* requiring the electors to choose such mayor, &c.

By *Stat. 2 Ann. c. 20*. Where persons intrude into the office of mayor, &c. of a corporation, a *quo warranto* shall be brought against the usurpers, who shall be ousted, and fined: and none are to execute an office in a corporation for more than a year. See further on this subject *Kyd's Treatise of the Law of Corporations*;—and see also particularly this Dict. titles *Mortmain*; *Mandamus*; *Quo warranto*.

To prevent improper conduct in trading corporations in elections, and in disposing of the joint-stock, it is by *Stat. 7 Geo. 3. c. 48*, enacted, that no member of such corporations shall be admitted to vote in the general courts, until he shall have been six months in possession of the stock necessary to qualify him: unless it comes to him by bequest, marriage, succession or settlement.—And by the same statute, only one half yearly dividend is to be made by one general court, five months at least from the preceding declaration of a dividend; and questions for increasing the dividend are to be decided by ballot. See title *East India Company*.

To facilitate the proceedings in cases of *mandamus* and *quo warranto*, and to prevent any undue advantage on either side, the *Stat. 12 Geo. 3. c. 21*, provides that where any person shall be entitled to be admitted a freeman, &c. of any corporation, &c. and shall apply to the proper officer to be admitted, and shall give notice of his intention to move the court of King's Bench for a *mandamus* in case of refusal, the officer shall pay all the costs of the application.—And the same statute enacts, that the proper officer shall, on the demand of two freemen, permit them and their agents to inspect the entries of admission of freemen, and to take copies and extracts; under penalty of 100*l*.

CORPOREAL INHERITANCE, In houses, lands, &c. See title *Inheritance*.

CORPSE, *stealing of*. If any one in taking up a dead body steals the shroud, or other apparel, it will be felony, 3 *Inft.* 110: 12 *Rep.* 113: 1 *Hal. P. C.* 515. But stealing the corpse itself, only, is not felony, but it is punishable as a misdemeanor by indictment at Common law. 2 *Comm.* 236.

CORPUS CHRISTI DAY. A feast instituted in the year 1264, in honour of the blessed sacrament: to which also a college in Oxford is dedicated. It is mentioned in the *Stat. 32 Hen. 8. cap. 21*.

CORPUS CUM CAUSA. A writ issuing out of the Chancery, to remove both the body and record, touching the cause of any man lying in execution upon a judgment for debt, into the King's Bench, &c. there to lie till he have satisfied the judgment. *F. N. B.* 251. See title *Habeas Corpus*.

CORRECTOR OF THE STAPLE. A clerk belonging to the staple, to write and record the bargains of merchants there made. See *Stat. 27 Ed. 3. Stat. 2. cc. 22, 23*.

CORREDIUM; CONREDIUM; The same with *corradium*. See *Corally*.

CORRUPTION OF BLOOD, *corruptio sanguinis*.]

An infection growing to the state of a man, and to his issue, and is where a person is attainted of treason or felony, by means whereof his blood is said to be corrupted, and neither his children, nor any of his blood, can be heirs to him or any other ancestor: also if he is of the nobility, or a gentleman, he and all his posterity by the attainder are rendered base and ignoble: but by pardon of the King, the children born afterwards may inherit the land of their ancestor, purchased at the time of the pardon or after; but so cannot they, who were born before the pardon. *Terms de Ley*.

If a man that hath land in right of his wife hath issue, and his blood is corrupt by attainder of felony, and the King pardons him; in this case, if the wife dies before him, he shall not be tenant by the curtesy, for the corruption of the blood of that issue: though it is otherwise, if he hath issue after the pardon; for then he should be tenant by the curtesy, although the issue which he had before the pardon be not inheritable. 13 *H.* 7. 17.

A son attainted of treason or felony in the life of his ancestor, obtains the King's pardon before the death of his ancestor, he shall not be heir to the said ancestor, but the land shall rather escheat to the lord of the fee by the corruption of blood. 26 *Aff.* pl. 32 *H.* 8.

If the father of a person attainted die seised of an estate of inheritance, during his life, no younger brother can be heir; for the elder brother, though attainted, is still a brother, and no other can be heir to his father, while he is alive; but if he die before the father, the younger brother shall be heir. 2 *Hutch. P. C. c.* 49. § 49. See further *Co. Lit.* 8, 391: *Dyer* 48: 3 *Inft.* 211.

Corruption of blood from an attainder is so high that it cannot be absolutely saved but by act of parliament; for the King's pardon doth not restore the blood so as to make the person attainted capable either of inheriting others, or being inherited himself by any one born before the pardon. 1 *Inft.* 391, 392: 2 *Hutch.* —. A statute which saves the corruption of blood, impliedly saves the descent of the land to the heir; and it prevents the corruption of blood.

CORS

blood so far also it saves the wife's dowry, &c. But nevertheless the land shall be forfeited for the hit of the offender. 3 Inst 47. 1 Hawk P. C. c. 41 § 5 — See further titles *Attainder*; *Forfeiture*; *Escheat*; *Life*; &c.

CORSELET, *Fr* in Lat *Corsilectum*] A little body. The name of an ancient armour used to cover the body or trunk of a man, wherewith *pikes* commonly set in the front and flanks of the battle were formerly armed, for the better resistance of the assaults of the enemy, and the surer guard of the soldiers placed behind, who were more slightly armed for their speedier advancing to and retreating from the attack. 4 Inst 5 P. J. W. 2.

CORSEPLESEN From the *Fr* *cors pleser*] A mortuary — and the reason why it was thus termed seems to be, that where a mortuary became due on the death of any man, the best or second best beast was according to custom, offered or *pledged* to the priest, and carried with the corpse. See Stat 21 H. 8 c. 6. and this Dict title *Mortuary*.

CORSED BREAD, *panis commutatus*] O' bal lal it was a kind of superstitious trial used among the Saxons, to purge themselves of any accusation, by eating a piece of barley bread, and eating it with solemn oaths and execrations, that it might prove *poison*, or their last morsel, if what they asserted or denied were not punctually true. These pieces of bread were first execrated by the priest, and then offered to the suspected person to be swallowed by way of purgation for they believed a person, if guilty, could not swallow a morsel so accursed, or if he did, it would choke him.

The form was thus *Woe I beseech thee, O Lord, if I be guilty of this trespach, or in the execration, that I have offered to him in order to discover the truth, that I may be released, but, I beseech thee so narrow that he may not swallow it, that he may cast it out of his mouth, and receive it.* Dr Cange. The old form, or *corosimus panis* borders a *dictum* and *probatum* *et*, is extant in *Letterbrogius*, p. 107. And in the laws of King Canute cap 6 — *Si quis alius minus panis in accusatur, et amicus distitutus, ut si accusatus non sit, et alius dicitur, proinde et alius accusatus et sit sententia dicitur, nisi suum sententiam corosimus panem pertrahat ut se perget.* from which it is conjectured, that *coried bread* was originally the very sacramental bread, consecrated and devoted by the priest, and received with solemn adjuration and devout expectance that it would prove mortal to those who dared to swallow it with a lie in their mouths; till at length the bishops and clergy were afraid to prostitute the communion bread to such vain and conceited uses, when to indulge the people in their superstitious fancies, and idle customs, they allowed them to practise the same judicial rite, in eating some other morsels of bread, beef or cust to the like uses.

It is recorded of the perfidious Godwin, Earl of Kent, in the time of King Edward the Confessor, that on his abjuring the murder of the King's brother, by this way of trial, as a just judgment of his solemn perjury, the bread stuck in his throat, and choked him *Ingulph*. This with other barbarous ways of purgation, was by degrees abolished though we have still some remembrance of this superstitious custom in our usual phrases of adjuration, as, *I will take the sacrament upon it; — May this bread be my poison — or, May this not be my last, &c.* See title *Ordeal*.

COSTS.

CORTIS, curtis.] A court or yard before a house *Blair*.

CORTUARIUM, curtula ur.] A yard adjoining to a court, *Blair* *Curtul Glaslan MS* f. 42.

CORUS, A certain corn measure heaped up, from the Hebr *cora*, a little eight bushels of wheat in a heap, making a quarter, are of the shape of a little hill; and probably a *corus* of whe it was eight bushels; *Dicem coros* *in*, *fructum quatuor* *Blair* *lin* 2 c. 6.

CO DUNA, custom or tribute. *Mon Arch* *lin*, 1. p. 562.

COSNAGE or **COINAGE** *Fr* *co* *co* *es*] i. e. kindred, consanguinity, is used for a writ that lies where the *heir*, that is, the father of the *heir*, or great grandfather, being seized of lands and tenements in fee at his death, and a stranger enters upon the heir and abates, then shall his heir have his writ of *co* *co* *es*. *But* *c* 8.) *F N B.* 221 See title *Writ of Mort d'Ancestr*.

COSNING, Is an offence where any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any special name. *It* *fr* *Symb* p. 2 *sect* 68 See title *Co* *co* *es*.

COSHRING Is where a man by privilege inherent by right and custom, allowed in the *feudal* laws; so were there several grievous exactions imposed by the lords on their tenants, by a sort of prerogative or feudal authority, as to he and feast themselves and their followers at their tenants' houses, &c. which was called *coshring*, *Spl* *of* *Parliaments* *MS*.

COSMUS, from the Greek, *κοσμος*] *Clarin* *Blair*.

COSARD, An Apple where a *kind* *of* *apple*, i. e. Seller of apples. *Cartular* *Abbt* *Reading* *MS* fol 916.

COSTERA, Coast, sea coast *Memor* *in* *Seacum*. *Pr* *h* 24 *Ld* 1.

COSTS

EXPENSES] In the prosecution and defence of actions, the parties are necessarily put to certain expence, or as they are commonly called *costs*, consisting of money paid to the King and Government for fines and stamp duties, to the officers of the court; and to the counsel and attorneys for their fees, &c.

These costs may be considered either as between *attorney* and *client*, being what are payable in every case to the attorney, by his client, whether he ultimately succeed or not, or as between *party* and *party*, being those only which are allowed, in some particular cases, to the party suceeding against his adversary. As between *party* and *party*, they are *interlocutory* or *final*, the former are given on various interlocutory motions and proceedings in the course of the suit — the latter, (to which the term of costs is most generally applied, and the rules respecting which are of the most consequence) are not allowed till the conclusion of the suit.

The following abstract of the law relating hereto, is taken principally from *Tidd's Law of Costs*, a short and comprehensive abridgement; to which, and the various other productions on the subject, the practitioner must necessarily have frequent recourse in nice and particular cases.

It will be sufficient for the present purpose, to arrange the information on this subject in the following manner.

COSTS I.

- I. In what Cases Costs are given to the Plaintiff.
- II. In what, to the Defendant.
- III. Of double and treble Costs.
- IV. Of taxing and recovering Costs.

I. No costs were recoverable by the plaintiff or defendant at Common law. 2 *Inst.* 288: *Hard.* 152. But by the *Stat. of Gloucester*, (6 *Edw.* 1.) c. 1. § 2, it is provided, "that the demandant may recover against the tenant the costs of his writ purchased; (which, by a liberal interpretation, has been construed to extend to the whole costs of his suit, 2 *Inst.* 288.), together with the damages given by that statute and that this act shall hold place, in all cases where a man recovers damages." This was the origin of costs *de momento*. *Gilb. Eq. Rep.* 195. And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages, antecedent to, or by the provisions of the *Stat. of Gloucester*; (10 Co. 116 a: as in *assumpsit*, covenant, debt on contract, case, trespass, replevin, ejectment, &c.; or where, by a subsequent statute, double or treble damages are given, in a case where *single* damages were before recoverable; (10 Co. 116 a: 2 *Inst.* 289 *Cowp.* 368;) as upon *Stat.* 2 *Hen.* 4. c. 11, for suing in the Admiralty Court; (10 Co. 116 a, b. *Dyer* 159 b. *Cal.* 297;) upon *Stat.* 8 *Hen.* 6. c. 9, for a forcible entry; (10 Co. 115 b: *Co. Lit.* 257 b: 2 *Inst.* 289: *Co. El.* 582;) or upon *Stat.* 2 & 3 *W. & M. Jiff.* 1 c. 5, for releasing a distress for rent (*Carth.* 321: 1 *Salk.* 205: 1 *Ld. Pavm.* 19: *Skin.* 555 *1 P.* 172 S. C.) And he hath also a right to costs, in all cases where a certain penalty is given by statute to the party grieved; (*Cro. Car.* 360: 1 *K. L. Abr.* 57: *Stim.* 363: *Carth.* 230: 1 *Salk.* 206: 1 *Ld. Raym.* 172: *Say. Costs* 11: *H. Black.* 10;) for otherwise the remedy might prove inadequate.

But the *Stat. of Gloucester* did not extend to cases where no damages were recoverable at Common law, as in *restitution*, *prohibition*, (*Co. b.* 20,) &c.; nor where double or treble damages were given by a subsequent statute, in a new case where *single* damages were not before recoverable; as in *waste* against tenant for life or years; (2 *Hen.* 4. 17: 9 *Hen.* 6. 66 b: 10 Co. 116 b: 2 *Inst.* 289;) upon the *Stat. of Gloucester*, (6 *Edw.* 1. c. 5,);—for not setting out tithes; (*Moor* 915: *Noy* 136: *Hard.* 152;) upon *Stat.* 2 & 3 *Edw.* 6. c. 13;—or for driving a distress out of the hundred, (2 *Inst.* 289: *Dyer* 177: But see *Cro. Car.* 560: 1 *Roll. Abr.* 574,) upon *Stat.* 1 & 2 *P. & M.* c. 12—Nor does this statute extend to popular actions, where the whole or part of a penalty is given by statute to a common informer; (1 *Roll. Abr.* 574: 1 *Vent.* 133: *Carth.* 231: 1 *Salk.* 206: 1 *Ld. Raym.* 172: *Cyf. Pr. C. B.* 87: *Barnes* 124. S. C: *Cowp.* 366: 1 *H. Black.* 10: *Bull. N. P.* 333;) as upon *Stat.* 5 *Eliz.* c. 4. § 31, for exercising a trade, without having served an apprenticeship; or upon the *Stat. of Usury*, 12 *Ann. Stat.* 2. c. 16. In these and such like cases, therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

Where *single* damages are given by a statute, subsequent to the *Stat. of Gloucester*, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are

not mentioned in the statute. The rule in *Pifford's case* is, that he shall not; (10 Co. 116 a;) and accordingly it is holden, that he is not entitled to costs in *quare impedit*; (2 *Hen.* 4. 17: 27 *Hen.* 6. 10: 10 Co. 116 a: 2 *Inst.* 289, 362: *Barnes* 140: And see *Cro. Car.* 360: *Carth.* 231: *Cowp.* 367, 8;) wherein damages are given by the *Stat. of Westminster* 2. (13 *Edw.* 1.) c. 5. § 3. But the rule in *Pifford's case* is contradicted by Lord Coke himself, (2 *Inst.* 230,) who says, that "this clause (respecting the *St. of Gloucester's* holding place, in all cases where a man recovers damages,) doth extend to give costs, where damages are given to any demandant or plaintiff in any action by any statute made after this parliament." And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where *single* damages are given by statute to the party grieved, although costs are not particularly mentioned in the statute. 2 *Wiff.* 91: *Barnes* 151. S. C: 3 *Bur.* 1723: 1 *Term Rep.* 71: But see the opinion of *Aston*, *Just. Court. Cowp.* 367, 8.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at Common law, they are expressly given him by *Stat.* 8 & 9 *W.* 3. c. 11, by which it is enacted, that "in all actions of *waste*, and actions of debt upon the statute for not setting forth *tithes*, wherein the *single* value or damage found by the jury shall not exceed the sum of twenty nobles; and in all suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum*, *fiat facias*, or *elegit*."

The plaintiff's general right to Costs being thus settled and established, upon the footing of the *Stat. of Gloucester*, has been since altered, restrained and modified by several subsequent statutes.

To prevent trifling and malicious actions for *words*, for *assault* and *battery*, and for *trespass*, it is enacted by *Stats.* 43 *Eliz.* c. 6: 21 *Jac.* 1. c. 16: 22 & 23 *C.* 2. c. 9. § 136, that where the jury who try any of these actions shall give less damages than 40s. the plaintiff shall be allowed no more Costs than damages: unless the judge before whom the cause is tried shall certify under his hand, on the back of the record, that an *actual battery* (and not an assault only) was proved; or that in *trespass* the *freehold* or *title* of the land came chiefly in question. Also by *Stats.* 4 & 5 *W. & M.* c. 23: 8 & 9 *W.* 3. c. 11, if the trespasses were committed in hunting or sporting, by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full Costs; though his damages, as assessed by the jury, amount to less than 40s.

The Legislature has also been obliged to interfere still further, to guard against trifling and vexatious actions, by means of what are commonly called the *Court of Conscience Acts*: Such are *Stats.* 3 *Jac.* 1. c. 15. § 4: 14 *G.* 2. c. 10; which provide that if an action be brought for less than 40s. against a defendant living in London, and liable to the jurisdiction of the Court of Requests there, the plaintiff shall not recover any Costs, but shall pay them to the defendant.

COSTS II.

Several other acts of parliament have been also made, establishing Courts of Conscience in various districts, in and about the metropolis; as in the town and borough of *Southwark*, &c. by *Stat. 22 Geo. 2. c. 47*; in the city and liberty of *Westminster*, and part of the Duchy of *Lancaster*, by *Stat. 23 Geo. 2. c. 27*, (explained and amended by *Stat. 24 Geo. 2. c. 42*); and in the *Lower hamlets*, by *Stat. 23 Geo. 2. c. 10*. And by *Stat. 23 Geo. 2. c. 33*, the county court of *Middlesex* was put on a different footing, for the more easy and speedy recovery of small debts. See titles *County-Courts*, *Courts of Conscience*.

In general where the act is not *placid*, the proper mode to obtain the costs, is for the defendant to apply to the court, by affidavit, for leave to enter a suggestion on the roll, of the facts necessary to entitle him to the benefit of the act suited to his case; which suggestion may be traversed or demurred to.

These statutes might perhaps have been with equal propriety classed under the 2d division of this title; but are introduced here, as forming an exception to the general title of a plaintiff to Costs in the cases already instanced.

The principal statute, made for restraining the plaintiff's right to costs, is *Stat. 22 & 23 Car. 2. c. 9*, (extended to *Wales*, and the Counties *Polarne*, by *Stat. 11 & 12 W. 3. c. 9*); by which it is enacted, that "in all actions of *trespass*, *assault and battery*, and *other personal actions*, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff shall have no more costs than damages, in any personal action whatsoever, if the damages be under forty shillings, except in cases of battery or freehold; and not even in these, without a certificate. And this construction was adopted, in some of the first cases that arose upon the statute. 3 *Keb.* 121, 247. But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local trespasses*, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question. *T. Raym.* 487: *F. Jon.* 232: 2 *Shov.* 258 *S. C.*: 3 *Mod.* 39: 1 *Salk.* 208. 1 *Str.* 577: *Gilb. Eq. Rep.* 195: *Barnes* 134: 3 *Wils.* 322, *S. C.* 1 *H. Black.* 294. Therefore it does not extend to actions of *debt*, *covenant*, *assumpsit*, *trover*, (3 *Keb.* 31: 1 *Salk.* 208, or the like; or to actions for a mere *assault*; (3 *T. R.* 391;) or for *criminal conversation*; (3 *Wils.* 319;) or *battery* of the plaintiff's servant, (3 *Keb.* 184: 1 *Salk.* 208: 1 *Str.* 192,) *per quod consortium vel servitium amissit*.—In all these cases, though the damages be under 40*s.* the plaintiff is entitled to full costs without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of the cause. 11 *Mod.* 198. And where the defendant lets judgment go by default, (*Bull N. P.* 329,) or justifies the assault and battery, or pleads in such a manner, as to bring the freehold or title of the land in question, on the face of

the record, or a view is granted, (1 *Ld. Raym.* 76: 2 *Salk.* 665,) a certificate is holden to be unnecessary; but it is necessary, where, to a plea of a right of way, there is a replication of *extra viam*. *Cochran v. Harrison*, *T. 22 Geo.* 3 But where, in an action for an assault and battery, the defendant justifies the assault only, (3 *T. R.* 391,) or an assault only is certified by the judge, (2 *Lev.* 102,) the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on *Stat.* 8 & 9 *W. 3. c. 11*, that the assault was wilful and malicious. 3 *Wils.* 326.

None of the statutes, made for restraining the plaintiff's right to costs, extend to actions brought in an inferior court, and removed by the defendant into a superior one: (2 *Lev.* 124: 4 *M. l.* 378, 9: 1 *Ld. Raym.* 395) and it has been holden, that *Stat.* 21 *Jac.* 1. c. 10, and *Stat.* 22 & 23 *Car.* 2. c. 9, only restrain the Court from awarding more costs than damages, but the jury, not being restrained thereby, may give what costs they please.

It often happens that there are several counts, or pleas, the issues upon which are some of them found for the plaintiff, and some for the defendant. In this case, in the court of *C. P.* where the declaration consists of several counts, and the plaintiff succeeds upon any one of them, he is entitled to the costs of the whole declaration, though the defendant succeed upon the other counts. *Bull N. P.* 335: 2 *Black. Rep.* 800, 1199. But it is otherwise in the court of *K. B.* for there neither party is allowed costs as to those counts the issues upon which are found for the defendant. *Sid. Cost.* 212: *Doug.* 8vo. 677. But see 1 *Wils.* 331. But if there be two distinct causes of action, in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. 3 *Term Rep.* 654.

As to the certificate on the *Stat.* 4 *Ann.* c. 16, allowing double pleas, (See title *Pleading*;) and costs thereon, where the judge refuses to grant the certificate, the Court have not a discretionary power, whether they will allow the defendant any costs at all; but are bound by the statute to allow him some costs, though the quantum is left to their discretion. *Barnes* 140: 2 *Term Rep.* 394, 5. The intention of the legislature was, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge, before whom the cause was tried, shall certify, that the defendant had a probable cause to plead the matters which are found against him.

II. It has already been observed, that no costs were recoverable by a defendant at common law: and the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the King *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marlberge*, (52 *Hen.* 3. c. 6,) Afterwards, costs were given to the defendant in *error*, by *Stat.* 3 *Hen.* 7. c. 10; and in *replevin*, by *Stat.* 7 *Hen.* 8. c. 4.

COSTS II.

8. c. 4. and Stat. 21 Hen. 8. c. 19, &c. But in one of these cases, the defendant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action. *See* *Costs* 70.

In error, brought by the defendant before execution, (*Cro. Jac.* 636,) or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by Stat. 3 Hen. 7. c. 10. and 8 & 9 W. 3. c. 11. § 2; upon the former of which statutes it has been holden, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action. *Dyer* 77: *Cro. Eliz.* 617, 659: 5 Co. 101. S. C.: *Cro. Car.* 145: 1 Str. 262: 2 Str. 1084: but see *Cro. Car.* 425: 1 Lev. 146: 1 Vent. 38, 106: 4 Mol. 245: *Carth.* 261. S. C. *fmb. contra.* By Stat. 13 Car. 2. stat. 2. c. 2. § 10, if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error, his double costs. And by Stat. 4 Ann. c. 16. § 23, for preventing vexation, from suing out defective writs of error, it is enacted, that "upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had, if the judgment had been affirmed, and to be recovered in the same manner." 2 Str. 834: *Caf. temp. Hardw.* 137. But none of the statutes before mentioned give costs, upon the reversal of a judgment. (1 Str. 617.)

In replevin, or second deliverance, the defendant, in king avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, by Stat. 7 Hen. 8. c. 4, and Stat. 21 Hen. 8. c. 19. § 3; if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred: which statutes extend to avowries, &c. made by an executor; (2 R. Rep. 437.) or for an *estray*; (*Cro. Eliz.* 330.) and, as it should seem, for an *amercement* by a court leet; (*Cro. Jac.* 520 *sed vide* *Cro. E.* 300.) but not to pleas of *prisel en autre lieu*, upon which the writ is abated, (*Com. Rep.* 122,) or to pleas of *property* in the thing distrained. *Hard.* 153. By Stat. 17 Car. 2. c. 7. § 2, the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his full costs of suit. And by Stat. 11 Geo. 2. c. 19. § 22, if the defendant avow, or make cognizance, according to that statute, upon a distress for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suit. But this latter statute does not extend to a *seizure* for a heriot-custom.

At length, costs were given to defendants by Stat. 23 Hen. 8. c. 15. § 1. "in trespass upon Stat. 5 Ric. 2. debt, covenant, detinue, account, trespass, on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff," in cases of nonsuit, or verdict for the defendant.

The King, and any person suing to his use, (Stat. 24 H. 8. c. 8.) shall neither pay nor receive costs; for besides that he is not included under the general words of the statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose that the Queen con-

sort has the same privilege: for in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her. *F. N. B.* 101: 1 *Inff.* 133. And on this principle of the King not paying or receiving costs, no costs are due on a *certiorari* removing summary proceedings; unless a recognizance be entered into at the time of removing the proceedings. 1 *Term Rep.* 82.

Paupers, (that is such as will swear themselves not worth five pounds,) are by Stat. 11 H. 7. c. 12, to have original writs and subpoenas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by the Stat. 23 H. 8. c. 15. § 2; but shall suffer other punishments at the discretion of the judges. And it was formerly usual on such paupers being nonsuited to give them their election either to be whipped or pay the costs; though that practice is now disused. 1 *Sid.* 261. 7 *Mod.* 114: *Salk.* 506. And in cases of misconduct, or in certain other circumstances they may be dispaupered; that is deprived of their privilege of suing as paupers.—It seems however agreed that a pauper may recover costs, though he pays none: for the counsel and clerks are bound to give their labour to him, but not to his antagonists. 1 *Eq. Ab.* 125.

Executors and Administrators are not particularly excepted out of Stat. 23 Hen. 8. c. 16; yet, as that statute only relates to contracts made with, or wrongs done to the plaintiff, (2 *Str.* 1107,) it has been uniformly holden, (*Cro. Eliz.* 503: *Cro. Jac.* 229: 2 *Bull.* 261: 1 *Salk.* 207, 314. 3 *Bur.* 1586: *Sav. Costs* 97,) that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a contract entered into with the testator or intestate, (*T. Jen.* 47: 2 *Ld. Raym.* 1414: 1 *Str.* 682 S. C.: *Caf. Pr. C. B.* 157: *Pr. Reg.* 118. S. C.: *Barnes* 141,) or for a wrong done in his life-time. (*Barnes* 129.) But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a contract, (6 *Mod.* 91, 161: 1 *Salk.* 207. S. C.: 1 *Ld. Raym.* 436: 1 *Str.* 682: *Barnes* 119: 2 *Str.* 1106. 4 *T. R.* 277,) express or implied; or in *trover* (*Com. Rep.* 162: *Caf. Pr. C. B.* 61: *Barnes* 132: *Caf. temp. Hardw.* 204. But see 3 *Lev.* 60 *fmb. contra.*) for a conversion, after the death of the testator or intestate. An executor or administrator is liable to costs, upon a judgment of *non pros*: (*Caf. Pr. C. B.* 14. 157, 8: 3 *Bur.* 1585.) and where he has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs upon a discontinuance, (*Caf. Pr. C. B.* 79: 3 *Bur.* 1451: 1 *Bur.* Rep. 451. S. C.) or for not proceeding to trial according to notice; (*Caf. Pr. C. B.* 158: 3 *Bur.* 1585;) but otherwise he is not liable to costs, in either of these cases. (2 *Str.* 871: *Barnes* 133: 4 *Bur.* 1927.) Nor, where he merely sues *en autre droit*, is he liable to costs, upon a judgment as in case of a nonsuit. 4 *Bur.* 1928.

The Stat. 23 Hen. 8. c. 15, only relates to cases where the plaintiff is nonsuited, or has a verdict against him. But by Stat. 8 Eliz. c. 2, "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do

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do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein, the judges, by their discretions, shall award to the defendant his costs, damages, and charges in that behalf sustained."

The plaintiff, it has been observed, is not entitled to costs in a popular action, for the whole or part of a penalty given by statute to a common informer, unless they are expressly given him by the statute. Nor was the defendant entitled to costs in such an action, until they were given by the Stat. 18 Eliz. c. 5. § 3, made perpetual by Stat. 27 Eliz. c. 10.

There being still many cases in which the defendant was not aided by the provisions of the before-mentioned statutes, the Stat. 4 Jac. 1. c. 3, gives the defendant costs on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them if he had obtained judgment.—The Stat. 13 C. 2 §. 2. c. 2 § 3; 8 & 9 W. 3. c. 11. §. 2, give costs to a defendant also in cases of non prof. and demurrer: and the latter Stat. § 1, gives costs to one of several defendants in trespass, assault, false imprisonment, or ejectment acquitted; though the other defendants are convicted.

When a feigned issue is ordered by a court of law, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it. 1 Lill. P. R. 344: Barnes 130: 1 Hall. 261, 331: Say Rep. 24: 1 Will. 324. But when a feigned issue is ordered by a court of Equity, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered it, and the costs there are in the discretion of the court. Where the issue is ordered by a court of law, on a rule for an information, (Say Rep. 229: 1 Burr 603,) or motion for an attachment, (Say Rep. 253,) the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned, from the time when the feigned issue was first ordered and agreed to. 1 Burr. 604. Yet, where it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the whole costs to be paid under it. 2 Burr. 1021.

III. WHERE the plaintiff recovers single damages, he is only entitled to single costs; unless more be expressly given him by statute. But if double or treble damages be given by statute, in a case wherein single damages were before recoverable, the plaintiff is entitled to double or treble costs, although the statute be silent respecting them; (Say. C. R. 228;) as in an action upon Stat. 2 Hen. 4. c. 11, &c. In some cases, double and treble costs are expressly given to the plaintiff; as upon the game laws, by Stat. 2 Geo. 3. c. 19 § 5. And wherever a plaintiff is entitled to double or treble costs, the costs given by the court *de incremento* are to be doubled or trebled, as well as those given by the jury. 2 Leon. 52: Cro. Eliz. 582: 3 Lev. 351: Carth. 297, 321: 2 Str. 1048. but see 1 Term Rep. 252. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives double costs, they are calculated thus: 1. The common costs; and then half the common costs. If treble costs, 1. The common costs; 2. Half of these; and then half of the latter.

Double or treble costs are also in some cases expressly given to the defendant; as in actions against parish officers, by Stat. 43 Eliz. c. 2. § 19;—against justices of the peace, constables, &c. by Stat. 7 Jac. 1. c. 5;—for distresses for rents and services, by Stat. 11 Geo. 2. c. 19. § 21, 2;—and against officers of the excise or customs, by Stat. 23 Geo. 3. c. 70. § 34: 24 Geo. 3. sess. 2. c. 47. § 35. In these, and such like cases, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll. 1 Str. 49, 50: Cas. Pr. C. B. 16: Cas. temp. Hardw. 125: Id. 138: 2 Str. 1021. S. C.: Say. Rep. 214: 3 Will. 442: Cas. temp. Hardw. 125. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the certificate of the judge who tried the cause, on Stat. 7 Jac. 1. c. 5, there that particular mode must be observed: (2 Vent. 45: Doug. 8vo. 307, 8: but see Doug. 8vo. 308. n.) so that if the judge certify, there is no need of a suggestion; and if he do not, it is useless, except where judgment goes by default. Cas. temp. Hardw. 138, 9.

IV. COSTS are taxed, as between party and party, by the Master in the King's Bench, or by one of the Prothonotaries in the Common Pleas, upon a bill made out by the attorney for the party entitled; or frequently, without a bill, upon a view of the proceedings; and if there have been any extra expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which is called an affidavit of increased costs. Imp. K. B. 348. It is usual, among fair practitioners, to give notice to the opposite attorney, of the time when the costs are intended to be taxed; Id. 349. But in order to enforce it, there must be a rule to be present at taxing costs: which rule is obtained from the clerk of the rules in the King's Bench, or one of the secondaries in the Common Pleas, and should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

The means of recovering Costs, as between party and party, are by action or execution, upon a judgment obtained for them; or by attachment, upon a rule of court. Thus, in ejectment, where there is a verdict and judgment against the tenant, an action may be brought, or execution taken out thereon, for the costs: Run. Eject. 140, 141. But where the plaintiff is nonsuited, for not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule. Id. ibid.: 1 Salk. 259: Barnes 182. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only remedy is by attachment against the lessor of the plaintiff. Run. Ej. 142, 3. See title Attachment.

Besides the ordinary method of proceeding, there are certain auxiliary means for the recovery of Costs, as between party and party. These means are by moving to stay the proceedings, until security be given for the payment of Costs; or until the Costs are paid of a former action

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action for the same cause; or by deducting the Costs of one action, from those of another. As examples of these means, it may be mentioned, that in *Weymouth*, (1 Str. 681,) and *actions qui tam*, (Id. 697, 705: *Barnes* 126,) where the plaintiff, or his lessor, is unknown to the defendant, and in case the plaintiff is a foreigner residing abroad, (1 Term Rep. 267, 362, 491,) the defendant may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs.

The practice of deducting or setting off the Costs, in one action against those in another, however agreeable to natural justice, does not seem to have obtained till lately in the court of K. B. 2 Str. 891, 1203: *Bull N.P.* 336: 4 Term Rep. 121. But in C. P. it has been frequently allowed; and that not only where the parties have been the same, but also where they have been in some measure, different *Barnes* 145: 2 Black Rep. 826: *Bull N.P.* 336.

As between *Attorney and Client*, the former may maintain an action against the latter for the recovery of his costs. *Geo. C.* 150, 160—But by the Stat. 3 Jac. 1. c. 7. § 1, attorneys and solicitors must deliver a bill to their clients before bringing an action: and by Stat. 2 Geo. 2. c. 23. § 23, (explained by Stat. 12 Geo. 2. c. 13. and made perpetual by Stat. 30 Geo. 2. c. 19 § 75,) no attorney nor solicitor shall commence any action, till the expiration of one month after the delivery of his bill; which is directed by the acts to be in a common legible hand, in *English*, except law-terms, and subscribed with the attorney's hand.

The said Stat. 2 Geo. 2. c. 23, also directs the mode of taxation of attorneys' bills by the officers of the several courts; and directs that if the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation: but if it shall not be less, the costs shall lie in the discretion of the court.

If the whole bill be for *contingency*, or for business done at the quarter, *year*, &c. it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing *both*. And so, where it was moved, that the Master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, Lord Mansfield said, there was no doubt but the master might tax the whole. *11 C. B.* 141, 2: 4 Term Rep. 124: *Say Rep.* 233. *Sav. Costs* 320.

It is not necessary for the executor or administrator of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action; (*Cas. Pr. C.B.* 58;) the Stat. 2 Geo. 2. c. 23. § 23, being confined to actions brought by the attorney himself, and not extending to his personal representatives. And, in the court of Common Pleas, they will not suffer such a bill to be taxed: (*Barnes* 119, 122;) but in the court of King's Bench it is otherwise; (2 Str. 1056: *Sav. Costs* 324, 5: *Imp. K. B.* 482;) for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due.

COTE

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment. *Doug.* 8vo. 199. in *11 Imp. K. B.* 479. The bill being delivered, the client may apply for a judge's summons, to shew cause, why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation. *Imp. K. B.* 479, 480. If the attorney do not attend, an order will be made of course. But the client cannot have a summons for delivery of the bill, and taxing it, together. *Id.* 480. *Barnes C. B.* 126.

COSTS IN EQUITY. Are allowed for failing to make an answer to a bill exhibited; or making an insufficient answer: and if a first answer be certified by a master to be insufficient, the defendant is to pay 40s Costs; 3l. for a second insufficient answer; 4l. for a third, &c. But if the answer be reported good, the plaintiff shall pay the defendant 40s Costs. An answer is not to be filed, (till when, it is not reputed an answer,) until Costs for contempt in not answering are paid. By Stat. 4 & 5 An. c. 16, if a plaintiff in Chancery dismisses his own bill, or the defendant dismisses the same for want of prosecution, Costs are allowed to the defendant.

In other cases it seems that the matter of Costs to be given to either party is not in equity held to be a point of right, but merely discretionary, under Stat. 17 R. 2. c. 6, according to the circumstances of the case. Yet the Stat. 15 H. 6. c. 14, which requires surety to satisfy the party grieved his damages, on granting the subpoena, seems expressly to direct that, as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

In case of a great fraud, a person may be obliged to pay such Costs as shall be ascertained by the injured party's oath. 2 Fern. 123.

COT, In the old *Saxon* signifies *cottage*, and so is still used in many parts of *England*.

COTARIUS, A cottager. the *cotarius*, or cottagers, are mentioned in *Domesday*.

COTE AND COT. The names of places which begin or end with these words or syllables, have the signification of a little house or *cottage*; there are likewise *dove cotes*, which are small houses or places for the keeping of *doves* or pigeons. See title *Pigeon-House*.

COTELLUS, COTERIA, A small cottage, house, or homestead. *Concl.*

COTERELLUS. *Cotarius* and *coterellus*, according to *Spelman* and *Du Fresne*, are servile tenants; but in *Domesday* and other ancient MSs. there appears a distinction as well in their tenure and quality, as in their name. For the *cotarius* held a free socage tenure, and paid a stated firm or rent in provisions or money, with some occasional customary services; whereas the *coterellus* seems to have held in mere villenage, and his person, issue and goods, were disposable at the pleasure of the lord. *Paroch. Antiq.* 310.

COTESWOLD. Is used for sheep-cotes and sheep feeding on hills: from the *Sax.* *cote* and *wold*, a place where there is no wood.

COIGART,

COTGARE, A kind of refuse wool, so elung or clotted together, that it cannot be pulled asunder. By Stat. 13 R. 2. cap. 9, it is provided, that neither demizen nor so-reigner shall make any other refuse of wools but *cotgare* and *villen*.

COTLAND and **COTSETHLAND**, Land held by a cottager, whether in socage or villenage.—*Paroch. Antiq.* 532.

COTSETHLA, **COTSETLE**, The little seat or mansion belonging to a small farm. *Curial. Malinflow.* MS.

COTSETHUS, A cottage-holder, who, by servile tenure, was bound to work for the lord. *Cotset* are the meanest sort of men, now termed *cottagers*. And *cotset* are those who live in cottages. *Leg. Hen. 1. c. 30.*

COTTAGE, *cotagium*.] A little house for habitation, without lands belonging to it.

By the Stat. 31 Eliz. c. 7, cottages were prohibited to be erected without laying at least four acres of land to the same; and divers other restrictions were thereby imposed. But this was repealed by Stat. 15 Geo. 3. c. 32, setting forth that the said Stat. of 31 Eliz. had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population; and in divers other respects was inconvenient to the labouring part of the nation in general.

COTTON LIBRARY, For better settling and preserving the library kept in the house at Westminster, called *Cotton-house*, in the name and family of the Cottons for the benefit of the Public, a statute was made 12 W. 3. c. 7. See Stat. 5 Ann. c. 30: 26 Geo. 2. c. 22.

COTTONS, Not within 27 Hen. 8, concerning the true making of cloth, 27 H. 8. c. 12. *sect.* 3. See title *Callico: Manufacturers; Navigation-Acts*.—Stealing cotton out of places used for whitening or dying it, felony without clergy. Stat. 18 Geo. 3. c. 27.

COTUCA, Coat armour. *Walsing.* 114.

COTUCHANS, Boors or husbandmen, of which mention is made in *Domesday*.

COUCHER, or **COURCHER**, A factor that continues abroad in some place or country for traffick; as formerly in *Gascogn*, for buying of wines. Stat. 37 Ed. 3. c. 16. This word is also used for the general book wherein any corporation, &c. register their particular acts. 3 & 4 Ed. 6. c. 10.

COVENABLE, Fr. *convenable*, Lat. *rationabilis*.] What is convenient or suitable.—Every of the same three sorts of goods, &c. shall be good and covenable, as in old time hath been used. Stat. 31 Ed. 3. cap. 2. *Covenable* indowed, that is, indowed as is fitting. *St. 4 H. 8. c. 12.* See *Plowd.* 472.

COVENANT,

CONVENTIO.] The agreement or consent of two or more by deed in writing, sealed and delivered; whereby either, or one of the parties doth promise to the other that something is done already or shall be done afterwards: he that makes the covenant is called the *covenantor*; and he to whom it is made, the *covenantee*. See *Shep. Touchst.* 160, and on the whole of this subject at length.

I. *The several Kinds of Covenants, and by what Words they are created.*

II. *What Covenants are good and binding, and by what Words they may be made.*

III. *Who shall take Advantage of Covenants, and who are bound by them.*

IV. *What shall be a Performance, and what a Breach of Covenant.—And of Penalties for Non-performance.*

I. A *Covenant* is generally either in fact or in law; in fact is that which is expressly agreed between the parties, and inserted in the deed; and in law, is that covenant which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lessee a house or lands, &c. for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall, during the term, quietly enjoy the same against all incumbrances. 1 Inst. 384.

There is also a *Covenant real*, and *Covenant personal*: a *covenant real* is, that whereby a man ties himself to pass a thing real, as lands or tenements; or to levy a fine of lands, &c. And *covenant personal*, is where the same is annexed to the person and merely personal; as if a person covenants with another by deed to build him a house, or to serve him, &c. *F. N. B.* 145: 5 Rep. 10.

Covenants are likewise *inherent*, that tend to the support of the land or thing granted; or are *collateral* to it; and are *affirmative*, where somewhat is to be performed; or *negative*; *executed*, of what is already done, or *executory*: a *covenant* being to bind a man, to do something in future, is for the most part *executory*. 1 Vent. 176: *Dyer* 112, 271.

A covenant to settle or convey particular lands, will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant. *Finch v. Earl of Winchelsea*, 1 P. Wms. 282: *Freemount v. Dedre*, 1 P. Wms. 42: *Coventry v. Coventry*; best reported at the end of *Francis's Maxims*; For Equity considers that as done, which being distinctly agreed to be done, ought to have been done. *Grounds and Rudiments of Law and Equity*, p. 75.

A general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor, and therefore cannot be specifically decreed in equity. *Freemount v. Dedre*, 1 P. Wms. 430. But if the covenantor expressly declare the settlement to be in execution of his power, though the particular lands to be charged be not specified, equity will ascertain them, *Coventry v. Coventry*, *Francis's Maxims*: *Gillb. Rep.* 160.

It is held in all cases where words that begin any sentence are *conditional*, and give another remedy, they shall not be construed a *covenant*; and yet if words of condition and covenant are coupled together in the same sentence, as *Provided always, and it is covenanted, &c.* in that case they may be adjudged both a *condition* and *covenant*. *Marsh* 103.

The law does not seem to have appropriated any set form of words, as absolutely necessary to be made use of in creating a *covenant*; and therefore it seems that any words will be effectual for that purpose, which shew the party's concurrence to the performance of a future act: as if lessee for years covenants to repair, &c. *Provided always, and it is agreed, that the lessor shall find great timber, &c.* this makes a *covenant* on the part of the lessor

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to find great timber, by the word *grant*; and it shall not be a qualification of the covenant of the lessee. 1 *New. Abr.* 527. See 1 *Durr.* 290.

"The dependence or independence of covenants, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." *Per Lord Mansfield, Jones v. Beakley, Dougl.* 605. See also *Hudon v. The East-India Company, 1 Term Rep.* 538. Where the participle *doing, performing, paying, repairing,* is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent. *Boone v. Eves, 2 Black. Rep.* 1312; *Allen v. Badington, Sid.* 280. *Atkinson v. Morrice, 12 Mod.* 503. But where the covenant goes to the whole consideration on both sides, there it is a condition precedent. *Duke of St. Alban's v. Shore, 1 H. Black. Rep.* 276.

If one makes a lease for years, reserving a rent, action of covenant lies for non-payment of the rent; for the *redemption* of the rent is an agreement for payment of it, which will make a covenant. 2 *Darr.* 230. A lease is made to two, and one seals the deed, but the other doth not; if he accepts the estate and occupies the land, he is bound to perform the covenants for payment of the rent, reparations and the like. 1 *Shep. Abr.* 458.

If one man covenants to pay another 20*l.* at a day; although he may have action of debt for the 20*l.* yet it is said he may have covenant at his election. 1 *Darr.* 229.

It is agreed that *A. B.* shall pay to *C. D.* 100*l.* for lands in *B.* this is a mutual covenant, whereon action of covenant may be brought if *C. D.* will not convey. 1 *Sid.* 423. But where there are mutual covenants, and the one not to be performed before a precedent covenant, in such case one covenant is not enforceable till the other is performed; though if the covenants are distinct and mutual, several actions may be brought by and against the parties. 1 *Lil. Abr.* 350; 2 *Mod.* 74. In a covenant to pay another so much money, he making him an estate in such land, &c. it has been adjudged, that if he tender the covenantor a feoffment, and offer to make livery, he may have action of covenant for the money, as if he had made a title. 3 *Salk.* 107.

Where a man covenants that he hath power to grant, and that the grantee shall quietly enjoy notwithstanding any claiming under him; these are distinct covenants, for one goes to the title, and the other to the possession. 1 *Mod.* 101.

There is this difference however between a covenant and condition; a condition gives entry, and covenant gives an action only. *Owen* 54. A person cannot have action of covenant upon a verbal agreement, for it cannot be grounded without writing, except by special custom. *F. N. B.* 145.

II. ALL covenants between persons must be to do what is lawful, or they will not be binding; and if the thing to be done be impossible, the covenant is void. *Dyer* 112. But where the thing is lawful at the time of the covenant made, and afterwards the matter agreed to be done is prohibited by act of parliament, yet such covenant will be binding. 3 *Mod.* 39. And if a man covenants to do a thing before a certain time; and it becomes impossible by the act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it. 2 *Didd. Abr.* 84.

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Though a covenant to stand seised of lands to be after purchased be void as law, unless there be some act to be done, yet it seems, that a covenant to settle lands of such a value, will charge after-purchased lands, though the covenantor had died at the time of executing the covenant. *Test. v. Hedges, 2 Vern.* 97.

If a person covenants expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by his contract. *Allen* 26, 27: 1 *Lil. Abr.* 146. But he is not so bound by covenant in law. Where houses are blown down by tempest, the law excuses the lessee in an action of waste, though in a covenant to repair and uphold, it will not. 1 *Flou. 29.* If a lessee for years, rendering rent, covenants for him and his assigns to repair the house, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the covenant is broken; notwithstanding acceptance of rent from the assignee, action of covenant lies against the first lessee, on his express covenant to repair; and this personal covenant cannot be extinguished by the acceptance of the rent. 2 *Darr. Abr.* 216. See also *Assignment*, and *post.* III.

Action of covenant also lies on covenant for payment of rent against such lessee; but not action of debt after acceptance. 3 *Rep.* 24. In covenant upon a demise, rendering rent, the defendant cannot say, that part of it was to be allowed; for this is a covenant against a covenant. *Comb.* 21.

An infant within age may bind himself apprentice, but neither at Common law nor by statute may be bound by covenant for his apprenticeship, so as to make him liable to an action of covenant, if he departs, &c. But by the custom of London he may bind himself by his covenant at fourteen years old. 1 *Cro.* 129; *Witch.* 63.

III. THERE may be an agreement and covenant, only to be performed by the parties themselves; and there are some covenants which none, but the party and his heirs may take advantage of, being such as concern the inheritance, and descend to the heir, as knit to the estate: covenants in *gross* go to the executors, &c. 1 *Roll. Abr.* 520; 2 *Darr.* 235. Not only parties to deeds, but their executors and administrators, shall take advantage of inherent covenants, though not named; and every assise of the land may have the benefit of such covenants; likewise executors and assigns are bound by them, although not named, as a covenant to repair, &c. 5 *Rep.* 16, 17: 1 *Cro.* 552. If a man covenants with another to do any thing, his heir shall not be bound, unless he be expressly named; and yet where a lessee covenants to repair, the heir shall have the benefit of the covenant, though not named, because it runs with the land. 2 *Lev.* 92; 5 *Rep.* 8.

The executors and administrators of the covenantor will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of its being performed by any other person but the Covenantor. See *Dyer* 14. *pl.* 69. 1 *Roll. Abr.* 519. *h.* 351. *Hude v. Dean & Canons of Windsor, Cro. Eliz.* 553.

All persons to whom the land descended, were by the common law, entitled to the benefit of covenants which run with the land; but grantees of the reversion were not. The Stat. 32 Hen. 8. c. 34, therefore enacted, "That all grantees, &c. of reversions, should have the like advantages against the lessees, their executors, &c. by en-

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COVENANT III.

try for non-payment of the rent, or for doing waste, or other breaches, and the same remedy by action only, for not performing other conditions, covenants, or agreements contained in the lease, against the lessee; as the lessor or grantor had." The statute also gives the lessee the same remedy against the grantee of the reversion, when they might have had against their grantors. It must not, however, be understood from the general words of the statute, that the grantee of the reversion can take benefit of every forfeiture by force of a condition, *Land Tax* concerning the operation of the statute to be confined to such conditions as are either incident to the reversion, as rent; or for the benefit of the State, as for not doing of waste, for keeping the houses in repair, for mending of fences, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like. See *Co. Li.* 215, where a variety of resolutions upon this statute are stated, and the authorities referred to. See also 6 *Fin. Ab. Covenant* (Ch. 3) §. 397; *Widd v. Russell*, 3 *T. R.* 309. See further *Enc. Ab. Covenant*, (Ch. 6); *Ab. Covenant*, (Ch. 3).

The liability of the assignee does not extend to covenants broken before the assignment; as a covenant to build within a certain time, which was not broken before the assignment. *Grescott v. Green*, 1 *Salk.* 199; *St. Saviour's Southwark v. Smith*, 3 *Burr.* 1271; 1 *Bl. R.* 351. Nor is the assignee to be affected by any covenant broken after he has assigned over. *Boulton v. Canon*, 1 *Freem.* 336.

A collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee by express words; in this case, the assignees are bound by the terms of the covenant, for unless named they would not be bound by law; "for the covenant concerns a thing which was not in use, at the time of the demise made; but to be newly built after, and therefore shall bind the covenantor, his executors and administrators, and not the assignee; for the law will not annex the covenant to a thing which hath no being." *Spencer's Case*, 5 *Co.* 166. But as the law would sustain such a covenant against the covenantor and his assigns, if expressly included in the covenant, and give damages for its non-performance, it should seem to follow, that the covenantee would be intitled in equity to a decree for the specific performance of such covenant to build; and of this opinion Lord Hardwicke appears to have been, in the case of the *City of London v. Nash*, 3 *Atk.* 515; 1 *Vex.* 12. But in the case of *Lucas v. Commerford*, 3 *Bos. C. R.* 166, Lord Thurlow C. held, "That there could not be a decree to rebuild in pursuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair."

As law the assignee is liable only for the rent actually incurred, or covenants broken during his possession. *Boulton v. Canon*, 1 *Freem.* 336. If therefore he assign the very day before the rent becomes due, the lessor cannot maintain his action for it. *Facey v. Pitcher*, *Carth.* 177; 4 *Mod.* 71; 3 *Co.* 22; 1 *Salk.* 81; 1 *Freem.* 326. Nor will the circumstance of such assignment being for fraud, as to a beggar, alter the case. *Lewis v. Nash*, *Str.* 1221; *Buller's N. P.* 159. But see *Kilfoe v. Freeman*, 2 *Freem.* 220, 231; *T. Rayn* 303; *T. Jones* 109; in which the validity of such assignment was denied. But whatever may be the rule of law upon this point, it seems to be well settled, that courts of equity will compel an assignee of a term to account for the rent the whole time

he enjoyed the term. *Wood v. Call*, 1 *Perm.* 185. Where the equity will go on to demand the full rent, under any circumstances, depends upon the terms of the assignment to a beggar or insolvent person, who is discharged but not determined, in the case of *William v. Jones*, 2 *Atk.* 519. If the assignee offers to give up the possession to the lessor on reasonable terms, and the latter refuses, or except such surrender it were clearly too much for a court of equity, in violation of a legal right, to prevent the assignment. *Psallans v. Dudmire*, 2 *Atk.* 545. But supposing the lessor to be willing to accept of a surrender of the term, and the assignee wantonly to insist on his legal right to assign, when and to whom he pleased, it seems that, under certain circumstances, a court of equity might without impropriety interpose to prevent the abuse of such right; and this Lord Hardwicke appears to admit, in *Psallans v. Dudmire*; for having stated the legal right and the propriety of courts of equity in general, following the rule of law, he observes, "but it is true in some sort of assignments made by tenants, the court has interposed;" nor does the difficulty reported to have occurred to Lord Hardwicke, in *Philip v. Haire*, appear upon examination, to have been intitled to much attention. His Lordship is reported to have said, "As to the accruing rents, it is a point of more difficulty; for the covenant in this lease not to assign, does not run with the land to the assignee, because assignees are not bound by name in the covenant." Whence it might be inferred, that if assigns had been expressly included in the covenant, his Lordship would have considered them bound by the covenant. But whether assignees be bound or not by a covenant, does not, (except in the case of a collateral covenant to be done upon the land,) depend upon their being named in the covenant; for if the covenant run with the land, assignees are bound, whether named or not; and if the covenant do not run with the land, but is a personal contract, or respect something to be done purely collateral to, and not on the land, they are not bound, though they be expressly named. See *Spencer's case*, 5 *Co.* 166; 17 *a.* Therefore, whether the assignee was named or not, was immaterial to the question, Whether the assignee was bound by the covenant not to assign without consent of the lessor? Nor does it appear as having been necessary in order to determine whether a court of equity should restrain an assignment to a beggar, previously to determine, whether the assignee was bound by the covenant not to assign; for supposing the assignee to be bound at law by the covenant, equity may restrain the wanton and fraudulent breach of a covenant; and supposing him not to be bound, yet he may be affected in conscience upon the same principle that the assignee of a merely personal covenant may be affected in conscience, though not bound at law. See *City of London v. Richmond*, 2 *Freem.* 421.—*Treat. of Equity*; 350. in n.

The grantee of a reversion may bring action of covenant against a lessee, as well in the county where the demise was made, as in the county where the lands lie. *Cartharv* 183. A person covenants with another, to pay him money at a time to come, and does not pay to his executors, &c. if the covenantor die before the day, yet his executors or administrators shall have the money. *Dyer* 112, 257. And in every case where the testator is bound by a covenant, the executor shall be bound by it; if it be not determined by his death, 48 *Ed.* 3, 2; 2 *Dan.* 232.

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allege that he is ~~not~~ ready to perform it; whereas, at law, if the covenants be not precedent, but distinct and independent, the plaintiff need not allege a performance of his covenants, to entitle him to recover against the defendant for the breach of his. *Parlage v. Cole*, 1 *Salk.* 329; *Nichols v. Raymbred*, *Hob.* 88. But see *Calonel v. Briggs*, 1 *Salk.* 111; *Goodison v. Nunn*, 4 *Term Rep.* 761.

Where the covenants are mutual and distinct, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant; for the damage may be unequal, and therefore each party must recover against the other, the damages he sustained. *Cole v. Shallett*, 3 *Lev.* 41; *Thompson v. Noel*, 1 *Law.* 16; *Hovelt v. Strickland*, *Comw.* 56: but see *Calonel v. Briggs*, 1 *Salk.* 122; *Goodison v. Nunn*, 4 *Term Rep.* 761.

When a breach is assigned, it must ~~not~~ be general, but must be particular; as in action of Covenant for not repairing of houses, the breach ought to be assigned particularly, what is the want of reparation. *Civ. Jac.* 369.

But on mutual promise for one to do an act, and in consideration thereof another to do some act, as to sell goods, &c. for so much money, a general breach that the defendant hath not performed his part, is well assigned. 3 *Lev.* 319.

Breaches assigned ought to be according to the very words of the condition or covenant: when they may be well enough, though too general. 1 *Lutw.* 325.

Where a thing is to be done by a person or his assigns, the breach is to be, that it was not done either by the one or the other. 5 *Mod.* 133. If a person is to tender a conveyance, &c. to another, his heirs or assigns, breach assigned that the defendant did not tender a conveyance to the plaintiff, without the words, "his heirs or assigns," is good: but if the tender be to be made by another man, his heirs, &c. and not to him, it is otherwise. 1 *Salk.* 139.

Where a lessee for years is to leave all the timber on the land, which was growing there at the time of the lease, and he cut down any trees, though he leaves the timber on the land at the end of his lease, this is a breach of covenant: for in contracts the intention of the parties is chiefly to be considered. *Raym.* 464. If several breaches are assigned, and the defendant demurs upon the whole declaration, the plaintiff shall have judgment for all that are well assigned, for they are as several actions. *Civ. Jac.* 557.

Covenants are generally taken most strongly against the covenantor, and for the covenantee. *Plowd.* 287. But it is a rule in law, that where one thing may have several intendments, it shall be construed in the most favourable manner for the covenantor. 1 *Lut.* 450. The common use of covenants is for assuring of land; quiet enjoyment free from incumbrances; for payment of rent reserved; and concerning repairs, &c. And in deeds of covenant, sometimes a clause for performance, with a penalty, is inserted in the body of the deed; at other times and more frequently, bonds for performance, with a sufficient penalty, are given separate; which last being sued, the jury must find the penalty; but on covenant, only the damages. *Wood's Inst.* 250. Vide the *Stat.* 8 & 9 *W. 3.* c. 11. And vide ante § 99. and tit. Bond.

Covenant for non-payment of rent, was referred to the jury as to the rent, and on payment thereof provided to say as to that, but there being another breach as

to not repairing, the plaintiff might proceed for that. *Ann. Mag. Rep. Dec.* 1. p. 25. In an action of covenant, it is not necessary to aver that the plaintiff performed his covenants. *Judicell v. Gould*, *Rep. temp. Hardw.* 343. 4.

By *Stat.* 8 & 9 *W. 3.* c. 11. In actions on bonds, for performance of covenants, plaintiff may assign as many breaches as he pleases, and the jury on the trial of the action, or on a writ of enquiry, may assess damages: on defendant's paying damages, execution may be stayed, but judgment shall remain to answer any further breach, and plaintiff may have a *scire facias* against the defendant. See title Bond VI.

"Where a penalty is intended, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessorial, and therefore only to secure the damage really incurred." *Per Thurlow, C.* *Stoman v. Walter*, 1 *Bro. Rep.* 418. And upon this construction of a penalty, courts of equity will interpose, to restrain proceedings at law to recover the penalty. But the principles of equal justice require, that courts of equity should enforce the specific performance of the act agreed to be done, or restrain from the doing of that, which was agreed should not be done. And upon this principle, wherever the primary object of the agreement be the securing of the specific subject of the covenant, the party covenanting is not entitled to elect, whether he will perform his covenant, or pay the penalty. See *Hobson v. Treven*, 2 *P. Wms.* 191; *Parks v. Wilson*, 10 *Mod.* 517; *Chilliner v. Chilliner*, 2 *Vez.* 528. But if the covenant be to do, or not to do, some particular act, or doing it, or neglecting to do it, to pay a certain sum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages. *East-India Company v. Blake*, *Finch's Rep.* 117; *Ponsonby v. Adams*, 2 *Bro. P. C.* 431; *Russe v. Peterfon*, 2 *Bro. P. C.* 436. (8vo ed.) *Louze v. Peeri*, 4 *Burr.* 2228.—See also *Small v. Lord Fitzwilliam*, *Pre. Ch.* 102. And as courts of equity will not relieve against stipulated damages, they will not, in general, interpose to enforce the performance of the covenant, or to restrain its violation. Therefore, where the lessee covenanted not to plough certain land, or if he did, to pay 20s. *per acre, per ann.* the court refused to restrain the lessee from ploughing. *Woodward v. Gyles*, 2 *Vern.* 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be reserved; as where the lessee had covenanted not to plough ancient meadow, or if he did, to pay an increase of rent, the court, upon his threatening to plough, appears to have granted an injunction. *Webb v. Clarke*, 8th of *May*, 1782.—See also *Dulwich College v. Davis*, *M.* 1787.

It is held an action of covenant may be laid in London, for non-payment of rent on a lease of lands in any other place. 1 *Sid.* 401. And if, in this action, a sum be mis- cast, either too little or too much, it is amendable; and not like to the action of debt, which if alleged less than it is, without shewing the rest to be satisfied, it is ill. 3 *Kyb* 39: 2 *Cro.* 247. In action of covenant, the plaintiff must have recourse to the deeds or writings, and the circumstances of time, place, &c. and take notice what particular covenant in the deed it is best to insist upon, to lay a breach right, &c. the words of covenanting are,

covenant,

COVENANT. COVIN.

covenant, *quod pignus*, and *quod*. Et. but there is no great stretch in words to make a covenant. See *Bract. lib. 1. c. 1. § 1. § 2.*

What shall be a covenant? *See Vin. Abr. Covenant. (G. 2.)*; *Bar. Abr. Covenant. (E.)*; *Com. Dig. Covenant. (A. 2.)*; *Gill. Lib. 1. c. 1. § 1.* As to collateral Covenants. *See Vin. Abr. Covenant. (G. 2.)*; *1 Vin. 36.* As to affirmative and negative Covenants. *See Vin. Abr. Covenant. (D. 1.)*; *1 Wood 117*; *Gill. Lib. 1. c. 1. § 1.* By what words an express Covenant may be created. *See Vin. Abr. Covenant. (C.)*; *Gill. Lib. 1. c. 1. § 1.* As to Covenants created by implication of law, and action thereon. *See Vin. Abr. Covenant. (G.)*; *Com. Dig. Covenant. (A.)*; *Gerrard. (A.)*; *Bar. Abr. Covenant. (B.)*

How a Covenant shall be expounded with regard to the context, or to synonymous or other words. *See Com. Dig. Covenant. (D.)*; *Vin. Abr. Covenant. (L. 4.)*—As to Covenants for quiet enjoyment. *See Touchst. 170*; *Feachb. 118*; *Dy 328 a*; *Gill. 187*; *Vin. Abr. Condition. (U. 2. pl. 6, 7)*; *Id. Covenant. (D.)*—For the construction of the words in a Covenant, "notwithstanding any act done by the covenantor." *See Vin. Abr. Covenant. (T.)*; *Cro. Jac. 233*, *Proffor v. Johnson*.—As to Covenants for further assurance. *See Vin. Abr. Covenant. (W.)* (G. 2.); *1 Wood 117*; *Gill. Covenant 209, 226*; *Cro. Jac. 251*.—Of Covenants to repair. *See Vin. Abr. Covenant. (L. 5.)*; *Touchst. 170*; *Feachb. 118*; *Lant. v. Norris, 1 Burr. 287*; *1 Wilk. p. 1. 75*.—Of Covenants to convey lands of a certain value; or that lands are of such a value; fully. *See Ed. Raym. 365*; *Cro. El. 43*; *1 Ko. Abr. 429*; *Langton v. Norris, 2 Ch. Rep. 140*.—Of Covenants that the grantor is seised in fee. *See Vin. Abr. Covenant. (Y.)*; *Paroles. (D. pl. 4.)*; *Cro. Jac. 369*; *3 Lev. 46*.—Of Covenants, to be free from incumbrances. *See Vin. Abr. Covenant. (A. 2.)*; *1 Wood 115*; *Gill. Covenant. c. 31.*

See fully in what cases and in what manner Covenants shall be said to be suspended, defeated, discharged, or void. *See Bar. Abr. Covenant. (G.)*; *Gill. 470*; *1 Wood 397, 429*; *Com. Dig. Covenant. (K.)*; *Chancery 2. (X. 3.)*; *Vin. Abr. Covenant. (O.)*

This word Covenant, is also taken for the *Solemn League and Covenant*; which was a seditious conspiracy, invented in Scotland, voted illegal by parliament, and against which provision is made by *Stat. 14 Car. 2. cap. 4.*

COVENANT TO STAND SEISED TO USES, is when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing under hand and seal agree that for their or any of their provision or preferment, he and his heirs will stand seised of land to their use; either in fee simple, fee-tail, or for life. The use being created by the *Stat. 27 H. 8. c. 10*, which conveyeth the estate as the uses are directed, this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds, are natural affection, marriage, &c. and the law allows in such cases consideration of blood and marriage, to raise uses, as well as money and other valuable consideration when a use is to a stranger. *See Plowd. 302*. There are no considerations now to raise uses upon covenants to stand seised, but natural love and affection, which is for advancement of blood; and consideration of marriage, which is the joining of the blood and marriage together: other considerations, as money, &c. for land, though the words in the deed are *stand seised*, yet they are bargains and

sales, and without assent they raise no use. *See Cro. Jac. 233*.

The usual covenant to stand seised to uses need not be by deed intended and enrolled. And where a man makes his estate to the use of his wife for life, this imports a sufficient consideration in itself; also if a person covenants to stand seised to the use of his wife, son, or cousin, it will raise an use without any express words of consideration; for sufficient consideration appears. *See 7 Rep. 40*.

In case of a covenant to stand seised, so much of the estate the owner does not dispose of, remains still in him. *See 1 Wood 374*. And where an use is raised by way of covenant, the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him; but if they are not, the possession shall remain in him until a lawful use arise. *See 1 Law. 197*; *1 Mod. 159, 160*.

If a covenant to stand seised to uses, no use doth arise, yet it may be good by way of covenant and give remedy to the covenantee in an action; as if the covenant be future; that, in consideration of a marriage, lands shall descend or remain to a son and the heirs of his body on the body of his wife; in this case the covenantee may have writ of covenant upon the covenant against the covenantor. But if a covenant be that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by law: here no action of covenant lies on the covenant; for this action will never lie upon any covenant but such as is either to do a thing hereafter, or where the thing is already done, and not when it is for a thing present. *See Plowd. 307, 398*; *Finnel's Law. 49*.—See title *Conveyance*.

COVERT BARON, *A fema covert-baron*, is a married woman. See title *Baron and Feme*.

COVERTURE, *Pr.*] Any thing that covers; as apparel, a coverlet, &c. but it is by our law particularly applied to the state and condition of a married woman, who is *sub potestate viri*; and therefore disabled to contract with any, to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof. *See Bract. lib. 1. c. 10. lib. 2. c. 15, &c.* *See Bro. Abr.* When a woman is married, she is called a *Feme Covert*; and whatever is done concerning her, during the marriage, is said to be during the *coverture*: all things that are the wife's, are the husband's; nor hath the wife power over herself, but the husband: and if the husband alien the wife's land, during the *coverture*, she cannot avoid it during his life; but after his death, she may recover by *cui in vita*. *Terms de Ley*.—See title *Baron and Feme*; *Cui in vita*.

COVIN, *Covina*.] A deceitful compact between two or more to deceive or prejudice others; as if tenant for life or in tail, conspires with another, that he shall recover the land which he the tenant holds, in prejudice of him in reversion. *See Plowd. 546*. *Covin* is commonly conversant in and about conveyances of land by fine, lease, recovery, &c. And then it tends to defeat purchasers of the lands they purchase, and creditors of their just debts; and so it is used in deeds of gift of goods; it may be likewise sometimes in suits of law, and judgments had in them. But wherever *covin* is, it shall never be intended, unless it appears and be particularly found: for *covin* and fraud though proved, yet must be found by the jury, as it will not be good. *See Brownl. 188*; *Bridgm. 112*.

If one make a lease to a person by *words*, and another grant another lease to another *quasi sine*, but without any deed or deed with this take the second lease may not avoid the first lease, because he is not a purchaser that comes in for money. 3 *Rep.* 83. On recovery by a good title, there may be *coverture*; as where a tenant for life by assent, is suffered a recovery by *Nich.* without making any defence; and if a man hath a rightful and just cause of action, and of *covert* and confess shall raise up a tenant by wrong against whom he may recover; the *covert* doth in substance the right, that the recovery, although it be upon good title, shall not bind. *See Covin* 47: *Co. Lit.* 292: 1 *Step. Abr.* 365. A. is tenant for life, remainder in tail to B. and a *præcipe* is brought against them as joint tenants, by *covert* between the demandant and A. and an answer procured for B. or joint tenant; and they join the wife, (or issue) and after make default; whereby final judgment is given; this shall not defeat the estate of B. who may bring a writ of *disseisin*, and shall be restored to his land. *Rel. Abr.* 621.

If a man that has a right to certain lands, by *covert* causes another to oust the tenant of the lands, in the intent to recover it from him, and he recovers accordingly against him by action tried; yet he shall not be permitted to his ancient right; but is in of the estate of him who made the ouster; and an assize lies against him. 2 *Dart.* 309. Land is aliened, pending a writ of debt, by *covert*, to avoid the extent thereof for the debt; the land so aliened shall be extended, when the *covert* appears upon the return of the *elegit* by the sheriff. *Ibid.* 311. If a man makes a deed of gift, &c. of his goods in his lifetime by *covert*, to oust his creditors of their debts, after his death the donee or vendee shall be charged for them. See the several statutes of *Frauds*. If goods are sold in market overt by *covert*, on purpose to bar him that hath right, this shall not bar him thereof. 2 *Inst.* 713: See title *Frauds*, &c.

COUNCIL. In the city of London, there are common *council-men* chosen in every ward at a court of wardmote held by the aldermen of the respective wards on St. Thomas's day yearly: they are to be chosen out of the most sufficient men; and sworn to give true *counsel* for the common-profit of the city, &c. *See London.* 127. In the court of common-council, are made laws for advancement of trade; and committees yearly appointed, &c. Resolutions made by them, are to have the assent of the Lord Mayor and Aldermen, by Stat. 21 Geo. 1. c. 11. See this *Diss.* title *London*.

COUNSELLOR, Confiliarius.] A person retained by a client to plead his cause in a court of judicature. A *Barrister*: See title *Barrister*.—To what is there noticed may be added.—That by Stat. 5 *Edm. 1.* c. 14. counsellors shall not be punished for shewing a false deed in evidence. No recusant convict, or non-conformist shall practise the law, as a *counsellor*, or otherwise, under penalties. See Stat. 3 Jac. 1. c. 5: 7 W. 3. c. 24: 13 Geo. 3. c. 61: 2 Geo. 4. c. 13. See titles *Orbis*, *Non-conformists*.

COUNT, for Prisoners. See title *Trial* and *Count* 277.

COUNT, The original declaration of complaint in a real action. As declaration is applied to personal, so *Count* is applicable to real causes: but *Count*, and *declaration* are oftentimes confounded, and made to signify the same thing. *F. N. B.* 16, 60. In passing a recovery, the

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COUNTENANCE.] This word seems to be used for credit or estimation. *Old Nat. Br.* 111. And in the Stat. 1 Ed. 3. c. 2. See *Countenance*.

COUNTY, Comitatium from the Lat. computare.] The name of two prisons in London, the *County* counter, and *County* prison, (supra consolidated) into one new-built prison for the use of the city, to confine debtors, peace-breakers, &c. *Co. Lit.*

COUNTERFEITS. See title *Counterfeits*. *Counterfeiting* the King's seal or money, &c. is treason, See title *Treason*: And *counterfeiting* Exchequer bills, bank-bills, lottery orders, &c. is felony. See title *Felony*, Forgery, &c.

COUNTERMAND, Contremandatum.] Is where a thing formerly executed, is afterwards by some act or ceremony made void by the party that first did it. And it is either actual, by deed; or implied; *virtual*, where a power to execute any authority, &c. is by a formal writing, for that very purpose put off for a time, or made void: and implied, is where a man makes his last will and testament, and thereby devises his land to A. B. if he afterwards enfeoffs another of the same land, here this *feoffment* is a *countermand* to the will, without any express words for the same, and the will is void as to the disposition of the land: Also if a woman seized of land in fee-simple, makes a will and deviseth the same to C. D. and his heirs, if he survive her; and after she intermarries with the said C. D. there, by taking him to husband, and coverture at the time of her death, the will is *countermanded*. *Terms de Ley*. But if a woman makes a lease at will, and then marries, this marriage is no *countermand* to the lease, without express matter done by the husband to determine the will.

Where land is devised; and after a lease made thereof for years only; it shall not be a *countermand* of the will, which is good notwithstanding, for the reversion after the lease for years is ended; but in case a man have a lease for years, and gives it by his will, and after surrenders it; it is a *countermand* of the devise; and the devise shall not have his lease. *See 27 Geo. 3. c. 24.* See title *Devise*. If a copyholder, like to die, do surrender his house to the use of his wife or children, without any consideration of money, &c. and he recovers before the presentment and admittance, it may be *countermanded*. It is otherwise if it be to the use of a stranger. *Kitch.* 82. If there be a feoffment with lease of attorney to make livery and seisin; and before it is made, the feoffor makes a feoffment, or bargain and sale, of the land, or lease to another; it will be a *countermand* in law of the authority given

COUNTRY

COUNTY.

Of these three, the county of *Durham* is now the only one remaining in the hands of a subject. For the earldom of *Ulster*, or *Cumula* territory, was united to the crown by *Hen. III.* and has ever since given title to the King's eldest son. And the County Palatine, or Duchy of *Lancaster*, was the property of *Henry Beaufort*, the son of *John of Gaunt*, at the time when he wrested the crown from King *Richard II.* and assumed the title of *Henry IV.* But he was too prudent to suffer this to be

united to the crown; lest if he lost one, he should lose the other also. For as *Plowden* (215.) and *Sir Edward Coke* (4 *Inst.* 235.) observe "he knew he had the Duchy of *Lancaster* by title and indefeasible title, but that his title to the crown was not so assured; for that after the decease of *Richard II.* the right of the crown was in the heir of *Leon I Duke of Clarence*, second son of *Edward III*; *John of Gaunt*, father to this *Henry IV.* being but the fourth son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of *Lancaster*, and all other his hereditary estates, with all their royalties, and franchises, should remain to him and his heirs for ever, and should remain, descend, be admitted, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, *Henry V.* and *Henry VI*; many new territories, and privileges being annexed to the Duchy by the former. *Parl. 2 Hen. 5. c. 30*; 3 *Hen. 5. c. 15*.—*Henry VI.* being attainted in 1 *Edw. IV.* this duchy was declared in parliament to have become forfeited to the crown; (1 *Fenn.* 155.) and at the same time an act was made to incorporate the Duchy of *Lancaster*, to continue the County Palatine; (which might otherwise have determined by the attainder, 1 *Fenn.* 157.) and to make the same parcel of the Duchy; and, farther, to vest the whole in King *Edward IV.* and his heirs, *Kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 *Hen. 7.* another act was made, to resume such part of the Duchy lands as had been dismembered from it in the reign of *Edward IV.* and to vest the inheritance of the whole in the King and his heirs for ever; as simply and largely, and in like manner, form, and condition, separate from the crown of *England* and possession of the same, as the *Three Henries* and *Edward IV.* or any of them, had and held the same.

The *Isle of Ely* is not a County Palatine, though sometimes erroneously called so, but only a royal franchise, the bishop having, by grant of King *Henry the First*, *jure regalia* within the *Isle of Ely*; whereby he exercises a jurisdiction over all causes, as well criminal as civil. 2 *Inst.* 220.

The *Counties Palatine* are reckoned among the superior courts: And are privileged as to pleas, so as no inhabitant of such counties shall be compelled by any writ to appear or answer out of the same; except for error, and in cases of treason, &c. and the *Counties Palatine* of *Chester* and *Durham*, are by prescription, where the King's writ ought not to come, but under the seal of the *Counties Palatine*; unless it be writs of proclamation. *Crompt. Jurif.* 137: 1 *Dunv. Abr.* 750.

But *certiorari* lies out of *B. R.* to justices of a *County Palatine*, &c. to remove indictments, and proceedings before them. 2 *Hawk P. C. c. 27. § 23.*

There is also a court of Chancery in the *Counties Palatine* of *Lancaster* and *Durham*, over which there are Chancellors; that of *Lancaster* called Chancellor of the Duchy, &c. See title *Chancellor*.—And there is a court of Exchequer at *Chester*, of a mixed nature, for law and equity, of which the *Chamberlain of Chester* is judge. There is also a Chief Justice of *Chester*; and other justices in the other *Counties Palatine*, to determine civil actions and pleas of the crown.

The Bishop of *Durham* has that *County Palatine*; and if any erroneous judgment be given in the courts of the bishoprick of *Durham*, a writ of error shall be brought before the Bishop himself; and if he give an erroneous judgment thereon, a writ of error shall be sued out returnable in *B. R.* 4 *Inst.* 218.

Infants in *Counties Palatine* enabled to convey by order of the respective courts belonging to those counties. 4 *G. 3. c. 16.*

The King may make a *County Palatine* by his letters patent without parliament. 4 *Inst.* 201.

As to further matter relative to the several *Counties Palatine*, see titles *Chester*, *Durham* and *Lancaster*; and particularly as to *Chester*, *Stats.* 43 *Eliz. c. 15*: (and this Dict. title *Fines*;) 22 *Geo. 2. c. 46*: 26 *Geo. 2. c. 34*: 27 *Geo. 3. c. 43*.

COUNTIES CORPORATE, are certain cities and towns, some with more, some with less territory annexed to them, to which out of special grace and favour, the Kings of *England* have granted the privilege to be Counties of themselves, and not to be comprized in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein.

The *Stat. 3 Geo. 1. c. 15*, for the regulation of the office of sheriffs, enumerates 12 cities, and 5 towns, which are counties of themselves, and which have consequently their own sheriffs. The Cities are *London* (by grant of *Hen. 1*) *Chester* (42 *Eliz.*) *Bristol*, *Coventry*, *Canterbury*, *Exeter*, *Gloucester*, *Litchfield*, *Lincoln*, *Norwich*, *Worcester*, *York* (32 *Hen. 8.*)—The Towns are *Kingston upon Hull*, *Nottingham*, *Newcastle-upon-Tyne*, *Pool*, *Southampton*. 1 *Comm.* 116—119. To these *Gloucester* is added in *Impey's Sheriff*; but on what authority does not clearly appear.

COUNTY COURT, *Comitia Comitatus*] Is by *Lambert* called *Conventus*, in his explication of *Saxon* words, and divided into two sorts; one retaining the general name, as the *County-court* held every month, by the sheriff or his deputy: the other called the *town*, held twice in every year, viz. within a month after *Easter* and *Michaelmas*; of both which See *Crompt. Jurif. fol. 241*. All administration of justice was at first in the King's hands; but afterwards, when by the increase of the people the burden grew too great for him, as the kingdom was divided into counties, hundreds, &c. so the administration of justice was distributed amongst divers courts; of which the sheriff had the *County-court* for government of the county, and lords of liberties had their *leets* and *law-days*, for the speedier and easier administering justice therein, &c.

Before the courts at *Westminster* were erected, the *County-courts* were the chief courts of the kingdom: And among the laws of King *Edgar* it is ordained, that there be two *County-courts* kept in the year, in which there shall be a bishop and an alderman, or earl, as judges; one to judge according to the Common law, and the other according to the Ecclesiastical law; But these united powers of a bishop and earl to try causes, were separated by *William the First*, called the *Conqueror*; and soon after the business of ecclesiastical cognifance was brought into its proper courts, and the Common law business into the King's Bench. *Blount*.

That the *County-court* in ancient times, had the cognifance of Pleas of the Crown, indictments of felony, &c. appears by *Glanv. lib. 1. cap. 2, 3, 4.* by *Bratton*, and *Britton*.

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Briton, in divers places, and *Flota*, lib. 2. c. 62. But the power of this court was much reduced by *Magn. Chart.* c. 17; and by 1 *Ed. 4. cap. 2*; by the former of which it is expressly provided, that "no sheriff shall hold pleas of the crown." It had formerly, and now hath the determination of certain debts, &c. under 40*s*. Over some of which causes the inferior courts have by the express words of the *Stat. of Gloucester* 6 E. 1. c. 8, a jurisdiction totally exclusive of the King's superior courts.

This Court may also hold plea of many real actions, such as dower, right-patent, right of ward. 4 *Inst.* 266: 3 *Inst.* 312. And of all personal actions to any amount, by virtue of a writ of *justicies*, which is in nature of a commission to the sheriff to do it. 4 *Inst.* 266. Here the plaintiff takes out a summons, and if the defendant do not appear, an attachment or *disfringas* is to be made out against him; but if the defendant appears, the plaintiff is to file his declaration, and after the defendant has put in his answer or plea; and the plaintiff having joined issue, the trial proceeds, &c. whereupon if verdict is given for the plaintiff, judgment is entered, and a *fi ri facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and be appraised and sold to satisfy the plaintiff: But if the defendant hath no goods, the plaintiff is without remedy in this court; for no *capias* lies therein, but an action may be brought at Common law, upon the judgment entered. *Greenwood of Courts*, p. 22: *Finch* 313: *F. N. B.* 152.

No sheriff is to enter in the County-court, any plaint in the absence of the plaintiff; nor above one plaint for one cause, under penalties: The defendant in the County-court is to have lawful summons; and two justices of peace are to view the estates of the sheriffs, before they issue them out of the County court, &c. By *Stat. 11 H. 7. c. 15*, Causes are to be removed out of the County court, by *reco. lare, pone*, and writ of *false judgment*, into B. R. &c. The *Stats. 9 H. 3. c. 35*: 2 E. 6. c. 25, enact, that no County-court shall be adjourned for longer than one month, consisting of 28 days.

All popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors and knights of the shire must ever be made in full County-court.

As this court hath of ancient times belonged to the Sheriff, and is incident to his office, the King cannot grant by letters patent the office of County-clerk nor the fees: but it of right belongs to the sheriff. 4 *Co. Miton's case*.

See *Stats. 7 & 8 W. 3. c. 25*, as to the County courts in *Yorkshire*: and 27 *H. 8. c. 26*: 34 *H. 8. c. 26*, as to those in *Wales*. *Blackstone*, (3 *Comm.* 82,) observes, on the late erection of numerous Courts of Conscience (see that title *post*.) that it is to be wished that the proceedings in the County and Hundred-courts could be again revived and improved; an experiment that has been tried and succeeded in *Middlesex*. For by *Stat. 23 Geo. 2. c. 33*, it is enacted—1. That a special County-court shall be held, at least once a month, in every hundred of the county of *Middlesex*, by the County-clerk.—2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year.—3. That in all

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causes not exceeding the value of 40*s*. the County-clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses, on oath, without the formal process anciently used; and shall make such order therein as they shall judge to be agreeable to conscience.—4. That no plaints shall be removed out of this court, by any process whatsoever, but the determination herein shall be final.—5. That if any action be brought in any of the superior courts, against a person resident in *Middlesex*, where the jury shall find less than 40*s*. damages, the plaintiff shall not recover, but pay, costs. (See title *Costs*).—6. Lastly, A table of very moderate fees is prescribed and set down in the act, which are not to be exceeded.

It seems indeed, as the learned commentator remarks, that this plan wants only to be generally known, to secure its universal reception.

COUNTY-RATES. By *Stat. 12 G. 2. c. 29*, Justices of peace at their quarter sessions, [and by *Stat. 13 Geo. II. c. 18*, Justices of liberties and franchises not subject to the County commissioners,] may make one general rate, to answer all former distinct rates, which shall be assessed on every parish, &c. and collected and paid by the high constables of hundreds to treasurers appointed by the justices; which money shall be deemed the public stock, and be laid out in repairing of bridges, gaols, or houses of correction, on presentment made by the grand jury at the assises or quarter-sessions, of their wanting reparation; but appeal lies by the church-wardens and overseers of the poor of the parishes to the justices at the next sessions, against the rate on any particular parish. And as to this appeal see also *Stat. 22 Geo. 3. c. 17*. See titles *Bridges*; *Gaols*.

COUNTING-HOUSE OF THE KING'S HOUSEHOLD. *Domus Computus Hospitii Regis.* Usually called the *Board of Green Cloth*; where sit the Lord Steward, and Treasurer of the King's House, the Comptroller, Master of the *Household*, Collierer, and two Clerks of the *Green Cloth*, &c. for daily taking the accounts of all expences of the *Household*, making provisions, and ordering payment for the same; and for the good government of the King's *Household* servants, and paying the wages of those below stairs. *Stat. 39 Eliz. cap. 7*.

COURIER. From the *Fr. Courir* to run.] An express messenger of haste.

COURRACIER. *Fr.*] A horse-courser. 2 *Inst.* 719.

COURTS.

A COURT, *Curia.*] The King's palace, or mansion; but more especially the place where justice is judicially administered. *Co. Lit.* 58. The Superior Courts are those at *Westminster*; and of Courts, some are of record, and some not; which are accounted *base Courts*, in respect of the rest.

A Court of record is that Court which hath power to hold plea, according to the course of the Common law, of real, personal, and mixed actions, where the debt or damage is 40*s*. or above; as the King's Bench, Common Pleas, &c. A Court, not of record, is where it cannot hold plea of debt or damages amounting to 40*s*. but of pleas under that sum: or where the proceedings are not according to the course of the Common law, nor inrolled; as the County-court, and the Court-Baron, &c. 1 *Inst.* 117: 260: 4 *Rep.* 52: 2 *Rel. Abr.* 574.

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Every *Court* of record is the *King's Court*, in right of his crown and dignity, though his subjects have the benefit of it; and therefore no other *Court* hath authority to fine and imprison: so that the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a *Court* of record. *Salk.* 200: 12 *Mod.* 388: *Finch L.* 231. The free use of all *Courts* of record and not of record, is to be granted to the people: 'The feet and tourn are the *King's Courts*, and of record.' 2 *Darr.* 259. The rolls of the superior *Courts* of record are of such authority, that no proof will be admitted against them; and these records are only triable by themselves. 3 *Inst.* 71. But as the *County-court*, *Court-baron*, &c. are not *Courts* of record, the proceedings therein may be denied, and tried by a jury; and upon their judgments, a writ of error lies not; but writ of false judgment. 1 *Inst.* 117. See *post.* *Court-law*.

In the *Courts* at *Westminster*, the plaintiff need not show at large in his declaration, that the cause of action arises within their jurisdiction, it being general: Inferior *Courts* are to show it at large, because they have particular jurisdictions. 1 *Lil. Abt.* 371. Also nothing shall be intended to be within the jurisdiction of an inferior *Court*, but what is expressly so alleged: And if part of the cause arises within the inferior jurisdiction, and part thereof without it, the inferior *Court* ought not to hold plea. 1 *Lev.* 104: 2 *Rep.* 16. See title *Abatement* 1. 1.

An inferior *Court*, not of record cannot impose a fine, or imprison: But the courts of record at *Westminster* may fine, imprison, and amerce. 11 *Rep.* 43.

The King being the supreme magistrate of the kingdom, and intrusted with the executive power of the law, all *Courts*, superior or inferior, ought to derive their authority from the crown. *Staudf.* 54. Though the King himself cannot now, as anciently, sit in judgment in any *Court* upon civil causes, nor upon indictments, because there he is one of the parties to the suit. 2 *Howk. P. C.* c. 1. § 1, 2. 'The King hath committed all his power judicial to one *Court* or the other. 4 *Inst.* 71. And by *Stat.* 52 *H.* 3. c. 1, it is enacted, that all persons shall receive justice in the *King's Courts*, and none take any distress, &c. of his own authority, without award of the *King's Courts*.

It is said the customs, precedents, and common judicial proceedings of a *Court*, are a law to that *court*: And the determinations of *courts*, make points to be law. 2 *Rep.* 12: 4 *Rep.* 53: *Hob.* 298. All things determinable in *Courts*, that are *Courts* by the Common law, shall be determined by the judges of the same *Courts*; and the King's writ cannot alter the jurisdiction of a *Court*. 6 *Rep.* 11. 'The *Court* of B. R. regulates all the inferior *Courts* of law in the kingdom, so that they do not exceed their jurisdictions, nor alter their terms, &c. And as the *Court* of *King's Bench* hath a general superintendency over all inferior *Courts*, it may award an attachment against any such *Court*, usurping a jurisdiction not belonging to it: But it is sometimes usual first to award a writ of prohibition, and afterwards an attachment, upon its continuing to proceed. 2 *Howk. P. C.* c. 22. § 25.

If a *Court*, having no jurisdiction of a cause depending therein, do nevertheless proceed, the judgment in such *Court* is *coram non iudice*, and void; and an action lies against the judges who give the judgment, and any officer

that executes the process under them: Though where they have authority, and give an ill judgment, there the party who executes the process, &c. upon the judgment, shall be answerable. 1 *Lil. Abt.* 370.

Judges of inferior *Courts* may be punished for misbehaviour either by information or attachment. *Moravia's case.* *Hudob.* 135. Any defects in the proceedings of an inferior *Court* cannot be amended, by the return which is not part of the record. *The King v. Holmes*, *Id.* 365. Where an inferior *Court* returns its proceedings, no diminution can be alledged. *Ibid.* *Sayer v. Curtis*, 367.

Action on the case lies against the plaintiff for suing one in an inferior *Court*, where the cause of action is out of its jurisdiction. 1 *Vent.* 369. And if a plaintiff on a contract for a large sum, splits it into several actions for small sums to give an inferior *Court* jurisdiction, a prohibition shall go. *Mol. Cas.* 90.

Striking, in the *Courts* at *Westminster*, is punished by cutting off the right hand, and forfeiture of goods, &c. How contempt to *Courts* are punishable by fine and imprisonment, &c. See title *Attachment*. See further as to particular *Courts*, *post.* *Court-baron*, &c. and under titles *King's Bench*, *Chancery*, *Common Pleas* and *Eschequer*.

Court of Admiralty, See title *Admiralty*.

Court-baron, *curia baronis*.] A *court* which every lord of a manor hath within his own precinct; it is an inseparable incident to the manor: and must be held by prescription, for it cannot be created at this day. 1 *Inst.* 58: 4 *Inst.* 268. A *Court baron* must be kept on some part of the manor: and is of two natures;

1. By *Common law*, which is the *barons' or freeholders' court*, of which the freeholders being suitors are the judges; and this cannot be a *Court-baron* without two suitors at least. The steward of this court is rather the register than the judge.

2. By *custom*, which is called the *Customary court*: and concerns the customary tenants and copyholders, whereof the lord, or his steward, is judge. See title *Copyhold*.

The *Court baron* may be of this double nature, or one may be without the other: but as there can be no *Court-baron* at *Common law* without freeholders; so there cannot be a *Customary court* without copyholders or customary tenants. 4 *Rep.* 26: 6 *Rep.* 11, 12: 2 *Inst.* 119. See title *Copyhold*.

The *Freeholders' court*, whose most important business is to determine, by writ of right, all controversies relating to lands within the manor; and which hath also jurisdiction for trying actions of debt, trespasses, &c. under 40s. may be held every three weeks; and is something like a *County court*, and the proceedings much the same: though on recovery of debt, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction is made.

The proceedings on a writ of right may be removed into the *County courts* by a precept from the sheriff called a *cessi* (*quia tollit causam*), 3 *Rep. Pref.*—And the proceedings in all other actions, may be removed into the superior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the suit. *F. N. B.* 4, 70: *Finch L.* 444, 5.

After judgment given also, a writ of *false judgment* lies to the courts at *Westminster* to re-hear and re-view the cause; and not a writ of error: for this is not a court of

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of record: and therefore in some of these writs of removal, the first direction given is to cause the plaint to be recorded; *recordari facias loquendam*. *F. N. B.* 18.

The other Court baron, for taking and passing of estates, surrenders, admittances, &c. is held but once or twice in a year, (usually with the court-leet) unless it be on purpose to grant an estate; and then it is holden as often as requisite. In this court the homage jury are to inquire that their lords do not lose their services, duties, or customs; but that the tenants make their suits of court; pay their rents and heriots, &c. and keep their lands and tenements in repair; they are to present all common and private nuisances, which may prejudice the lord's manor; and every public trespass must be punished in this court, by amercement, on presenting the same. By *Stat. Extent. Man.* 4 E. 1, it shall be inquired of customary tenants, what they hold, by what works, rents, heriots, services, &c. And of the lord's woods, and other profits, fishing, &c.

COURT OF CHIVALRY, *curia militaris*.] Otherwise called the *Marshal court*; the judges of it are the *Lord High Constable of England*, and the *Earl Marshal*; this court is said to be the fountain of the *marital law*, and the *Earl Marshal* hath both a judicial and ministerial power; for he is not only one of the judges, but to see execution done. 4 *Inst.* 123. See title *Court-Martial*.

The Court of Chivalry is the only Court Military known to, and established by the permanent laws of the land; it was formerly held before the *Lord High Constable* and *Earl Marshal of England*, jointly, but since the extinguishment of the former office, it hath usually, with respect to civil matters, been before the *Earl Marshal* only. See title *Constable*.—From the sentence of this court an appeal lies immediately to the King in person. 4 *Inst.* 125. This court was in great reputation in times of pure Chivalry, and afterwards, during our connexions with the Continent, by the territories which our princes held in *France*; but is now grown almost entirely out of use, on account of the feebleness of it's jurisdiction, and want of power to enforce its judgments. 3 *Comm.* 68.

The jurisdiction of this court is declared by *Stat.* 13 R. 2. c. 2, to be this: "that it hath cognizance of contracts touching deeds of arms, or of war, out of the realm; and also of things which touch war within the realm, which cannot be determined or discussed by the Common law; together with other usages and customs to the same matters appertaining." So that wherever the Common law can give redress, this court hath no jurisdiction: which has thrown it entirely out of use, as to matters of contract, all such being usually cognizable in the courts of *Westminster-hall*, if not directly, at least by fiction of law: as if a contract be made at *Gibraltar*, the plaintiff may suppose it made at *Westminster*, &c. for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words, "other usages and customs," support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees and quality. Whence it follows, that the civil jurisdiction of this court of Chivalry is principally in two points; the redressing injuries of honour; and correcting encroachments in matters of coat-armour, precedence, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and so delicate, that its wrongs and injuries escape the notice of the Common law, and yet are fit to be redressed somewhere; such, for instance, as calling a man coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts of *Westminster*; and yet they are such injuries as will prompt every man of spirit to demand some honourable amends, which by the ancient law of the land was appointed to be given in the court of Chivalry. *Year Book*, 37 Hen. 6. 21: *Selden of Duch.* c. 10: *Hal. Hist. C. L.* 37. But modern resolutions have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein. *Salk.* 533; 7 *Mod.* 125; 2 *Harok. P. C. c.* 4. 67, 8. And it hath always been most clearly holden, (*Hal. Hist. C. L.* 37,) that as this court cannot meddle with any thing determinable by the Common law, it therefore can give no pecuniary satisfaction or damages, inasmuch as the quantity and determination thereof is ever of Common-law cognizance. And therefore this court of Chivalry can at most only order reparation in point of honour; to compel the defendant *mandatum sibi ipse imponere*, to take the lie he has given upon himself, or to make such other submission as the laws of honour may require. 1 *Ro. Ab.* 128: Neither can this court, as to the point of reparation in honour, hold a plea of any such word, or thing wherein the party is relieveable by the courts of Common law. As if a man give another a blow, or calls him thief or murderer; for in both these cases the Common law has pointed out his proper remedy by action.

As to the other point of it's jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour; it is the business of this court, according to *Sir Matthew Hale*, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the King's patent or act of parliament, (which cannot be over-ruled by this court,) have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat. *Co. Lit.* 261. See title *Battel*. But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts, it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre and not of justice: whereby such falsity and confusion have crept into their records (which ought to be the standing evidence of families, descents, and coat-armour) that, though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom. 2 *Roll. Abr.* 686: 2 *Jon.* 224. But their original visitation-books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to enquire into the state of families, and to

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register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees. And it is much to be wished, that this practice of visitation at certain periods were revived; for the failure of inquisitions *post mortem*, by the abolition of military tenures, combined with the negligence of Heralds in omitting their usual progresses, has rendered the proof a modern descent, for the recovery of an estate or succession to a title of honour, more difficult than that of an ancient. This will be indeed remedied for the future, with respect to claims of peerage, by a standing order (11 May 1767.) of the House of Lords; directing the Heralds to take exact accounts, and preserve regular entries of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer, and his family shall, on the day of his first admission, be delivered to the house by Garter, the principal King-at-arms. But the general inconvenience, affecting mere private successions, still continues without a remedy. *3 Comm. 102—6.*

COURT CHRISTIAN, curia Christianitatis.] The ecclesiastical judicature, opposed to the civil court, or lay tribunal: and as in secular courts, human laws are maintained, so in the Court Christian, the laws of Christ should be the rule. And therefore the judges are divines; as archbishops, bishops, archdeacons, &c. *2 Inst. 488.* See *o. n.* title *Courts Ecclesiastical.*

COURTS OF CONSCIENCE, curia conscientie.] In the 9th year of King Hen. 8. the Court of Conscience, or Court of Requests, in London, was erected: there was then made an act of common council, that the Lord Mayor and Aldermen should assign monthly two Aldermen and four discreet Commoners, to be Commissioners to sit in this court twice a week, to hear and determine all matters brought before them between party and party, between citizens and freemen of London, in all cases where the debt or damage was under 40*s.* And this act of Common Council was confirmed by Stat. 1 Jac. 1. c. 14; which empowered the Commissioners of this court to make such orders between the parties touching such debts, as they should find stand to equity and good conscience. The Stat. 3 Jac. 1. c. 45, fully establishes this court; the course and practice whereof is by summons, to which if the party appear, the commissioners proceed summarily; examining the witnesses of both parties, or the parties themselves on oath, and as they see cause give judgment. And if the party summoned appear not, the commissioners may commit him to the Compter prison till he does; also the commissioners have power to commit a person refusing to obey their orders, &c.

By Stat. 14 Geo. 2. c. 10, the proceedings of the Court of Conscience are regulated; and in case any person affront or insult any of the commissioners, on their certifying it to the Lord Mayor, he shall punish the offender by fine, not exceeding 20*s.* or may imprison him ten days.

There are many other Courts of Conscience established of late years by act of parliament. See title *Courts*, and also title *Debts*.

Courts of Conscience have been established at the following places: *Albany's*, St. town of, by 25 Geo. 2. c. 38; *Bath*, by 6 Geo. 3. c. 16; *Beverly* in Yorkshire, by 21 Geo. 3. c. 38; *Birmingham*, by 25 Geo. 2. c. 34; *Blackheath*, *Brackley*, *Buxton*, *Kirkstall*, *Roxley Little*, and *Leigh*, &c.

in *Kent*, by 6 Geo. 3. c. 6. and 10 Geo. 3. c. 29; *Bolingbroke*, and *Candlehoe* in *Linsey*, in *Lincolnshire*, by 18 Geo. 3. c. 34; *Boston*, by 25 Geo. 2. c. 7; *Bradford*, *Melksham*, and *Worlestown*, in *Wiltshire*, by 3 Geo. 3. c. 19; *Buxton hundred*, by 31 Geo. 2. c. 23; *Brosely*, by 22 Geo. 3. c. 37; *Canterbury*, by 25 Geo. 2. c. 45; *Chippensham*, *Calne*, *Dorchester*, *North*, and *Conham*, in *Wilts*, by 5 Geo. 3. c. 9; *Deal*, &c. by 26 Geo. 3. c. 18; *Derby borough*, and *liberties* of, by 6 Geo. 3. c. 20; *Dover*, within the town and port of, the parish of *Charlton*, and other places in *Kent*, by 24 Geo. 3. c. 8; *Ellor hundred*, in *Lincolnshire*, by 15 Geo. 3. c. 64; *Ely*, by 18 Geo. 3. c. 36; *Exeter*, by 13 Geo. 3. c. 27; *Folkstone*, &c. in *Kent*, by 26 Geo. 3. c. 118; *Faversham*, and *Boughton and Ospringe*, in *Kent*, by 25 Geo. 3. c. 7; *Halifax*, in *Yorkshire*, by 17 Geo. 3. c. 15; 20 Geo. 3. c. 65; *Horncastle*, *Soke*, in *Lincolnshire*, by 19 Geo. 3. c. 43; *Kidderminster*, by 12 Geo. 3. c. 66; *King's Lynn*, by 10 Geo. 3. c. 20; *Kingsdon-upon-Hull*, by 2 Geo. 3. c. 38; *Kirkby*, in *Westmorland*, by 4 Geo. 3. c. 41; *Lincoln*, by 21 Geo. 2. c. 16; *Liverpool*, by 25 Geo. 2. c. 24; *Poulton*, *Kirkham*, *Leitham* and *Bispham*, *Prusall* and *Stalmine*, in *Lancashire*, by 10 Geo. 3. c. 21; *Rochester* and *Stroud* in *Kent*, by 22 Geo. 3. c. 37; *Sandwich*, in *Kent*, by 26 Geo. 3. c. 22; *Shrewsbury*, by 23 Geo. 3. c. 73; *Soke*, *Yorkshire*, by 4 Geo. 3. c. 40; *Old Swinford*, *Worcestershire*, and *Staffordshire*, by 17 Geo. 3. c. 19; *Taunton*, by 31 Geo. 2. c. 24.

COURT OF DELEGATES. See *post.* title *Courts Ecclesiastical* b.

COURTS ECCLESIASTICAL, curia ecclesiastica, Spiritual Courts.] Are those Courts which are held by the King's authority as supreme governor of the church, for matters which chiefly concern religion, *4 Inst. 321.* And the laws and constitutions whereby the church of England is governed, are, 1. Divers immemorial customs. 2. Our own provincial constitutions; and the canons made in convocations, especially those in the year 1603. 3. Statutes or Acts of Parliament concerning the affairs of religion, or causes of ecclesiastical cognizance; particularly the rubrics in our Common Prayer-Book, founded upon the statutes of uniformity. 4. The articles of religion, drawn up in the year 1562, *Articuli Cleri*, 9 E. 2. and established by 33 Eliz. cap. 12. And it is said, by the general Canon law, where all others fail.

As to suits in spiritual or Ecclesiastical Courts, they are for the reformation of manners, or for punishing of heresy, defamation, laying violent hands on a clerk, and the like; and some of their suits are to recover something demanded, as tithes, a legacy, contract of marriage, &c. And in causes of this nature the courts may give costs, but not damages: things that properly belong to these jurisdictions are matrimonial and testamentary; and such defamatory words, for which no action lies at law; as for calling one adulterer, fornicator, usurer, or the like. *11 Rep. 54; Dyer 240.*

The proceedings in the Ecclesiastical courts are according to the Civil and Canon law, by citation, *Ubi*, answer upon oath, proof by witnesses, and presumptions, &c. and after sentence, for contempt, by excommunication; and if the sentence is disliked, by appeal.

The jurisdiction of these courts is voluntary, or contentious; the voluntary is merely concerned in doing what no one opposes, as granting dispensations, licences, faculties, &c.

COURTS- -ECCLESIASTICAL.

The punishments inflicted by these courts are censures, punishments *pro salute animæ*, by way of penance, &c. They are not courts of record. See further title *Prohibition*.

Much oppression having been exercised through the channel of these courts, on persons charged with trifling offences within their spiritual jurisdiction, the *Stat. 27 Geo. 3. c. 44*, limits the time of commencing suits for defamatory words to six months;—and for incontinence and beating in the church-yard to eight months.—See titles *Limitations*, *Fornication*.

In briefly recounting the various species of Ecclesiastical Courts, or as they are often styled, Courts-Christian, (*cursæ Christianitatis*) we may begin with the lowest, and so ascend gradually to the supreme court of appeal.

1. *The Archdeacon's Court* is the most inferior court in the whole ecclesiastical polity. It is held in the Archdeacon's absence before a judge appointed by himself, and called his official: and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the Bishop's Court of the diocese. From hence however by *Stat. 24 Hen. 8. c. 12*, an appeal lies to that of the bishop.

2. *The Consistory Court* of every diocesan bishop, is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The Bishop's Chancellor, or his Commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the Archbishop of each province respectively.

3. *As to the Court of Arches*, See title *Arches Court*.

4. *The Court of Peculiars*, is a branch of and annexed to the Court of Arches. It has a jurisdiction over all those parishes dispersed through the Province of *Canterbury* in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are, originally, cognizable by this court; from which an appeal lay formerly to the Pope, but now by the *Stat. 25 Hen. 8. c. 19*, to the King in Chancery.

5. *The Prerogative Court* is established for the trial of all testamentary causes, where the deceased hath left bona notabilia within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons, are, originally, cognizable herein, before a judge, appointed by the Archbishop, called the judge of the Prerogative Court, from whom an appeal lies by *Stat. 25 Hen. 8. c. 19*, to the King in Chancery, instead of the Pope as formerly.

6. *The Great Court of Appeal* in all ecclesiastical causes, viz. the Court of Delegates, (*judices delegati*) appointed by the King's commission under his Great Seal, and issuing out of Chancery, to represent his royal person, and hear all appeals made to him by virtue of the before-mentioned *Stat. of Hen. 8*. This commission is frequently filled with Lords, spiritual and temporal, and always with judges of the courts at *Westminster*, and Doctors of the Civil Law. Appeals to *Rome* were always looked upon by the *English* nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first intro-

duced in very turbulent times in the sixteenth year of King *Stephen* (A. D. 1151); at the same period (Sir *Henry Spelman* observes) that the civil and canon laws were first imported into *England*. *Cod. Vet. Leg.* 315. But, in a few years after, to obviate this growing practice, the constitutions made at *Clarendon*, 11 *Hen. II.* on account of the disturbances raised by Archbishop *Becket*, and other zealots of the Holy See, expressly declare (*chap. 8.*) that appeals in causes ecclesiastical ought to lie, from the Archdeacon to the Diocesan; from the Diocesan to the Archbishop of the Province; and from the Archbishop to the King; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given in the reigns of King *John*, and his son *Henry III.* to the encroaching power of the Pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to *Rome* in causes ecclesiastical so strongly, that it never could be thoroughly broken off; till the grand rupture happened in the reign of *Henry VIII.* when all the jurisdiction usurped by the Pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the *Stat. 25 Hen. 8.* was but declaratory of the antient law of the realm. 4 *Inst.* 324. But in case the King himself be party in any of these suits, the appeal does not then lie to him in Chancery, which would be absurd; but by the *Stat. 24 Hen. 8. c. 12*, to all the Bishops of the realm assembled in the upper house of Convocation.

7. *A Commission of Review*, is a commission sometimes granted, in extraordinary cases, to revise the sentence of the Court of Delegates; when it is apprehended they have been led into a material error. This commission the King may grant, although the *Stats. 24 & 25 Hen. 8.* before cited, declare the sentence of the delegates definitive; because the Pope as supreme head by the canon law used to grant such commission of review; and such authority as the Pope heretofore exerted, is now annexed to the Crown by *Stats. 26 Hen. 8. c. 1.* and 1 *Eliz. c. 1.* But it is not matter of right, which the Subject may demand *ex debito iustitiæ*; but merely a matter of favour; and which therefore is often denied.

These are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be Courts of Record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, viz. the Court of the King's High Commission in causes ecclesiastical. This court was erected and united to the regal power by virtue of the *Stat. 1 Eliz. c. 1.* instead of a larger jurisdiction which had before been exercised under the Pope's authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts and enormities. Under the shelter of which very general words, means were found in that, and the two succeeding reigns, to veil in the High Commissioners extraordinary, and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this Court was justly abolished by *Stat. 16 Car. 1. c. 2.*—See 3 *Crum.* 64. & *seq.*

See further

COURTS—OF HUSTINGS.—LEET.

See further on the general principles, as to the jurisdiction of Ecclesiastical Courts, this Dict. title *Canon Law, Civil Law*.

COURT OF HUSTINGS, *curia hustingi*] The highest Court of Record, holden at *Guildhall*, for the City of London, before the Lord Mayor and Aldermen, the Sheriffs, and Recorder. 4 *Inft.* 247. This court determines all pleas *real, personal, and mixed*; and here all lands, tenements, and hereditaments, rents and services, within the city of London and suburbs of the same, are pleadable in two *Hustings*; one call *Hustings of plea of lands*, and the other *Hustings of common pleas*. In this court the burgesses to serve for the city in parliament, must be elected by the Livery of the respective companies.

In the *Hustings of plea of lands*, are brought *writs of right patent* directed to the sheriffs of London, on which writs the tenant shall have three summonses at the three *hustings* next following; and after the three summonses, there shall be three *essoins* at three other *hustings* next ensuing; and at the next *hustings* after the third *essoin*, if the tenant makes default, process shall be had against him by *grand cape*, or *petit cape*, &c. If the tenant appears, the demandant is to declare in the nature of what writ he will; without making *provision* to sue in nature of any writ: then the tenant shall have the view, &c. and if the parties plead to judgment, the judgment shall be given by the Recorder: but no damages, by the custom of the city, are recoverable in any such writ of right patent.

In the *Hustings of common pleas* are pleadable, writs *ex gravi querela*, writs of *quaredam*, of *deceit*, *waste*, &c. also writs of *exigent* are taken out in the *hustings*; and at the fifth *hustings* the outlawries are awarded, and judgment pronounced by the Recorder.

If an erroneous judgment is given in the *hustings*, the party grieved may sue a *commission* out of *Chancery*, directed to certain persons to examine the record, and thereupon do right. 1 *Roll. Ab.* 745.—See further the *Privilegia Londoni*; and this Dict. title *London*.

COURT OF THE DUTCHY OF LANCASTER. See title *Chancellor of the Dutchy*, &c.

COURT-LEET; or LEET.

The word *Leet* is not to be found either in the *Saxon* law, or in *Glanvil*, *Bracon*, *Britton*, *Flota*, or the *Mirror*, our most antient law writers; nor in any statute prior to *Stat. 27 E. 3. c. 28*, though it is allowed to occur in the Conqueror's charter for the foundation of *Battle Abbey*, and not unfrequently in *Domesday Book*, *Spelman v. Letia*. It seems to be derived from the *Saxon*, *leod*, *plebs*; and to mean the *populi curia*, or folk mote, as the sheriff's tourn or *Leet* of the county (at least) appears to have been once actually called (See *Spelman in verb. Folk/mote*;) in contradiction, perhaps, to the *Halmote* or Court Baron, which consisted of the free tenants only, who, being few in number, might conveniently assemble in the Lord's Hall; whereas the *Leet*, which required the attendance of all the residents, within the particular hundred, lordship, or manor, and concerned the administration of public justice, was usually held in the open air. *Spelman in verb. Malleobogium*. According to *H. Skins*, (*Leach's Hæsk. P. C.* ii. 112. which see;) a Court-Leet is a Court of Record, having the same jurisdiction within some particular precinct, which the sheriff's tourn hath in the county. See also 4 *Comm.* 273.

The view of Frank-pledge, *visus franciplegii*, means the examination or survey of the free-pledge, of which every man, not particularly privileged, was antiently obliged to have nine, who were bound that he should be always forth-coming to answer any complaint. The better to understand this, we are to be informed, that the kingdom being divided by King *Alfred* into counties or shires, and each county into hundreds, and each hundred into tithings, each tithing containing ten families or households, the heads of these families were reciprocally bound and responsible for each other; so that, in fact, of every ten householders throughout the kingdom, each man had nine pledges or sureties for his good behaviour.

Leet is also a word used for a *Law day* in several of our antient statutes. See *Dyer* 30 b.

That the *Leet* is the most antient court in the land, (for criminal matters, the Court Baron, being of no less antiquity in civil,) has been pronounced by the highest legal authority, 7 *H. 6. 12 b.* 1 *Roll. Rep.* 73. For though we do not meet with the word among the *Saxons*, there can be no doubt of the existence of the thing.

Lord *Mansfield* states that this court was coeval with the establishment of the *Saxons* here, and its activity "marked very visibly both amongst the *Saxons* and the *Danes*." 3 *Burr.* 1860. In those times whoever possessed a vill or territory, with the liberties of *soc*, *free*, &c. (a long string of barbarous words) was the lord of a manor, had a court-leet, court-baron, and in a word, every privilege which it seems to have been possible for the monarch to bestow, or for the subject to acquire. See *Spelman in verb. Mancium*.

The *Leet* is a Court of Record for the cognizance of criminal matters, or pleas of the crown, and necessarily belongs to the King; though a Subject, usually the Lord of a Manor, may be and is entitled to the profits, consisting of the *essoign-pence*, fines and amerciaments.

It is held before the steward, (or was, in antient times, before the bailiff) of the Lord; *Mirror, passim*; *Finch's Law* 248.—See also *Kennet's P. A.* 319.—This officer who should be a barrister of learning and ability, is a judge of record, may take recognizance of the peace, may fine, imprison, and in a word, as to things to which his power extends, hath equal power with the justices of the Bench.—By *Stat. 1 Jac. 1. c. 5*, he is prohibited from taking to the value of 12d. for his own use, by colour of any grant of the profits of this court.

This court is held sometimes once, sometimes thrice, but most commonly twice in the year; that is, within a month after *Easter*, and a month after *Michaelmas*; and cannot, unless by adjournment, be held at any time not warranted by antient usage. See *Mug. Chan. c. 35*, and *Spelman in v. Letia*; according to whom this court should be held regularly only once a year; though sometimes by custom twice, when it is called *residuum leet*. As to the place in which it is held, that, it has been said, may be any where within the precinct, 8 *H. 7. 3*: *Owen* 35; but more strictly speaking, ought to be certain and accustomed. *Rastall's Entries* 151.

All persons above the age of twelve years, and under sixty, except peers, clerks, women, and aliens, resident within the district, whether masters or servants, owe personal suit and attendance to this court, and ought to be here sworn to their fealty and allegiance. 2 *Inft.* 120.

121. And here also, by immemorial usage and of common right, that most ancient constitutional officer the constable, (4 *Inst.* 265,) and sometimes by prescription the mayor of a borough, (See *Stat. 2 Geo. 1. c. 4.*) are elected and sworn.

The general jurisdiction of the court extends to all crimes, offences, and misdemeanors at the Common law, as well as to several others which have been subjected to it by act of parliament. These are enquired after by a body of the suitors, elected, sworn and charged for that purpose, who must not be less than twelve, nor more than twenty-three; and who, in some manors, continue in office for a whole year; while, in others, they are sworn and discharged in the course of a day. Whatever they find they present to the steward; who if the offence be treason or felony, must return the presentment, (in these cases called an indictment), to the King's justices of oyer and terminer, and gaol delivery. See *Stats. W. 2. c. 13: 1 E. 3. st. 2. c. 17.* In all other cases he has power, upon the complaint of any party grieved, or upon suspicion of the concealment of any offence, to cause an immediate enquiry into the truth of the matter by another jury. See *Stats. 33 H. 8. c. 6.* and *1 Eliz. c. 17. § 10.* But the presentment, being received, and the day passed, shall be held true, and unless it concern the party's freehold, shall not be shaken or questioned by any tribunal whatever. *Hale P. C. 151, 5: Leach's Hawk. P. C. ii. 111, 112: and 11 Co. 44.* Upon every presentment of the jury retained by the court, an amercement follows of course, which is afterwards assessed, in open court agreeable to *Magna Charta, c. 14.* by the *parcs curies*, that is, the peers, or equals of the delinquent; and assessed or reduced to a precise sum, by two or more suitors sworn to be impartial. *8 Rep. 39.* See also *Stat. W. 1. c. 6.* And that these statutes were in this particular but in affirmation of the Common law, See *8 Rep. 39 b: 2 Inst. 27.* The amercements thus ascertained are then extracted (or extracted) from the roll or book in which the proceedings are recorded and levied by the bailiff, by distress and sale of the party's goods, (*8 Rep. 41:*) by virtue of a warrant from the steward to that effect, or may be recovered by other means as by process of *levari facias*, (*Hond. 471.*) or action of debt. (*Bull. N. P. 167.*) No crime in those remote ages appears to have been punished by death; unless it were that of open theft, where the offender was taken with the *mainour*, that is, with the thing stolen upon him: and of this crime, and this only, the cognizance did not belong to the Leet. All other offences of what nature or degree soever, subjected the party to mulct or pecuniary fine, which was, in many cases determined and fixed. This pecuniary composition, with respect to certain capital offences, was abrogated, and the punishment of death substituted in its place by King Henry 1. *Spelman in v. Felo, Wilkins. LL. Sav. 304.*

It is not improbable that the distinction of *indictments* for felonies, and *presentments* of inferior offences, owes its origin to the above measure.

It has been said, that by the clause *nullus vicecomes*, &c. in the *Great Charter, c. 17.* the jurisdiction of the Leet was abridged, and its power to hear and determine taken away; but this has been said and repeated without due attention either to the nature and constitution of the court, or to the law of the time. No offence, it is well

known, is at this day, or, for aught that appears, ever was, heard and determined in the Leet. (nor before the period referred to, by any other criminal-court in the kingdom), otherwise than upon the presentment of twelve men, or what we now in most courts call the Grand Jury. This presentment, as has been already observed, found and established the fact; and judgment, whether of *misericordia*, mutilation or death, followed as an incident or matter of course; precisely, indeed, as the punishment does at this day on the verdict for the king of the petty jury. In fact, therefore, the jurisdiction of the Leet was not in the least abridged or affected by that charter: nor is it at all probable that the barons would either seek or suffer the diminution of their own privileges, of which on the contrary, there is an express saving.

That this court has no power to enquire of the death of a man, or of rape, is a more ancient, but not less erroneous opinion. The contrary is most directly and expressly held in the *Statutum Wallie.* in *Briton, Flota, the Mirror*, and the *Stat. of 18 E. 2.* (which statute, though it enumerates certain particulars of the jurisdiction of the Leet does not confine it to them only); all much older and better authorities than the book of Assises, *41 E. 3. p. 40.* in which that opinion first appears.

The steward of a Leet may award to prison, persons either indicted or accused of felony before him, or guilty of any contempt in the face of the court. *Stat. Wilm. 2. c. 13.* which however seems to apply only to the sheriff's tourn. See *Crump. J. P. 92 b: Ow. 113.*

See further for the whole of this subject, *Com. Dig. title Leet.*

The Court-Leet has now been for a long time in a declining way; its business as well as that of the tourn having for the most part gradually devolved on the quarter sessions. See *4 Comm. 274: 3 Barr. 1864.*

This last circumstance is very pathetically lamented by the ingenious author, from whom the above account of the Court-Leet is principally drawn; and to whom the editor of the present work is indebted for much of the information under title *Constable*. How far the restoration of the powers of the Court Leet in the present extensive deluge of crimes is advisable or not, is a question not to be determined in the compass here allotted to the subject. Every one desirous of being accurately informed of the foundations of the *English* law, will wish that the learned author from whom the above extracts have been made, would spend his time rather in examining the ancient, than condemning the present state of our jurisprudence. For the former task he is eminently qualified; the latter is only worthy of inferior talents.

COURT OF MARSHALSEA, *Curia palatii*] A court of record to hear and determine causes between the servants of the King's household and others within the verge; and hath jurisdiction of all matters within the verge of the court, and of pleas of trespass, where either party is of the King's family and of all other actions personal, wherein both parties are the king's servants; and this is the original jurisdiction of the court of *marshalsea*. *1 Bull. 211.* But the *curia palatii*, erected by King *Charles. 1.* by letters-patent, in the 6th year of his reign, and made a court of record, hath power to try all personal actions, as debt, trespass, slander, trover, actions on the case, &c. between party and party, the liberty whereof extends

COURTS—OF MARSHAL—MARTIAL.

tends twelve miles about *Whitehall*; *Stat. 13 R. 2. §. 1. c. 3.* Which jurisdiction was confirmed by King *Charles II.*

The judges of this court are the steward of the King's household, and knight-marshal for the time being, and the steward of the court, or his deputy, being always a lawyer. *Crompt. Jurisd. 102; Kirch. 179, &c. 2 Inst. 548.*

This court is kept once a week, in *Southwark*; and the proceedings here are either by *capias* or attachment; which is to be served on the defendant by one of the knight-marshal's men, who takes bond with sureties for his appearance at the next court; upon which appearance, he must give bail, to answer the determination of the court; and the next court after the bail is taken, the plaintiff is to declare, and set forth the cause of his action, and afterwards proceed to issue and trial by a jury, according to the custom of the Common law courts. If a cause is of importance, it is usually removed into *B. R.* or *C. B.* by an *habeas corpus cum causa*; otherwise causes are here brought to trial in four or five court-days. The inferior business of this court hath of late years been much reduced, by the new courts of conscience in and near *London*; for which the four counsel belonging to the court were indemnified by salaries during their lives, by *Stat. 23 Geo. 2. c. 27.*

By *Stat. 28 E. 1. c. 3.*, the steward and marshal of the King's house are not to hold plea of freehold, &c. Error in the *Marshalsea* court may be removed into the *King's Bench*. *Stat. 5 E. 3. c. 2: 10 E. 3. §. 2. c. 3.* And the fees of the *Marshalsea* are limited by the *Stat. 2 H. 4. c. 23*—This *Marshalsea* is that of the household; not the *King's Marshalsea*, which belongs to the *King's Bench*. See *Court of the Lord Steward, &c.*

COURT-MARTIAL.

Curia Martialis.] A Court for trying and punishing the military offences of Officers and Soldiers.

- I. Of the Origin.
- II. Of the Jurisdiction, } Of Courts-Martial.

I. THOUGH the authority of the *Court of Chivalry*, with regard to matters of war, &c. both within and without the realm, not determinable by the general municipal law, was first established by the Common law, and afterwards confirmed by several statutes; and was never objected to, even in criminal cases, till the post of High Constable was laid aside; (See titles *Constable*; *Court of Chivalry*;) yet we find its jurisdiction encroached upon much earlier; for by the *Stat. 18 H. 6. c. 19.* desertion from the King's army was made felony, and by *Stat. 7 H. 7. c. 1: 3 H. 8. c. 5.* benefit of Clergy is taken away, and authority given to justices of peace to enquire thereof, and hear and determine the same. And *Rapin* quotes an instance of *H. VII.* having ordered those accused of holding intelligence with the enemy after the battle of *Stoke*, 1487, to be tried by commissioners of his own appointing, or by Courts-martial, according to the Martial law; instead of the usual court of justice, which was not so favourable to his design of punishing them only by fines. This however seems to have been an avaricious, arbitrary and illegal exertion of power; not authorised by any law of the land.

From the time the *Court of Chivalry* was abridged of its criminal jurisdiction, by the suppression of the post of

High Constable until the Revolution, there appears to have been no regular established court for the administration of Martial law. For although the *Court of Chivalry* still continued to be held from time to time by the Earl Marshal, its authority extended only to civil matters; and notwithstanding desertion was by *Stat. 2 & 3 E. 6. c. 2.* made felony without benefit of clergy, and other military crimes were made punishable by fines, imprisonment, &c. and by *Stat. 39 Eliz. c. 17.* idle and wandering soldiers and mariners were to be reputed as felons, and to suffer as in cases of felony, without benefit of clergy (with some exceptions); and the justices of assize and gaol-delivery were to hear and determine these offences; yet there are instances during this period, of other courts being erected for the administration of Martial law; and not only military persons made subject to it, but many others punished thereby; some entirely at the discretion of the crown, and others by appointment of the parliament only; and it was a circumstance of nearly a similar nature, that occasioned the enacting the *Petition of Right* § *C. 1. c. 1*; one clause of which was, that the commissions for proceeding by Martial law should be dissolved and annulled; and no such commission be issued for the future.

Though undoubtedly these commissions were illegal, yet the necessity of subordination in the army, and the impossibility of establishing that subordination without Martial law, soon became apparent; and the two Houses of Parliament, in the beginning of their rebellion against *Charles I.* passed an Ordinance, appointing commissioners to execute Martial law; which was certainly at least as un-constitutional an act without the assent of the King, as any proceedings of his had been without consent of Parliament. So true is it that Necessity has no law; and that usurped power is always obliged to have recourse to means to support itself, at least as severe as, and generally more violent than, those which it previously condemns in a lawful government; which it may for a while succeed in overturning on false and specious pretexts of undefined liberty.

This ordinance was passed in 1644, and afterwards renewed by the Parliament; and in process of time adopted as a model for the Mutiny act passed after the Revolution: as many other regulations made during the powerful but tyrannical usurpation of sovereign authority, were afterwards modified to the true genius of the British constitution.

At the Restoration, one of the first steps taken by the parliament was, to disband the army, and to regulate the militia, among whom a military subordination was established, whenever they were drawn out; and fines and imprisonments imposed on them for particular delinquencies. See title *Militia*.

Charles II. however kept up 5000 regular troops, for guards and garrisons, by his own authority; which his successor, *Jac. II.* by degrees increased to 30,000 and more numerous armies were occasionally raised by authority of parliament; yet we find no statute for the government of these troops; nor was it till after the Revolution that a regular act of the whole Legislature passed for punishing mutiny and desertion, &c. by Courts-martial.

This act was first occasioned by a mutiny, in a body of *English* and *Scott* troops, upon their being ordered to *Holland*, to replace some of the *Dutch* troops which

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H.H. III., had brought over with him and intended to keep in *England*. The King immediately communicated this event to the Parliament, who readily agreed to give their sanction to punish the offenders, and on the 3d April 1689, (1 *W. & M.*) passed an act for punishing Mutiny and Desertion, &c. which was to continue in force only until November following.—It was however renewed again in January, and has with the interruption of about three years only, from April 1698 to February 1701, been annually renewed ever since, with some occasional alterations and amendments, as well in times of peace as war.

II. MARTIAL LAW, as formerly exercised at the discretion of the Crown, and too often made subservient to bad purposes, justly became obnoxious to the people; and not only the propriety but the legality of its being executed in times of peace, has been absolutely denied. It is laid down (3 *Inst.* 52,) that if a lieutenant or other, that hath commission of Martial-law, doth in time of peace, hang or otherwise execute any man by colour of Martial-law, this is murder, for it is against *Magna Charta*.—And Hale, (*Hist. C. L. c.* 2,) declares Martial law to be in reality no law, but something indulged rather than allowed as law; that the necessity of order and discipline is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land: and if a Court martial put a man to death in time of peace, the officers are guilty of murder. See *H.P.C.* 46.

As future exigencies however have arisen in the State, it has become necessary to alter and amend the old laws and enact new ones; and since the custom of keeping up standing armies in time of peace as well as war has become prevalent and general throughout Europe, (a custom as it seems originally introduced by Charles VII. of France about 1445,) the Legislature of Great Britain has also judged it necessary, for the safety of the kingdom, the defence of its possessions, and the balance of power in Europe, (as the preamble to the Mutiny-act expresses it,) to maintain, even in times of peace, a standing body of troops; and to authorize the exercise of Martial law among them.

A proper distinction then should be made between Martial-law, as formerly executed, entirely at the discretion of the Crown, and unbounded in its authority, either as to persons or crimes, and that at present established, which is limited with regard to both.—Courts-Martial are at present held by the same authority as the other courts of judicature of this kingdom: and the King, (or his Generals, when empowered to appoint them) has the same prerogative of moderating the rigor of the law, and pardoning and remitting punishments, as in other cases; but he can no more add to, nor alter the sentence of a Court-martial, than he can a judgment given in the courts of law. Martial-law is now exercised within its proper limits, by the advice and concurrence of parliament, and the condemnation of criminals by Courts-martial acting under such authority, cannot be regarded as illegal or contrary to *Magna Charta*; since during the existence of the statute by which these Courts are held, Martial-law, so modified and restrained, is as much part of the law of the land as *Magna Charta* itself.

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Courts-Martial cannot sit before 8 in the morning, or after 3 in the afternoon, except in cases which require an immediate example: the attendance therefore of the members does not exceed 7 hours at a time: and they are at liberty to adjourn from day to day till they have fully considered the matter before them: and when they come to give their opinions, they are not under the necessity of being unanimous, but the prisoner is condemned or acquitted by a majority of voices; except in cases of death, where 9 out of 13 or two-thirds, if there be more than 13 present, must concur in opinion. *Articles of War*, § 15, a. 8, 9.

As to general Courts-martial, the Mutiny-act and Articles of War are very explicit, both as to the number they shall consist of, and the rank of the officers who are to compose them: it being expressly directed, that no General Court-martial shall consist of less than 13 members, whereof none are to be under the degree of a commissioned officer.—That the President shall not be under the degree of a field officer, unless such an one cannot be had, in which case the next in seniority to the commander, not being under the degree of a captain, shall preside: and no field officer is to be tried by any person under the degree of a captain.—And it is a general custom not to put subaltern officers, particularly those but of short standing in the army, on General Courts-martial, provided a sufficiency of field-officers and captains can be conveniently assembled. See *Art. of War*, § 15 a. 8, 9. 12: *Mutiny act*, § 12.

Although a President and 12 members are sufficient to constitute a legal court, yet it is frequently judged necessary to assemble and swear in more; in order as far as possible to guard against accidents arising from sickness, or other causes the non-attendance of some of the court. Whilst there is a *quorum* of 13, the president included, of those originally sworn in, the court may proceed to business, although others of the court do not attend; but if it become necessary to call in a new member, the court must proceed *de novo*.

The Crimes that are cognisable by a Court-martial, as repugnant to military discipline, are pointed out by the Mutiny-act and Articles of War; which every military man is or ought to be fully acquainted with, and therefore not necessary to be recited here: and as to other crimes which officers and soldiers being guilty of, are to be tried for in the ordinary course of law, it is needless to enter into a detail of them.

By the last article in the code of Military-laws, Courts-martial are authorized to take cognizance of all crimes *not capital*, and all disorders and *misdemeanors*, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, which are not enumerated in the preceding articles, and punish them at their discretion. *Art. of War*, § 20 a. 3. Upon the authority of this article it has been too much the custom in the army to try soldiers by Courts-martial, for thefts and other crimes cognisable before the courts of law. But it seems questionable, whether an exception might not in many such cases be made to their jurisdiction: for the Mutiny-act, § 62, and Articles of War, § 11 a. 1, expressly direct, that any officer, non-commissioned officer or soldier who shall be accused of any capital crime, violence or offence, against the person, estate or property of any of his Majesty's subjects, punishable by the laws of the land,

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shall be delivered over to the civil magistrate by the commanding officer, under penalty of his being cashiered in case of refusal.—There was formerly an article, of late omitted, particularly authorizing Courts-martial to take cognisance of all soldiers accused of stealing from their comrades.

The Persons liable to Martial-law are likewise enumerated in the Act and the Articles. The latter mention only Officers, Soldiers and persons serving with the armies in the field. But *Hale* and others are of opinion, that *aliens* who in a hostile manner invade the kingdom, whether their King were at war or peace with ours, and whether they come by themselves or in company with *English* traitors, cannot be punished as traitors, but must be dealt with by Martial-law. *H. P. C. cc. 10, 15: 3 Inst. 11.*—This however means *Martial-law* in the strict sense of the word, in which it cannot be applied to proceedings under the *Mutiny-act*; and which kind of Martial law is unknown in this kingdom.—The *receiving pay* as a soldier, subjects the receiver to military jurisdiction. The court of *C. P.* therefore refused to grant a prohibition to prevent the execution of the sentence of a Court-martial, passed against one who *received pay* as a soldier; but who assumed the military character merely for the purpose of recruiting, in the usual course of that service—and this though the proceedings of the Court-martial, appeared, in some instances, to be erroneous. *Grant v. Sir Charles Gould, 2 H. Black. Rep. 69.*

The Articles of War, in a few cases, point out the express *Sentence* to be passed on criminals, without any alternative: in some an optional power is given, of punishing with death or otherwise, and in others, offenders are punished at the discretion of the Court, omitting the word *death*; evidently meaning thereby to exclude the power of punishing capitally in such cases.

In cases where an optional power is vested in the Court to punish with death or otherwise, the question to follow that of *guilty or not guilty*, (upon the Court or the majority of it declaring for the former,) is, whether or not the prisoner shall suffer death? If *two-thirds* of the Court do not concur in the affirmative, the votes of the affirmants are considered as void. A lesser number than two-thirds being, as was before said, incompetent to give judgment of death, another question becomes necessary to be proposed to every member, what punishment, *other than death*, shall the prisoner undergo? And each member gives his voice, *de novo*, on this question, wherein a majority is competent to determine.

The crimes cognizable by a Court-martial may be divided into *felonies* and *misdemeanors*; or more properly, into capital offences, and offences only criminal and not capital; and if on the evidence a prisoner does not appear guilty of a crime of so capital a nature, as is set forth in the charge, the Court may find him guilty in a less degree; but they cannot declare him guilty of a mutiny, or any other *distinct* crime or offence, unless it be likewise in the charge given against him, before the trial commences.

The judgments of Courts-martial, besides being open to the disapprobation of the King, or his commanders in chief, are liable like those of other courts, to be taken *en quittance* of, and the members punished for illegal proceedings; for the Court of King's Bench being the supreme court of Common law, hath not only power to reverse erroneous judgments given by inferior courts,

but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of authority against the known, obvious, and common principles of justice. *2 Hawk. P. C. c. 3. § 10: c. 27. § 22.*—The *Mutiny-act* directs, that every action against any member or minister of a Court-martial, in respect to any sentence, shall be brought in some of the courts of record at *Westminster, &c.* § 63. And there have been many instances of prosecutions of this nature in *Westminster-hall*.—An officer on a Court martial however is not liable to be punished for mere mistakes which an honest well-meaning man may innocently fall into. And if the plaintiff or prosecutor becomes nonsuited, or the defendant has a verdict, he shall recover treble costs. *Mutiny-act, § 62.*—There is also another tribunal before which the proceedings of Courts-martial are liable to *censure* at least, namely, the *House of Commons*.

It is enacted by § 12 of the *Mutiny-act*, that no officer or soldier being acquitted or convicted of any offence, shall be liable to be tried a second time by the same or any other Court-martial, for the same offence, unless in the case of an appeal from a regimental to a general Court-martial; and by the Articles of War “If upon a second hearing the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the General Court-martial.”—No sentence given by any Court-martial, and signed by the President, is liable to be revised more than once. And this may be rather deemed an appeal to the same court than a new trial; since in this case the same persons only are to re-consider what they have already done, without any new judges being added to them, or any new witnesses produced.

A distinction is made in the *Oath* taken by the *President and Members* of a Court martial, and that of the *Judge-Advocate*. The former are sworn, not only to conceal the vote or opinion of each particular member, but also the sentence of the Court, until it shall be approved by his Majesty, or by some person duly authorized by him; the latter is only sworn not to divulge the opinion of any particular member of the Court-martial.

For further particulars, See *Adye's Treatise on Courts-Martial*; from whence most of the above is abridged—See also this Dict. title *Solators*.—And as to Naval Courts-martial, title *Navy*.

COURT OF PIEPOWDERS, *cursa pedis pulverisati.*] Is a court held in fairs, to do justice to buyers and sellers, and for redress of disorders committed in them: so called, because they are most usual in Summer, when the suitors to the court have *dusty feet*; and from the expedition in hearing causes proper thereunto, before the dust goes off the feet of the plaintiffs and defendants. *4 Inst. 272:* or from *Pied poulheaux* appellat. *Barrington, Arc. Stats. 337.* It is a court of record incident to every Fair; and to be held only during the time that the Fair is kept. *Dott. & Stud. c. 5.* As to the jurisdiction, the cause of action for contract, slander, &c. must arise in the fair or market, and not before at any former fair, nor after the fair: it is to be for some matter concerning the same fair or market; and must be done, complained of, heard and determined the same day. Also the plaintiff must make oath that the contract, &c. was within the jurisdiction and time of the fair. *Stat. 17 Ed. 4. c. 2: 2 Inst. 220.*

The Court of Piepowders may hold a plea of a *fura* above 40s. and it is said, judgment may be given at another

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other fair, at a court held there, and a writ of error lies upon a judgment given. *Dyer* 133: *F. N. B.* 18. This court may not meddle with any thing done in a market, without a *special custom* for it; but for what is done in a fair only: and not there for *scandalous words*, unless they concern *matters of contract* in the fair; as where it is for slandering the *wares* of another, and not of his *person* in the same fair. *Moor, Ca.* 854. The steward before whom the court is held, is the judge: and the trial is by merchants and traders in the fair; and the judgment against the defendant shall be *quod amercietur*. If the steward proceeds contrary to the *Stat.* 17 *Ed. 4. c. 2*, he shall forfeit 5 *l*.

From this court a writ of error lies in the nature of an appeal to the courts at *Westminster*. *Cro. Eliz.* 773.—And those courts are now bound by the *Stat.* 19 *Geo. 3. c. 70*. to issue writs of execution in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction.

COURT OF REQUESTS, *curia requisitionum*.] Was a court of equity, of the same nature with the court of Chancery, but inferior to it; principally instituted for the relief of such petitioners, as in conscionable cases addressed themselves by supplication to his majesty. Of this court, the Lord Privy Seal was Chief Judge, assisted by the *Masters of Requests*; and it had beginning about the 9 *H. 7*, according to Sir *Julius Caesar's* Treatise on this subject: though Mr. *Gwyn*, in his *Preface to his Readings*, saith it began from a commission first granted by King *Hen. VIII*.

This court having assumed great power to itself, so that it became burdensome, *Mich. anno 40 & 41 Eliz.* in the court of Common Pleas it was adjudged, upon solemn argument, that the Court of Requests, was no court of judicature, &c. And by the *Stat.* 16 & 17 *Car. 1. c. 10*. it was taken away. 4 *Inst.* 97.—See title *Courts of Conscience*.

COURT OF THE LORD STEWARD OF THE KING'S HOUSE. The Lord Steward, or, in his absence, the treasurer and controller of the King's house, and Steward of the Marshalsea, may inquire of, hear and determine in this court, all treasons, murders, manslaughter, blood-sheds, and other malicious strikings, whereby blood shall be shed, in any of the palaces and houses of the King; [or within the limits *i. e.* 200 feet from the gate. 4 *Comm.* 276;] or in any other house where his royal person shall abide. And this jurisdiction was given by the *Stat.* 33 *H. 8. c. 12*: 3 *Inst.* 140. But this court was at first intended only to inquire of and punish felonies, &c. by the King's servants against any lord or other person of the King's council. 3 *H. 7. c. 14*.

COURT OF STAR-CHAMBER, *Curia cameræ stellatæ*.] A Court of very antient original, but new-modelled by *Stats.* 3 *H. 7. c. 1*: 21 *H. 8. c. 20*; which ordained, That the Lord Chancellor, Treasurer, and Lord Privy Seal, calling a Bishop, and Lord of the King's Council, and the two Chief Justices to their assistance, on bill or information might make process against maintainers, rioters, persons unlawfully assembling, and for other misdemeanors, which, through the power and countenance of such as did commit them, lifted up their heads above their faults, and punish them as if the offenders had been convicted at law, by a jury, &c. But this act was repealed, and the Court dissolved by *Stat.* 16 & 17 *Car. 1. c. 10*; having been used to oppress the Subject, particularly in matters of state.

COURTS OF UNIVERSITIES.] These are the Chancellor's courts in the two Universities of *England*; *Oxford* and *Cambridge*. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the King's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these, by the University charter, they are at liberty to try and determine, either according to the Common law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the civil law.

These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations.—The oldest charter, it appears, containing this grant to the University of *Oxford*, was 28 *Hen. 3. A. D.* 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King *Henry VIII*, in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to *Cambridge* in the third year of Queen *Elizabeth*. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the King might erect new courts, yet he could not alter the course of law by his letters patent. Therefore in the reign of Queen *Elizabeth* a statute was passed, (13 *Eliz. c. 29*.) confirming all the charters of the two Universities, and those of 14 *Hen. 8*: and 3 *Eliz.* by name. Which statute established this high privilege without any doubt or opposition. *Jenk. Cent.* 2. pl. 88: *Cent.* 3. pl. 33: *Hard.* 504: *Godb.* 201: *Hist. C. L.* 33.

This privilege, so far as it relates to civil causes, is exercised at *Oxford* in the Chancellor's court; the judge of which is the Vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of Convocation; and if they all three concur in the same sentence it is final: at least by the statutes of the University (*Tit.* 21. § 18,) according to the rule of the civil law (*Cod.* 7. 70, 1). But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates, appointed by the Crown under the great seal in Chancery. 3 *Comm.* 83—5.

COURTS OF WALES, *Curia principality Walliæ*.] The Courts of the principality of *Wales*.

These Courts upon the thorough reduction of that kingdom, and the settling of its polity in the reign of *Hen. VIII*. were erected all over the country; principally by the *Stat.* 34 & 35 *Hen. 8. c. 26*, though much had before been done, and the way prepared by the *Stat.* of *Wales*, 12 *Ed. 1*, and other statutes. By the *Stat.* of *Hen. 8*. before-mentioned, courts-baron, hundred, and county-courts are there established as in *England*. A Session is also to be held twice in every year in each county, by judges, (See *Stat.* 18 *Eliz. c. 8*.) appointed by the King. This Session is to be called the *Great Sessions* of the several counties in *Wales*; in which all pleas of real and personal actions shall be held, with the same form of process, and in as simple a manner, as in the courts of King's Bench and Common Pleas, at *Westminster*. See, for farther regulation of the practice of these

courts, Stat. 5 Eliz. c. 25: 8 Eliz. c. 20: 8 Geo. 1. c. 25. § 6: 6 Geo. 2. c. 14: 13 Geo. 3. c. 51. Writs of error shall lie from judgments in this great sessions, it being a court of record, to the Court of King's Bench at Westminster. But the ordinary original writs of process from the King's courts at Westminster, do not run into the principality of Wales, (2 Rol. Rep. 141;) though process of execution does; (2 Bulst. 156: 2 Sand. 193: Raym. 206;) as do also prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like. Cro. Jac. 484.—And even in causes, between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try the same in the next English county, adjoining to that part of Wales where the cause arises, and wherein the venue is laid. Vaugh. 413: Harb. 66. But, on the other hand, to prevent trifling and frivolous suits, it is enacted by Stat. 13 Geo. 3. c. 51, that in personal actions, tried in any English county, where the cause of action arose, and the defendant resides in Wales, if the plaintiff shall not recover a verdict for 1*l.* he shall be nonsuited, and pay the defendant's costs, unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper to be tried in such English county. And if any transitory action, the cause whereof arose, and the defendant is resident in Wales, shall be brought in any English county, and the plaintiff shall not recover a verdict for 1*l.* the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict.

By Stat. 11 & 12 W. 3. c. 9, it is enacted, that sheriffs in Wales, shall not hold to bail, on process, issuing out of any of his Majesty's courts of record at Westminster, unless the debt be sworn to be 20*l.*

For further satisfaction, as to the several Courts within this kingdom, see 4 *Inst.* and the *Commentaries*.

COURT-LANDS, Demains, or lands kept in the lord's hands, to serve his family. See *Curtils Tenae*.

COUSENAGE, See *Coffnage*.

COUTHUTLAUGH, from the Sax. *couth*, i. e. *seins*, and *utlaugh*, exlex.] A person that willingly and knowingly receives a man outlawed, and cherishes or conceals him: for which offence he was, in ancient times, to undergo the same punishment as the outlaw himself. Bract. lib. 3. cap. 2. cap. 13.

COWS, See title *Cattle*.

CRAIERA, *crayer*.] A small vessel of lading; a hoy or smack. Pat. 2 R. 2: Stat. 14 Car. 2. c. 27.

CRILL, An engine made use of to catch fish. Blount.

CRANAGE, *cranagium*.] A liberty to use a crane for drawing up of goods and wares of burden from ships and vessels, at any creek of the sea or wharf, unto the land, and to make profit of it: it also signifies the money paid and taken for the same. Stat. 22 Car. 2. c. 11.

CRANNOCK, An ancient measure of corn. Cartular. Abbat. Glasen. MS. f. 39.

CRASPICIS, A whale, viz. *piscis crassus*. Blount.

CRASTINO SANCTI VINCENTII, The morrow after the feast of St. Vincent the Martyr, i. e. the 22d of January; which is the date of the statutes made at Merton, anno 25 Hen. 3. There are likewise certain return days of assize in terms, in the courts at Westminster, beginning with Crastino, &c. as Crastino animalium, the Morrow of

All Souls, in Michaelmas term; Crastino Purificationis beate Marie Virginis, in Hilary term; Crastino Ascensionis Domini, in Easter term; and Crastino Sancta Trinitatis, in Trinity term. See Stat. 51 H. 3. ff. 2 & 3: 32 H. 8. c. 21: 16 Car. 1. c. 6: 24 Geo. 2. c. 48.—See *Days in Bank Terms*.

CRATES, Lat.] An iron grate before a prison, used in the time of the Romans. 1 Vent. 304.

CRAVARE, To impeach. Si homicida divadietur ibi vel cravetur, &c. Leg. H. 1. c. 30.

CRAVEN, or CRAVENT, The word of obloquy, where in the ancient trial by battel, the victory should be proclaimed, and the vanquished acknowledge his fault, or pronounce the word *cravent*, in the name of *Reereantise*, &c. and thereupon judgment was given forthwith; after which the *reerant* should become infamous, &c. 2 Inst. 248. If the appellant joined battel, and cried *cravent*, he should lose *liberam legem*; but if the appellee cried out *cravent*, he was to be hanged. 3 Inst. 221.—See titles *Battel*, *Champion*.

CREAMER, A foreign merchant; but generally taken for one who hath a stall in a fair or market. Blount.

CREANSOR, *creditor*, from Fr. *creyance*.] Signifies him that trusts another with any debt, money, or wares; in which sense it is used in *Old Nat. Br.* 66. and 38 Ed. 3. c. 5.

CREAST, or CREST, *crista*.] Any imagery, or carved work, to adorn the head of waincoat, &c. like our modern *cornice*: but this word is now applied by the heralds to their devices set over a coat of arms. Kennet's *Paroch. Antiq.* 573.

CREATION-MONEY, This is mentioned in Stat. 12 Car. 2. c. 1. See title *Peers*.

CRECHE, A drinking-cup. Mon. Angl. tom. 1. p. 104.

CREDITORS, Shall recover their debts of executors or administrators, who in their own wrong, waile, or convert to their use the estate of the deceased, &c. Stat. 30 Car. 2. c. 7. Wills and devises of lands, &c. as to creditors on bonds or other specialties, are declared void; and the creditors may have actions of debt against the heir at law and devisees. 3 & 4 W. & M. c. 14. And in favour of creditors, whenever it appears to be the testator's intent, in a will, that his lands should be liable for paying his debts; in such case equity will make them subject, though there are not express words; but there must be more than a bare declaration, or it shall be intended out of the personal estate. 2 Vern. Rep. 708. Where one devises that all his debts, &c. shall be first paid; if his personal estate is not sufficient to pay the creditors, it shall amount to a charge on his real estate for that purpose. Plead. Canc. 430.—See titles *Assets*, *Copysold*, *Executor*.

CRECK, *creca*, *crecca*.] A part of a haven where any thing is landed from the sea: so that it is observed, if when you are out of the main sea within the haven, you look round and see how many landing places there are, so many creeks may be said to belong to that haven. Cramp. Jurisd. M. 110. It is also said to be a shore or bank whereon the water beats, running in a small channel from any part of the sea; from the Lat. *crepus*. This word is used in the Stat. 4 H. 4. c. 20: 5 Eliz. c. 5.—See title *Navigatum Adit*.

CREMENTUM COMITATUS, The sheriffs of counties anciently answered in their accounts for the improvement of the King's rents above the ancient vicennial rents,

rents, under the title of *Crementum* [*incrementum*, increase] *Comitatus*, or *Firma de Cremento Comitatus*. *Hales's Sher. Acco.* p. 36.

CREPARE OCULUM, To put out an eye; which had a pecuniary punishment of 60*s.* annexed to it. *Leg. H. 1. c. 78.*

CREST, See *Crest*.

CRETINUS, *cretena*.] A sudden stream or torrent. *Histor. Croyland contin.* 483, 617.

CRIMINAL CONVERSATION. See titles *Adultery*; *Baron and Feme*.

CROCARDS, A sort of old base money. See *Pollards*, and title *Coin*.

CROCIA, The *crozier* or pastoral staff, so called *a similitudine crucis*, which bishops, &c. had the privilege to carry as the common ensign of their religious office; being invested in their prelaties, by the delivery of such a *crozier*: hence the word *crocia* did sometimes denote the collation to, or disposal of bishopricks and abbies, by the donation of such pastoral staff; so as when the King granted large jurisdictions, *exceptis crociis*, it is meant, except the collation or investiture of episcopal sees, &c. *Addit. to Corvel.*—See title *Bishops*.

CROCIARIUS, The *crociary* or cross-bearer, who like our verger, went before the prelate, and bore his cross. *Liber de Miraculis Tho. Episc. Heref. MS. anno 1290.*

CROFT, Sax. *croftum* and *crofta*.] A little close adjoining to a dwelling-house; and enclosed for pasture or arable, or any particular use. In some old deeds *crofta* occurs as the Latin word for a *croft*; but *cum toftis* & *croftis*, is most frequent. *Inglph.* It seems to be derived from the old English word *creast*, signifying *handy craft*; because such grounds are usually manured and extraordinarily drest by the hand and skill of the owner.—See *Toft*.

CROISES, and *croisado*. See *Croyses*.

CROE, *crocus*.] Turning up the hair into curls or corks; whence comes *crook*, *crooked*, &c. *Par. 21 H. 3.*

CROP, *cropta*.] The seeds or products of the harvest in corn, &c. *Fleta, lib. 2. cap. 82.*

CROSS-BOWS, None shall shoot in, or keep any cross-bow, hand-gun, hagbut, &c. but those who have lands of the value of 100*l.* per annum; and no person shall travel with a cross bow bent, or gun charged, except in time of war; or shoot within a quarter of a mile of any city, or market-town, unless for defence of himself or his house, or at a dead mark, under the penalty of 10*l.* *Stat. 33 H. 8. cap. 6*—See title *Arms, Game*.

CROSES, By *Stat. 13 Eliz. c. 2*, Croffes, beads, &c. used by the Roman Catholics, are prohibited to be brought into this kingdom, on pain of a *præmunire*, &c. In ancient times it was usual for men to erect crosses on their routes, by which they would claim the privileges of the *Templars* to defend themselves against their rightful lords; but this was condemned by the *Stat. Westm. 2. c. 37*. It was likewise customary in those days to set up crosses in places where the *corps* of any of the nobility reled, as it was carried to be buried, that *a transcumbens pro corpore anima deprecetur*. *Walsing. anno 1291*. There were several of these crosses erected over England, especially in honour of the resting places of our Kings, on their bodies being transmitted to any distant place for burial: but these superstitions sunk in this kingdom with the *Romish religion*.

CROY, Marsh land. *Inglphus*, p. 853.—*Blount*.

CROYES, *cruce signati*.] Is used by *Britton* for pilgrims, because they wear the sign of the cross upon their garments. Of these and their privileges, *Britton* hath treated, *lib. 5. part 2. cap. 2: part 5 cap. 9*. Under this word are also signified the *Knights of St. John of Jerusalem*, created for the defence of pilgrims; and likewise all those persons who in the reigns of K. Hen II.: Ric. I.: Hen. III.: and Ed. I. *cruce signati* took upon them the *croisado*, dedicating and lifting themselves to the wars, for the recovery of Jerusalem and the Holy Land. *Greg. Syntag. lib. 15. cap. 13, 14*. See a general account of the *croisades* in *Robertson's Hist. Emp. C. V. vol. 1. p. 22, &c.*

CROWN, See title *King*.

CROWN OFFICE. An Office belonging to the court of King's Bench, of which the King's Coroner or Attorney there is commonly Master. The Attorney General, and Clerk of the Crown exhibit informations in this office, for crimes and misdemeanors; the one *ex officio*, and the other usually by order of court; and here informations may be laid for offences and misdemeanors at Common law, as for *batteries*, *conspiracies*, *libelling*, *nuisances*, *contempt*, *seditionous words*, &c. wherein the offender is liable to pay a fine to the King. *Finch 340: Show 109.*

By *Stat. 4 & 5 W. & M. c. 18*, The Clerk of the Crown in B. R. is not to receive or file any information for *trespass*, *battery*, &c. without express order of court; nor to issue any process without taking a recognisance in 20*l.* penalty to prosecute with effect; and if the party appear, and the plaintiff do not procure a trial in a year, or if verdict pass for the defendant, &c. the court shall award the defendant costs: but this act doth not extend to informations in the name of the King's Coroner or Attorney, &c.

When a *battery* is committed privately, so that the person injured can make no proof thereof by witnesses at law; it is usual to bring an information in this office, or to prefer an indictment, the most legal method, where the party may be a witness for the King, it being his suit. See title *Indictment, Information, King's Bench, Quo Warranto*, &c.

CRUSTUM, Was a garment of purple, mixed with many colours. *Mon. Ang. tom. 1. pag. 210.*

CRY DE PAIS, On a robbery or other felony done, *hue and cry* may be raised by the country in the absence of the constable, which is called *cry de pais*. 2 *Hale's Hist. P. C. 100*—See title *Hue and Cry*.

CRYSTAL, A chapel or oratory under ground. *Du Cange*.

CUCKING STOOL, See title *Castigatory*.

CUDE, A *cude cloth* is a chrysom or face-cloth for a child baptized. Vide *Chrysmale*.

CUI ANTE DIVORTIUM, A writ for a woman divorced from her husband to recover her lands and tenements which she had in fee-simple, or in tail, or for life, from him to whom her husband did alienate them during the marriage, when she could not gainsay it. *Reg. Orig. 233: F. N. B. 240*. And the heir shall have a *sur cui ante divortium*, where the wife dieth before the action brought; as well as he shall have a *sur cui in vita*. *F. N. B. 193*. But of an estate-tail, the heir shall not have *sur cui in vita*, or *ante divortium*, but shall be put to his *joinder* in the defender. *New Nat. Br. 454*.—See title *Entry*.

COT

CUI IN VITA, A writ of entry, for a widow against him to whom her husband aliened her lands or tenelements in his life-time; which must contain in it, that during his life she could not withstand it. *Reg. Orig.* 232: *F. N. B.* 173. If husband and wife be *jointenants* before the coverture, and the husband alieneth all the land, and dieth, she shall have a *cui in vita* for a moiety, and no more: but if they are *joint purchasers*, during the coverture, and he alien all the land, and dieth, his wife shall have a *cui in vita* of the whole land; because that during the coverture, as to *purchase*, they are but one person in law. *F. N. B.* 187. And for this reason, if husband and wife, and a third person, *purchase jointly*, and the husband alieneth all in fee, and dieth, the wife shall have a *cui in vita* of a moiety. *Ibid.*

Where the husband and wife exchange the lands of the wife for other lands, if the wife agree unto the exchange after the husband's death, she shall not have a *cui in vita*. Also if the wife do accept of parcel of the land in dower, of which she hath a *cui in vita*, by that acceptance she shall be barred of the residue. *New Nat. Br.* 430. If the husband and wife lose by default the wife's lands, after the death of her husband, she shall have a *cui in vita* to recover those lands so lost by default. *F. N. B.* 187. By *Stat.* 13 *Ed.* 1. c. 3, *Cui in vita* is given to the wife where the deceased husband lost her lands by default in his life-time: and she shall be admitted to defend her right during his life, if she come in before judgment. Likewise if tenant in dower, by the curtesy, or for life, do make default, &c. the heirs and they to whom the reversion belongeth, shall be admitted to their answer, if they come before judgment: and if on default judgment happen to be given, such heirs, &c. shall have a writ of entry for recovery of the same, after the death of such tenants. See *Booth* on real actions, and *F. N. B.*—See the preceding article.

CULAGIUM, The laying up of a ship in the dock to be repaired. *MS. Arth. Trexon. Arm. de Plac. Edw.* 3.

CULM, See *Coal*.

CULPRIT, A prisoner accused for trial. The word arose originally from the reply of the proper officer in behalf of the King, affirming a criminal to be guilty, after he hath pleaded Not guilty, without which the issue to be tried is not joined: it is compounded of two words, viz. *Cul* and *pit*; the one an abbreviation of *culpabilis*, and the other derived from the French word *prest*, i. e. ready; and it is as much as to say that he is ready to prove the offender guilty. See 4 *Comm.* 339.

CULTURA, A parcel of arable land. *Blount*.

CULVERTAGE, *Culvertagium*.] Is said by some persons to be derived from *Culum* & *Potere*, to turn tail: and in this sense, *sub nomine culvertagii*, was taken to be on pain of cowardice, or being accounted cowards. And in this sense *Spelman in voc. Niderling* derives it from *Culver* a dove. But in the opinion of others, it rather signifies some base slavery, or the confiscation of an estate; being a feudal term for the lands of the vassal forfeited and encroaching to the lord: and *sub nomine culvertagii*, in this signification, was under pain of confiscation. *Mitt. Paris.* anno 1112.

CULWARD and **CULVERD**, A coward, or cowardice. *Chart. Temp. E.* 1.—See the preceding word.

CUNA CERVISIE, A tub of ale. *Dumfries*. But this word is truly *Crua*.

CURATE.

CUNEUS, A mint or place to coin money: *C. i. num. monetum* signifies the King's stamp for coinage; and from the word *cune*, is derived coin. See *Coin*.

CUNTEY-CUNTEY, A kind of trial, as appears by *Bracton. Bract. lib.* 4. *naft.* 3. c. 18, where it seems to intend the ordinary jury.

CURAGULUS, One who taketh care of a thing. *Mon. Ang.* tom. 2.

CURATE, *Curator*.] He who represents the incumbent of a church, parson or vicar, and takes care of divine service in his stead: in case of pluralities of livings, or where a clergyman is old and infirm, it is requisite there should be a Curate to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an Ordinary, having episcopal jurisdiction: and when a Curate hath the approbation of the bishop, he usually appoints the salary too; and in such case, if he be not paid, the Curate hath a proper remedy in the ecclesiastical court, by a sequestration of the profits of the benefice; but if he hath no licence from the bishop, he is put to his remedy at common law, where he must prove the agreement, &c. *Right Clerg.* 127.

By *Stat.* 28 *H.* 8. c. 11, such as serve a church during its vacancy, shall be paid such stipend as the Ordinary thinks reasonable out of the profits of the vacancy; or if that be not sufficient, by the successor, within fourteen days after he takes possession.

By *Stat.* 12 *An.* c. 12, where Curates are licensed by the bishop, they are to be appointed by him a stipend not exceeding 50*l.* per ann. nor less than 20*l.* a year, according to the value of the livings, to be paid by the rector or vicar: and the same may be done on any complaint made. One person cannot be Curate in two churches, unless such may satisfy the law, by reading both morning and evening prayers at each place: nor can he serve one cure on one Sunday, and another cure on the next; for he must not neglect to read morning and evening prayer in his church every Lord's day; if he doth he is liable to punishment. *Comp. Incumb.* 572. But it is otherwise where a church or chapel is a member of the parish-church; and where one church is not able to maintain a curate. *Can.* 48.

A Curate having no fixed estate in his curacy, not being instituted and inducted, may be removed at pleasure by the bishop or incumbent. *Noy.* But there are perpetual curates, as well as temporary, who are appointed where tithes are impropriate, and no vicarage endowed: these are not removeable; and the impropriators are obliged to find them, some whereof have certain portions of the tithes settled on them. *Stat.* 29 *Car.* 2. c. 8.

It was provided in 1603 by *Can.* 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a College, or a Master of Arts of five years standing, who lives in the University at his own expence, the bishop shall support him till he prefer him to a living. 3 *Burn. Eccl. L.* 28.—The bishops before they confer orders require either proof of such a title as is described by the canon, or a certificate from some Rector or Vicar, promising to employ the candidate for orders *bonâ fide* as a curate, and to grant him a certain allowance till he obtains some ecclesiastical preferment, or shall be removed for some fault. In a case where the Rector of *St Anne Westminster* gave such a title, and afterwards dismissed his Curate

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Curate without assigning any cause, the Curate recovered in an action of *assumpsit* the same salary for the time after his dismission which he had received before. *Cowp.* 437.—When the Rector had vacated *St. Anne's* by accepting the living of *Rochdale*, the Curate brought another action to recover his salary after the Rector left *St. Anne's*; but the Court of *K. B.* held that that action could not be maintained: as these titles are only binding upon those who give them, while they continue incumbents in the church for which such Curate is appointed. *Doug.* 137.

No Curate (or Minister) ought to perform the duties of any church, before he has obtained a licence from the Bishop. 2 *Burn*, 58.

The Bishop cannot increase the salary of the Curate, where there is a specific agreement between the Incumbent and the Curate. *Ficm.* 70.

Every clergyman that officiates in a church, (whether incumbent or substitute) is in our liturgy called a *curate*: *Curates* must subscribe the declaration, according to the act of Uniformity, or are liable to imprisonment, &c. See title *Clergyman, Parson, Advocate, Chaplain, &c.*

CURFEU, *Fr. Couvrir, to cover; Feu, fire.*] A bell which rang at eight o'clock in the evening, in the time of *William the Conqueror*; by which every person was commanded to rake up or cover over his fire, and put out his light: and in many places of *England* at this day, where a bell is customarily rung towards bed-time, it is said to ring *curfew*. *Stowe's Annals*.

In the *Welsh* language, *cuſfa*, signifies a beating; also, *stroke*. *Richards's Antiquæ Lingue Britannicæ Thesaurus*.

CURIA, This word was sometimes taken for the persons, as feudatory and other customary tenants, who did their suit and service at the court of the lord. *Kennet's Paroch. Antiq.* 139. And it was usual for the Kings of *England*, in ancient times, to assemble the Bishops, Peers, and great men of the kingdom to some particular place, at the chief festivals in the year; and this assembly is called by our historians *curia*; because there they consulted about the weighty affairs of the nation. And it was therefore called *Solemnis Curia*, *Augustalis Curia*, *Curia Publica*, &c. See title *Court, Witenagemote*.

CURIA ADVISARE VULT, Is a deliberation which a Court of judicature sometimes takes, where there is any point of difficulty, before they give judgment in a cause. *New Book Entr.* And when judgment is said, upon motion to arrest it, then it is entered by the judges *curia advisare vult*. *Shep. Epit.* 682.—See title *Judgment*.

CURIA CURSUS AQUÆ, A court held by the lord of the manor of *Graveſend* for the better management of barges and boats using the passage on the river *Thames* from thence to *London*, and plying at *Graveſend* bridge, &c. mentioned in *Stat.* 2 *Geo.* 2. c. 26.

CURIA CLAUDENDA, A writ to compel another to make a fence or wall, which he ought to make between his land and the plaintiff's, on his refusing or deferring to do the same. *Reg. Orig.* 155. This writ doth not lie but against him who hath a close adjoining to the plaintiff's land, who is obliged to inclose it; and it lieth not but for him who hath a freehold, &c. It may be sued before the sheriff in the county court, or in the common pleas: and the judgment is to recover the inclosure and damages. *New Nat. Br.* 282, 283. But, if the occupier of a close adjoining to mine, ought to repair the

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fence between the closes, and do not, and his cattle stray into my close and do damage, I may distrain them damage feasant, or drive them out, and bring an action of trespass. If my cattle stray into his close and do damage, he has not a right to distrain them, nor can he support trespass against me for the same. Should my cattle after straying into his close, stray out of the same into any highway, or other place, and be lost, or trespass in the ground of a third person, and be by him distrained damage feasant, and kept till replevied, or I have made satisfaction, I may maintain an action against the defaulter, *i. e.* against the occupier of the adjoining close, for not repairing his fence, whereby such damage hath happened to me. The writ of *curia claudenda* therefore is grown out of use. See title *Trespass*.

CURIA DOMINI, The lord's house, hall or court, where all the tenants attend at the time of keeping courts.

CURIA PENTICIARUM, Is a court held by the sheriff of *Chester*, in a place there called the *Pendice* or *Pentice*: and it is probable its being originally kept under a *pent-house*, or open shed covered with boards, gave it this denomination. *Blount*.

CURNOCK, A measure containing four bushels, or half a quarter. *Fleta, lib.* 2. c. 12.

CURRICULUS, The year, or course of a year: *Actum est hoc annorum Domini incarnationis quatuor quinquagenis & quinq̄, quinis lustris, & tribus curriculis*. This is the year 1028; for four times 50 make 200, and five times 200 make 1000. Then five lustra are twenty-five years, and three Curriculi, three years; making in all the very year. *Blount*.

CURRIERS, Persons that curry and dress leather. No currier shall use the trade of a butcher, tanner, &c. or shall curry skins insufficiently tanned, or gash any hides of leather, on pain of forfeiting for every hide or skin 6s. 8d. And persons in *London* putting leather to be curried to any but freemen of the Curriers' Company, and such curriers not currying the leather sufficiently, shall forfeit the ware or the value, &c. *Stat.* 1 *Jac.* 1. c. 22. The clause relating to freemen is repealed; but if any currier do not curry leather sent him, within sixteen days between *Michaelmas* and *Lady-Day*, and in eight days at other times, on conviction before a justice, he shall forfeit 5*l.* to be levied by distress, &c. yet subject to mitigation. 12 *Geo.* 2. c. 25. Curriers and such as deal in leather, may cut and sell it in small pieces in their shops to any persons whatsoever. *Stat. Ibid.*—See titles *Leather, Skins, &c.*

CURSING, See *Swearing*.

CURSITORS, *Clerici de Curſu.*] Clerks belonging to the *Chancery*, who make out original writs; and are called *Clerks of Course*, in their oath appointed 18 *Ed.* 3. *stat.* 5. There are of these clerks twenty-four in number, which make a corporation of themselves; and to each clerk is allotted a division of certain counties, in which they exercise their functions. 2 *Inſt.* 670.—See title *Proceſſi*.

CURSONES TERRÆ, Ridges of land. *Stat.* 14 *Ed.* 2.

CURSORE, A sort of light ships or swift sailors. *Hovacen R.* 1.

CURTESY OF ENGLAND, *Jus Curialitatis Angliæ.*] Is where a man taketh a wife seised in fee-simple, or fee-tail general, or as heirless in special tail, and hath issue by her, male or female, born alive, which by any possibility

bility may inherit, and the wife dies; the husband holds the lands during his life; and is called *Tenens per legem Angliæ*, or Tenant by the curtesy of England. See title *Tenures* III. 9.—Though this is called the *Curtsey of England*, it appears to have been the established law of Scotland, where it was called *Curtialitas*.—It is likewise used in Ireland by virtue of an ordinance of H. III.—So that probably the word *curtesy* is in this sense understood rather to signify an attendance upon the lord's courts, than to denote any peculiar favour. See 2 *Comm.* 126.

Four things are requisite to give an estate by the curtesy, *viz.* Marriage, seisin of the wife, issue, and death of the wife. *Co. Lit.* 30. If land descend to the wife after the husband hath issue by her; or if the issue be dead at the time of her death, being born alive; the husband shall be tenant by the curtesy. Also if a child is born alive, it is not material whether it is baptised, or ever heard to cry, to make the husband tenant by the curtesy; for if it is born alive, it is enough. *Dy.* 25: 8 *Rep.* 34.

The words in the general editions of *Littlton*, 1 *Inst.* 29, are *overs on wife*, but in *Baron* and *Machlinia's* edition they are *next wife*, and are translated by Lord Coke, *born alive*. May not the word *wife* in the first instance have been an error for *life*, meaning thereby that the issue must be *heard*, or *seen*; so as to ascertain its being alive?

But the child must be such as by possibility may inherit; and therefore if land be given to a woman, and the heirs male of her body, and she takes husband and hath issue a daughter, and dies; as this issue cannot possibly inherit, the husband shall not be tenant by the curtesy. *Terms de Lev.*

If the child is rip'd forth of the mother's belly, after her death, though it be alive, it will not cause tenancy by the curtesy; for this ought to begin by the issue, and be consummate by the death of the wife, and the estate of tenant by the curtesy should avoid the immediate descent. *Ibid.* A man shall not be tenant by the curtesy of a bare right, title, use, reversion, &c. expectant upon an estate of freehold, unless the particular estate is determined during the coverture; nor of a seisin in law: but if a wife dies before a rent becomes due; or in the case of an advowson, before the church becomes void; the husband shall be tenant by the curtesy, though the wife had only a seisin in law; for in this case no other seisin could be attained. *F. N. B.* 149: *Co. Lit.* 29, 30, 40.

Though in strictness of law there cannot be curtesy of *Trusts*, yet since Lord Coke's time our courts of equity have allowed curtesy, both of trusts and other interests which though in law mere rights and titles, are deemed estates in equity; and made to conform to many of the rules and consequences incident to estates in law. See in 1 *Atk.* 603, the case of *Cashborn v. Inghib*, in which *Hardwicke* C. decreed curtesy of an equity of redemption. See *S. C.* more fully reported in *Vin. tit. Curtesy*, E. pl. 23. However, a wife may in point of benefit have a trust of inheritance, which may be so declared as to prevent curtesy; as by directing the profits during the wife's life to be paid for her separate use; for in such case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 *Atk.* 715. It is also proper to remark that though curtesy out of a trust is allowed, yet dower has been refused; a distinction not easily reconcilable with reason, however settled by the current of authorities. See 1 *Inst.* 29 a; n. 6.

As to *Curtesy in Titles and Offices of honour*, See 1 *Inst.* 29 b; and Mr. *Hargrave's* learned notes there, by which it seems that no such curtesy can take place; though the question appears not to be settled, a decision having been repeatedly avoided thereon.

There is no tenancy by the curtesy of copyhold lands, except there be a special custom for it. But in gavelkind lands, a husband may be tenant by the curtesy without having issue. 1 *Inst.* 30. But it is only of a moiety of the wife's land, and ceases if the husband marries again. *Robins. Gavelk.* l. 2. c. 1. Where a husband is entitled to this tenancy, if after the wife is an *indent*, and her estate in the land found: when she dies, he shall not be tenant by the curtesy, for the King's title by relation prevents it. *Plowd.* 261. If the wife be seised in fee of lands, and attaint of felony, but have issue by her husband, and she is hanged, &c. it is said the husband shall be a tenant by the curtesy: but yet the land will be forfeited; according to *Kitch.* 159: 21 *Ed.* 3. 49.

A woman seised of land had two daughters, and covenanted to stand seised to the use of E. her eldest daughter in tail; on condition that she should pay to her other daughter within a certain time 300*l.* And if E. made default, or died without issue before such payment, then the land to go to the second daughter; the mother dying, E. took a husband, and had issue, and died afterwards without any issue living, before the day of payment: it was here held, that her husband should be tenant by the curtesy. 1 *Leon. ca.* 233.—See *Kitch.* 159.

CURTEYN, *Curtana*.] The name of King *Edward the Confessor's sword*; which is the first sword carried before the Kings of England at their coronation: and it is said the point of it is broken as an emblem of mercy. *Mat. Paris. in Hen.* III.

CURTILAGE, *Curtilagium*, from the Fr. *Cour*, *Court*, and Sax. *Leagb* locus.] A court-yard, back-side, or piece of ground lying near and belonging to a dwelling house. See *Stats.* 4 *Ed.* 1. c. 1: 35 *H.* 8. c. 4: 39 *Eliz.* c. 10: 6 *Rep.* 64. and *Spelm.* And though it is said to be a yard or garden, belonging to a house; it seems to differ from a garden, for we find, *cum quodam gardino & curtillagio*. 15 *Ed.* 1. n. 34.

CURTILES TERRÆ, Court lands. It is recorded, that among our Saxon ancestors, that the *Thanes* or nobles who possessed *Bockland*, or hereditary lands, divided them into *Inland* and *Outland*: the *Inland* was that which lay most convenient for the lord's mansion-house; and therefore the lords kept that part in their own hands, for the support of their families, and for hospitality: afterwards the Normans called these lands *Terras Dominicales*, the demains, *demesnes*, or lord's lands: the Germans termed them *Terras Indominicatas*, lands in the lord's own use: and the Feudists, *Terras Curtiles*, lands appropriate to the court or house of the lord. *Spelm. of Feuds*, c. 5.

CUSTANTIA, *Custagium*, costs.

CUSTODE ADMITTENDO, AND CUSTODE AMOVENDO, writs for the admitting or removing of Guardians. *Reg. Orig.*

CUSTODES LIBERTATIS ANGLIÆ AUTHORITY PARLIAMENTI, The title in which writs and all judicial process did run during the grand rebellion, from the murder of King *Charles I.* till the Usurper *Oliver* was declared Protector, &c. mentioned and declared traitorous, by *Stat.* 12 *Car.* 2. c. 3.

CUSTODIAM

CUSTOM.

CUSTODIAM DARE, Was taken for a gift or grant for life. *Du Cange*.

CUSTOM, *consuetudo*.] Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent: so, wherever they consent and use a certain rule or method as a law, such rule, *&c.* gives it the power of a law; and if it is *universal*, then it is *common-law*: if *particular* to this or that place, then it is *custom*. 3 *Salk.* 112. As to the rise of customs, when a reasonable act once done was found to be good and beneficial to the people, then they did use it often, and by frequent repetition of the act, it became a custom; which being continued without interruption time out of mind, it obtained the force of a law, to bind the particular places, persons, and things concerned therein. Thus a custom had beginning and grew to perfection.

To make a particular custom good, the following are necessary requisites.

1. *Antiquity*.—That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show the beginning of it, within legal memory, that is within any time since the first year of *Richard I.* it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist. *Co. Lit.* 113. Therefore a custom that every pound of butter sold in a certain market, should weigh eighteen ounces, is bad; being directly contrary to *Stat. 13 & 14 Car. 2. c. 26*, which directs it to contain 16 oz. 3 *Term Rep.* 271.

2. It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. *Co. Lit.* 114. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. *Co. Lit.* 114. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*; (*Litt.* § 212;) or rather, taken negatively, they must not be unreasonable. Which is not always, as *Sir Edward Coke* says, (1 *Inst.* 62,) to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of *October*, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the

lord will never put in his; and then the tenants will lose all their profits. *Co. Copyb.* § 33.

5. Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void: for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. 1 *Ro. Abr.* 565. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain; for the value may be ascertained at any time; and the maxim of law is, *id certum est, quod certum reddi potest*.—A custom that poor house-keepers shall carry away rotten wood in a chase is bad; being too vague and uncertain. 2 *Term Rep.* 758.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, who he will use them or no. Therefore a custom that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure is idle and absurd; and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. 9 *Rep.* 58: See *Doug.* 190.

As to the *Allowance* of special customs. Customs in derogation of the Common law must be construed strictly. This rule is founded upon the consideration that a variety of customs in different places upon the same subject is a general inconvenience: the courts therefore will not admit such customs but upon the clearest proofs. 1 *Term Rep.* 466. Thus by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee-simple. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years, for the custom must be strictly pursued. *Co. Cop.* § 33.—And moreover all special customs must yield to the King's prerogative. Therefore if the King purchases land of the nature of gavelkind, where all the sons inherit equally; yet on the King's demise, his eldest son shall succeed to those lands alone. *Co. Litt.* 15.

A custom contrary to the public good, or injurious to a multitude, and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void. 2 *Danv.* 424, 427. Customs ought to be beneficial to all, but may be good where against the interest of a particular person, if for the public good. *Dyer* 60. A custom is not unreasonable for being injurious to private persons or interests, so as it tends to the *general advantage* of the people. 3 *Salk.* 112.

A custom may be good in some cases where a *prescription* is not: But customs that are good for the substance and

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matter of them, may yet be bad for the manner; if they are uncertain, or mixed with any other custom that is unreasonable, *Sc.* 2 *Bull.* 166: 2 *Brownl.* 198.

A Custom extends over some place or will: A prescription extends only to particular persons. *Hardw.* 293. A prescription must always be had by way of *que estate*. *Ibid.* See title *Prescription*.

Custom that every one who passeth over such a bridge, within the lord's manor, and which the lord doth repair, shall pay him one penny, is a good custom; but if it be to pay the lord 12 *d.* it will be naught, for it is unreasonable. *Cuth.* *Cop.* 35: 1 *Bull.* 203.

A custom that a lord shall have within his manor *liberam fildam*, or *free fold* throughout the village; and that no other shall have it but by agreement with him, and if any take it, the lord may abate the same; this hath been held a good custom. 1 *Rel.* 560. Custom for inhabitants, as such, to have common adjudged void. *Gutewood's case*. 6 *Co.* 60. A custom, that tenants of a manor shall grind all the corn they spend in their own houses, in the lord's mill, *Sc.* is good: But a custom that every inhabitant of a house held of the lord, shall grind the corn that he spends, or shall sell, at his mill, is void. *Moor, ca.* 1217: *Hob.* 149. Custom to have a common bakehouse in a manor or parish, for all the tenants or inhabitants, is a good custom. 2 *Bull.* 158.

Custom is and must always be alleged to be in many persons; and so it may be claimed by copyholders, or the inhabitants of a place, and when it is claimed, it must be as within such a county, hundred, city, borough, manor, parish, hamlet, *Sc.* *Co. Lit.* 110, 113: 4 *Rep.* 31. A good custom or prescription hath the force of a grant; as where one and his ancestors have had a rent time out of mind, and used to distrain, *Sc.* But a custom that begins by extortion of lords of manors, is judged wanting a lawful commencement, and therefore void: and where custom is amongst many, and they are all dead but one, the custom is gone. *Flowd.* 322: *Dyer* 199.

Customs for an eldest daughter to inherit, or a youngest son, may be good: For these, though contrary to a particular rule of law, may have a reasonable beginning. *Nelf. Abr.* 579. And by custom a woman may be endowed of a moiety of the husband's lands, *Sc.* Also by custom, infants may bind themselves apprentices, *Sc.* 2 *Danv. Abr.* 438.

Regularly a man cannot alledge a custom against a statute, because that is the highest matter of record in law: But a custom may be alleged against a negative statute, which is made in affirmation of the Common law, 1 *Inst.* 115. Acts of parliament do not always take away the force of customs. 2 *Danv. Abr.* 436. A custom is to be positively alleged, by usage in fact. *Lutw.* 1319.

General customs which are used throughout England, and are the Common law, are to be determined by the judges: But particular customs, such as are used in some certain town, borough, city, *Sc.* shall be determined by a jury. *Doct. & Stud.* c. 7, 10: 1 *Inst.* 110. *Consuetudo pro lege servatur*, *Sc.* *Smith Bracton*, lib. 3. c. 3. And custom is said to be altered. But the judges of the court of *B. R.* for *C. B.* can over rule a custom though it be one of the customs of London, if it be against natural reason, *Sc.* 1 *Mod.* 212.

The law takes particular notice of the custom of *Gavelkind* and *Borough English*; (*Co. Litt.* 175;) and there is

no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded; (*Lit.* § 265;) and as well the existence of the custom must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases is by a jury of 12 men, and not by the judges; except the same particular custom has been before tried, determined and recorded in the same court. *Doct. & Stud.* 1, 10: 1 *Comm.* 76.

As to the manner of laying a custom, and the difference between alleging a thing by way of custom, or by way of prescription, See 6 *Co.* 60: *Hob.* 113: *Cro. Eliz.* 441: *Poph.* 201: *Style* 479: 1 *Lev.* 176: 1 *Vent.* 386: 3 *Lev.* 160: *Cuth.* 192. See further title *Prescription*, and as to particular customs relative to *Inheritance*, *Dower*, *Sc.* See titles *Copyhold*; *Gavelkind*, *Sc.*

THE CUSTOMS OF LONDON, differ from all others in point of trial, for if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate of the Lord Mayor and Aldermen, by the mouth of the Recorder. *Cro. Car.* 516.—Unless it be such a custom as the Corporation itself is interested in, as a right of taking toll, *Sc.* for then the law permits them not to certify in their own behalf. *Hob.* 85.—And when a custom has once been certified by the Recorder, the judges will take notice of it, and will not suffer it to be certified a second time. *Dougl.* 365.—As to the form in which the recorder shall certify a custom, See 1 *Burr.* 248.

These Customs of London relate to divers particulars, with regard to trade, apprentices, widows, orphans, *Sc.* As to the custom relative to the distribution of a free-man's estate, and which now in consequence of *Stat.* 11 *Geo.* 2. c. 18. § 17, extends only to cases of intestacy, or express agreements made in consideration of marriage, See title *Executor*, V. 9.—As to the custom of Foreign Attachment, See title *Attachment Foreign*.—As to the custom of a feme covert being a sole trader, See titles *Baron & Feme*; *Bankrupt*.—And further in more particular detail, as to the general and local customs of London, See this Dict. under title *London*.

It is said, 1 *Ro. Rep.* 106, that the courts at *Westminster* of course take notice of the customs of London, but not of any other place.—But this is only where they have been certified; See ante title *Custom*.

The Customs of London are confirmed by act of parliament. 8 *Rep.* 126: *Cro. Car.* 347.

THE CUSTOM OF MERCHANTS, *Lex Mercatoria*.] A particular system of customs used only among one set of the King's subjects; which however different from the rules of the Common law, is yet ingrafted into it, and made part of it; being allowed for the benefit of Trade, to be of the utmost validity in all commercial transactions; for it is a maxim in law that *cuilibet in arc sua credendum est*. 1 *Comm.* 75.

It seems that this Custom of Merchants, is only so far considered as law, that it affords the rule of construction in cases of contracts, agreements, *Sc.* and other transactions in Trade and Commerce. Mr. *Christian* in his note on the above passage of the Commentaries, truly remarks, that the *lex mercatoria* like the *lex & consuetudo parliamenti*, describes only a great division of the laws of England. The laws relating to bills of exchange, insurance, and all mercantile contracts are as much the general law of the land, as the laws relating to marriage

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or murder.—And the opinion of Mr. Justice *Egler* is, that the Custom of Merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determinations. 2 Burr. 1226.

See further more particularly as to the effect and influence of this Custom of Merchants, under *Bankrupt*; *Bill of Exchange*; *Factor*; *Insurance*; *Partnership*, and other titles in this Dictionary.

CUSTOMS ON MERCHANDISE. These are enumerated, (1 *Comm.* 313.) among the perpetual taxes; and are there explained to be the *Duties, Toll, Tribute or Tariff* payable upon merchandize exported and imported.

The considerations, says the Commentator, upon which this revenue, or the more antient part of it which arose only from exports, was invested in the King, were said to be two.—1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him.—2. Because the King was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates. *Dyer* 165.—Some have imagined they were called with us customs, because they were the inheritance of the King, by immemorial usage, and the common law, and not granted him by any *Stat. Dy.* 43. pl. 24.—But Sir *Edward Coke*, 2 *Inst.* 58, 9, hath clearly shewn that the King's first claim to them was, by grant of parliament. 3 *E.* 1. And indeed this is in express words confessed by *Stat.* 25 *E.* 1. c. 7; wherein the King promises to take no customs from merchants without the common assent of the realm “saving, to us and our heirs, the customs on wool, skins and leather formerly granted to us by the commonalty aforesaid.” These were formerly called the hereditary Customs of the Crown, and were due on the exportation only of the said three commodities, and of none other: which were still the staple commodities of the kingdom, because they were obliged to be brought to those ports where the King's staple was established, in order to be there first rated and then exported. *Danv.* 9. They were denominated in the barbarous Latin of our antient records, *custuma*; not *consuetudines*, which is the language of our law, whenever it means merely usages. The duties on wool, sheep-skins, or wool-fells, and leather, exported, were called *custuma antiqua sive magna*; and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers paid an additional toll, viz. half as much again as was paid by natives. The *custuma parva et nova* were an impost of 3d. in the pound, due from merchant strangers only, for all commodities as well imported as exported; which was usually called the aliens' duty, and was granted in 31 *Edw.* 1: 4 *Inst.* 29. But these antient hereditary customs, especially those on wool and wool-fells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by *St.* 11 *Ed.* III. c. 1.

There is also another very antient hereditary duty belonging to the crown, called the *prisa* or *butlerage* of wines: which is considerably older than the customs, being taken notice of in the great roll of the Exchequer, 8 *Ric.* 1. still extant. *Madox. Hist. Exch.* 526, 532. *Prisa* was a right of taking two tons of wine from every ship (English or Foreign) importing into England twenty tons or more; one before, and one behind, the mast: which by charter of *Edw.* 1, was exchanged into a duty of 2s. for

every ton imported by merchant strangers, and called *butlerage*, because paid to the King's butler. *Danv.* 8: 2 *Bulst.* 234: *Stat. Est.* 16 *Edw.* 2: *Com. Journ.* 27, 4, 1689.

Other Customs payable upon exports and imports were distinguished into *subsidies, tonnage, poundage* and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned over and above the *custuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the *prisa* and *butlerage* aforesaid: poundage was a duty imposed *ad valorem*, at the rate of 12d. in the pound on all other merchandize whatsoever, and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required. *Danv.* 11, 12.

These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of The Customs.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon imported as well as exported commodities, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 *Eliz.* 19,) express it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandize safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 *Ric.* II. *Danv.* 12. but in *Henry the Sixth's* time, they were granted him for life by a statute in the thirty-first year of his reign; and again to *Edward IV.* for the term of his life also: since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of *Charles the First*.

Upon the Restoration, this duty was granted to King *Charles the Second* for life, and so it was to his two immediate successors; and by three several *Stat.* 9 *Ann.* c. 6: 1 *Geo.* 1. c. 12: 3 *Geo.* 1. c. 7, it was made perpetual and mortgaged for the debt of the Public. The customs thus imposed by parliament were, till the *Stat.* 27 *Geo.* 3. c. 13, contained in two books of rates, set forth by parliamentary authority; *Stat.* 12 *Car.* II. c. 4: 11 *Geo.* 1. c. 7. Aliens used to pay a larger proportion than natural subjects, generally called the aliens' duty; now repealed by *Stat.* 24 *Geo.* III. *sess.* 2. c. 16. except as to scavage duties granted to the city of London.

By *Stat.* 27 *Geo.* 3. c. 13, called the *Consolidation act*, all the former statutes imposing duties of customs and excise, were repealed with regard to the quantum of the duty; and the two books of rates above-mentioned were declared to be of no avail for the future; but all the former duties were consolidated, and were ordered to be paid according to a new book of rates annexed to that statute. Before this act was passed it could not be supposed that many persons besides Excise-men and Custom-house-officers could be acquainted with the various duties payable upon the different articles of commerce, which, in many instances, were numerous on the same article, and lay dispersed among many acts of parliament. But

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now by the excellent improvement, may be found the duty upon the importation or exportation of any article; or what excise duty any commodity is subject to, in an alphabetical table.

Bullion, Wool, and some few other commodities may be imported duty-free. All the articles enumerated in the tables or book of rates pay upon importation or exportation, the sum therein specified, according to their weight, number or measure. And all other goods and merchandize, not being particularly enumerated or described, and permitted to be imported and used in *Great Britain*, shall pay upon importation 27 *l.* 10 *s.* per cent. *ad valorem*, or for every 100 *l.* of the value thereof; but subject to a draw-back of 25 *l.* per cent. upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but on failure thereof, they are subject to a duty of 5 *l.* 10 *s.* per cent. *ad valorem*. And to prevent frauds, in the representation of the value, a very simple and equitable regulation is prescribed by the act, *viz.* the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price, which he himself fixed upon them with an advance of 10 *l.* per cent. besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner, and the subsequent expences, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the publick revenue.—This statute (says Mr. *Christian* in his note on 1 *Comm.* 316, from whence the above is extracted) is of infinite consequence to the commercial part of the world; it has reduced an important subject from a perfect chaos, to such a plain and simple form, as to induce every friend to his country to wish that similar experiments were made upon other confused and entangled branches of our Statute law.

For further matter relating to, or at least intimately connected with, the above subject, See titles *Navigational*; *Smugglers*.

If goods and merchandize are brought by a merchant to a port or haven, and there part thereof sold, but never put on land, they must pay the customs; and discharging them out of the ship into another upon the sale, amounts in law to a putting them upon the land, so that if the custom duties are not paid, the goods will be forfeited. *Hill. 24 Eliz. 12 Co. 18.*

A very great number of Acts of Parliament have been passed to prevent frauds in this branch of the revenue, as well as in the Excise; and it is more to be wished than hoped, that the measure, pursued respecting the *quarant* of the duties, by the Consolidation act, could be followed by a general act restraining every fraud, and containing every regulation, with a precise statement of the punishment for each offence. But while the dishonest are ingenious to find out means of evading the most explicit laws, the honest part of the Community must forego the length and intricacy of statutes which ultimately lose their liberty and property.

The following are short extracts of such statutes as seem most material to the present purpose; besides those already mentioned.

By *Stat. 14 R. 2. c. 10*, no Customier or comptroller of the customs, shall have any ships of his own, or meddle with the freight of ships. And by *Stat. 20 H. 6. c. 5*, no searcher, surveyor, &c. or their clerks, deputies, or servants, may have any such ships of their own; nor shall use merchandize, keep a wharf, inn or tavern, or be factor, attorney, &c. to a merchant, under the penalty of 40 *l.*—By *Stat. 3 H. 6. c. 3*, Customers, collectors, or comptrollers, shall not conceal customs duly entered and paid, on pain to forfeit the treble value of merchandize so customed, and to make fine and ransom to the king. By *Stat. 13 & 14 Car. 2. c. 11. § 19*. If any persons employed about the customs and subsidies take a bribe, or connive at any false entry, they shall forfeit 100 *l.* and be incapable of any employment under the king; and the person giving the bribe shall forfeit 50 *l.*—By *Stat. 5 Geo. 1. c. 11 § 24*, &c. if an officer of the revenue, shall make any collusive seizure of foreign goods, to the intent the same may escape payment of the duties, he is to forfeit 500 *l.* and be incapable of serving his Majesty; and the importer and owner shall forfeit treble the value of the goods so collusively seized, &c.—By *Stat. 12 Geo. 1. c. 28. § 7*, officers of the customs, &c. are not to trade in brandy, coffee, &c. or any exciseable liquor, on pain of 50 *l.* and forfeiture of offices.

Officers of the customs may search ships. 13 & 14 *Car. 2. c. 11. § 4*. Having writ of assistance, may search houses, § 4. The penalty of abusing officers, § 6. keepers of wharfs, quays, &c. landing or shipping goods, without the presence of some officer of the customs, shall forfeit 100 *l.*

By *Stat. 6 Geo. 1. c. 21*, Where officers of the Customs are hindered in the execution of their duty, by persons armed to the number of eight, the offenders are to be transported for seven years.

By *Stat. 8 Geo. 1. c. 18*, If any goods are put into any vessel to be carried beyond sea: or be brought from beyond sea, and unshipped to be landed, the duties not being paid, nor agreed-for at the Custom house; the same shall be forfeited, one moiety to the king, the other to the seizer, &c. And by subsequent statutes, foreign goods taken in at sea, by any coasting vessel, &c. shall be forfeited, and treble value.

By *Sat. 9 Geo. 2. c. 35*, Where three persons are assembled and armed with fire arms, &c. to be assisting in the running of goods, they shall be guilty of felony and transported, and 50 *l.* be paid for apprehending such offenders: also the like reward to any of them for discovering others. All persons two or more in company, found pulling within five miles from the sea-coasts, with any horses, cart, &c. wherein are put above six pounds of tea, or five gallons of brandy, or other foreign goods of 30 *l.* value, landed without entry, and not having permits, and who shall carry offensive weapons, &c. or assist any of the officers, of the Customs, shall be adjudged runners of goods, and be transported as felons, and all the goods to be seized and forfeited: and suspected persons lurking near the coasts, not giving a good account of themselves, may be sent by a justice to the house of correction for a month; and informers to have 20 *s.* for every offender so taken.

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If any person offers any tea, brandy, &c. to sale, without a permit, the persons to whom offered may seize and carry it to the next warehouse belonging to the Customs or Excise; and the seizure shall have a third part, &c. And watermen, carmen, porters, &c. in whose custody run goods are found, shall forfeit treble value, or be committed for three months.

Ships and vessels from foreign parts, having on board tea, or brandy, rum, &c. in casks under fifty gallons, (except for the use of seamen) found at anchor or hovering near any port, or within two leagues of the shore, and not proceeding in their voyages, unless in cases of unavoidable necessity, all such tea, &c. shall be forfeited.

Persons offering any bribe to officers of the Customs, to connive at the running of goods, to forfeit 50*l.* and obstructing such officers in entering or searching ships, incurs a forfeiture of 100*l.* And if an officer be wounded or beaten on board a ship, the offenders to be transported, &c.

By Stat. 19 Geo. 2. c. 34. If any persons, to the number of three, or more, armed with offensive weapons, shall be assembled in order to be aiding in the illegal exportation of goods prohibited to be exported, or the running uncultomed goods, or the illegal relanding any goods, or rescuing the same, after seizure, from any officer, or from the place where they shall be lodged, or in the rescuing any person apprehended for any offence made felony by any act relating to the Customs or Excise, or preventing the apprehending any person guilty of any such offence; or in case any persons to the number of three, or more, so armed, shall be so assisting, or, if any person shall have his face blacked, or wear any mask, or other disguise, when passing with such goods, or shall forcibly hinder, obstruct, assault, oppose, or resist any officer of his majesty's revenue, in seizing such goods, or shall maim or dangerously wound any such officer in his attempting to go on board any vessel, or shoot at or dangerously wound any such person when on board and in the execution of his office, every such person shall be guilty of felony, and suffer death. § 1.

On information on oath of any person's being guilty of any of the above offences, the justice may certify the information to one of the Secretaries of State, who is to lay it before his Majesty; whereupon his Majesty may make an order, requiring the offender to surrender himself in forty days after publication thereof in the *Gazette*; and in default thereof, the order being published twice in the *Gazette*, and proclaimed in two markets near where the offence was committed, and a copy thereof affixed in some public place there, the offender shall be attainted of felony, and suffer death. § 2. Any person harbouring or aiding any such offender after the time for his surrender expired, knowing him to have been so required to surrender, being prosecuted within a year, shall be transported for seven years. § 3. Offences made felony by this act, may be sued in any county. § 5.

If any officer, &c. in the seizing, &c. such goods, or in the endeavouring to apprehend any such offender, shall be beat, wounded, maimed, or killed, or the goods be rescued, the inhabitants of the rape, lath or hundred, unless the offender be convicted within six months, shall forfeit 100*l.* to the executors of any officer killed; and pay damages to any officer beat, &c. not exceeding 40*l.* and

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for any goods rescued, not exceeding 200*l.* § 6. A reward of 300*l.* for apprehending any offender; a person wounded in apprehending an offender to have 50*l.* extraordinary, and the executors of a person killed, to have 100*l.* § 10.

By Stat. 13 & 14. Car. 2. c. 11, Ships and vessels outward-bound, are not to take in any goods, till the vessel, &c. is entred with the collectors of the Customs; and before departure, the contents of the lading are to be brought in under the hands of the masters, &c. Also when ships arrive from beyond sea, the masters are to make a true entry upon oath, of the lading, goods, ship, &c. under the penalty of 100*l.* And if any concealed goods are found after clearing, for which the duties have not been paid, the master of the vessel shall be subject to the like penalty.

CUSTOMS AND SERVICES, belonging to the tenure of lands, are such as tenants owe unto their lords; which being withheld from the lord, he may have a writ of *customs and services*. See titles *Consuetudinibus* & *Servitiis*.

CUSTOMARY FREEHOLD See title *Copyhold*.

CUSTOS BREVIUM, A principal clerk belonging to the court of *Common Pleas*, whose office is to receive and keep all the writs returnable in that court, and put them upon files, every return by itself; and to receive of the *prothonotaries* all the records of *nisi prius*, called the *Posseas*; for they are first brought in by the clerk of assize of every circuit to the prothonotary, who enters the issue in the causes, to enter the judgment: and four days after the return thereof, the prothonotary enters the verdict and judgment thereupon, into the rolls of the court; whereupon he afterwards delivers them over to the *custos brevium* who binds them into a bundle. He makes entry likewise of all writs of covenant, and the concord upon every fine; and maketh forth exemplifications, and copies of all writs and records in his office, and of all fines levied.

The *finis* after they are egrossed, are divided between the *custos brevium* and the *chirographer*; the *chirographer* always keeps the writ of covenant and the note, and the *custos brevium* the concord and the foot of the fine; upon which foot of the fine the *chirographer* causeth the proclamations to be indorsed, when they are proclaimed. This officer is made by the king's letters patent: and in the court of King's Bench, there is also a *custos brevium* & *rotularius*, who fileth such writs as are in that court filed, and all warrants of attorney, &c. and whose business it is to make out the records of *nisi prius*, &c. See titles *Chirographer*; *Common Pleas*.

CUSTOS PLACITORUM CORONÆ, An officer which seems to be the same with him we now call *custos rotulorum*. *Bratt. lib. 2. c. 5.*

CUSTOS ROTULORUM, Keeper of the Rolls or records of the county. The officer who hath the custody of the rolls or records of the sessions of the peace, and also of the commission of the peace itself. He is always a justice of the peace of the *quorum* in the county where appointed, and usually some person of quality: but he is rather termed an officer or minister, than a judge. *Lamb. Eiren lib. 4. cap. 3. p. 373.* By Stat. 35 H. 8. c. 1, (altered by Stat. 3 & 4 E. 6. c. 1, but restored by 1 W. & M. c. 21.) the *Custos rotulorum* in every county, is appointed by a writing signed by the King's hand, which shall be a warrant to the

Lord

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Lord Chancellor to put him in commission; and he may execute his office by deputy; and hath power to appoint the clerk of the peace, &c. See title *Clerk of the Peace*. The *Custos rotulorum*, two justices of the peace, and the clerk of the peace, are to inroll deeds of bargain and sale of lands of papists, &c. by 3 Geo. 1. cap. 18. See title *Papists*.

CUSTOS OF THE SPIRITUALTIES, See *Guardian*.

CUSTOS OF THE TEMPORALTIES, See *Guardian*.

CUT-PURSE. If any person *clam & secretè*, and without the knowledge of another, cut his purse or pick his pocket, and steal from thence to the value of 12d. it is felony without benefit of clergy. *Stat. 8 Eliz. c. 4.* See title *Felony*.

CUTTS. Flat-bottomed boats, built low and commodiously, used in the channel for transporting of horses. *Stow. Annal. p. 412.*

CYR

CUTTER OF THE TALLIES, An officer in the Exchequer, to whom it belonged to provide wood for the tallies, and to cut the sum paid upon them, &c. See title *Exchequer*.

CUVE, Is a French word, in English *keever*, from whence comes *keever*, a tub or vat for brewing. *Coxvel.*

CYCLAS, A long garment close upwards, and open or large below. See *Mart. Paris Anno 1236*.

CYDER, is one of the many articles liable to Excise-duties.—See title *Excise*.

CYNEBOTE. This words signifies the same with *Conegild. Blount.*

CYRICBRYCE, (Sax.) *Irruptio in ecclesiam. Leg. Eccl. Canoni Regis.* See title *Sacrilege*.

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DA, Fr.] A word affirmative for yes. *Law. French Dictionary.*

DAG, A gun; *un dagg*, a small gun, or hand-gun. See *Haque*.

DAGENHAM-BREACH, A duty is granted on coals imported into London to repair the walls, and banks thereof; to be collected and disposed by trustees, &c. *Stats. 12 Ann. St. 2. c. 17: 7 Geo. 1. c. 20. Sec. 32.*

DAGUS or **DAIS**, The chief or upper table in a monastery; from a cloth called *dais*, with which the tables of kings were covered.

DAKIR, See *Dicker*.

DALMATICA, A garment with large open sleeves, at first worn only by bishops, though since made a distinction of degrees; so called, because it came originally from Dalmatia.

DALUS, **DAILUS**, **DAILIA**, A certain measure of land.—*Et totam Dailiam marisci tam de rossa quam de prato*, &c. *Mon. Ang. tom. 2. p. 211.* In some places it is taken for a ditch or *vale*, whence comes *dale*. The *dali grati* have been esteemed such narrow slips of pasture, as are left between the ploughed furrows in arable land: which in some parts of England are called *doles*: the present *Welsh* use this word for low meadow by the river side. And this seems to be the original name and nature of *Deal* in Kent, where *Cæsar* landed, and fought the Britons: *Cæsar ad Dole bellum pugnavit.*—*Cowel*.

DAMAGES.

DAMNA.] This term signifies generally any hurt or hindrance that a man receives in his estate: but particularly, a part of what the jurors are to enquire of and bring in, when an action passeth for the plaintiff: for after verdict given of the principal cause, the jury are asked touching *costs* and *damages*, which comprehend a recompence for what the plaintiff hath suffered, by means of the wrong done him by the defendant. *Co. Lit. 257.* This word *damage* is taken in law, in two several significations, the one *properly* and *generally*, the other *relatively*: *properly*, as it is in cases wherein *damages* are founded upon the statutes where *costs* are included within the word *damages*, and taken as *aamages*.

But when the plaintiff declares for the wrong done to him, to the *damage* of such a sum, this is to be taken *relatively* for the wrong which passed before the writ brought, and is assessed by reason of the foregoing trespass, and cannot extend to *costs* of suit, which are future, and of another nature. *10 Rep. 116, 117.* See title *Costs*.

I. In what Actions Damages may be recovered, and against whom.

II. How Damages are to be assessed, increased, and mitigated.

I. In *personal* and *mixed* actions, *damages* were recovered at Common law: But in *real* actions; no *damages* were

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recoverable, because none were demanded by the count or writ: Whereas in actions *personal*, the plaintiff counts *ad dampnum* for the injury; and if he recovers no *damages*, he hath no costs. *10 Rep. 111, 117.* In a *personal* action, the plaintiff shall recover *damages* only for the tort done before the action brought; and therein he counts for his *damages*: In a *real* action, he recovers his *damages* pending the writ; and therefore never counts for his *damages*. *10 Rep. 117.* By the *Stat. of Glouc. 6 Ed. 1. cap. 1*, *damages* are given in *real* actions, assises of *novel disseisin*, *mort d'ancestor*, &c. and shall be recovered against the alienage of a disseisor, as well as against the disseisor himself; and the demandant shall have of the tenant likewise costs of suit; but not expences for trouble and loss of time. *2 Inst. 288.* See further the said *Stat. 6 Ed. 1. c. 1: Stat. 3 H. 7. c. 10: 2 Inst. 284, 286: 2 Danv. Abr. 448.*

No *damages* could be recovered at the Common law, but against the wrong-doer, and by him to whom the wrong was done. *2 Inst. 284.* *Damages* shall be recovered in writ of admeasurement of dower; but not in a writ of admeasurement of pasture. *2 Danv. 457.* In writ of partition, by one co-parcener against another, it is said no *damages* shall be had. In a *formedon*, no *damages* shall be recovered: so in a *nuper obit*, writ of account, writ of execution, &c. *Ibid. 455, 456.* *Damages* and costs are due in a writ of annuity; and if the jury find for the plaintiff, and do not assess *damages*, it will be error; though he may after verdict release the *damages*, and take judgment for the annuity. *11 Rep. 56: Dyer 320, 369.*

In battery, imprisonment, and taking of goods, against three persons; one commits the battery, another the imprisonment, the third takes the goods, all at one time, all are guilty of the whole, and to be charged in *damages*. *3 Lev. 324.* See *10 Rep. 66, 69.*

II. In *real* actions, *damages* are assessed by writ of inquiry: When the jury find the issue for the plaintiff, they are to assess the *damages*. And in actions upon the case, &c. where *damages* are uncertain, it is left to the jury to inquire of them: In debt, which appears certain to the court what it is, the *damages* assessed by the jury are small, in fact only nominal, as one shilling; and the master in *B. R.* taxeth the costs; which are added thereto, and called *damages*. *1 Lill. 390.* When judgment is given by default, in action of debt, the court is to assess the *damages*, and not the jury; So if judgment by *nil dicit*, in action of debt.

Where *excessive damages* have been given, or there hath been any *misdemeanor* in executing a writ of inquiry; the court hath sometimes relieved the defendant by a new writ of inquiry. *2 Danv. 464.* And where *damages* are excessive, on motion, the defendant may have a new trial. *Style 465: 1 Nelf. lib. 537.* In trespass against two, one comes and pleads Not guilty, and it is found against him; and afterwards another comes and pleads the like, and is found Guilty by another inquest; in

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in this case, the first jury shall assess all the *damages* for the trespass. *New Nat. Br.* 236. Trespass against divers defendants, they plead Not guilty severally, and the jury finds them all Guilty: The jury must assess the *damages jointly*, for it is but *one entire trespass*, and made joint by the declaration. 11 *Rep.* 5.

If action is brought for two several causes of action, one of which is not actionable, if intire *damages* are given, the verdict is void: *Contra* if the *damages* are severed. And where *damages* are intirely assessed, and they ought not to be given for some part; no judgment can be given on the verdict. 10 *Rep.* 130. Where *damages* are awarded for delay of execution, and being kept out of the money, they are usually assessed by allowing the party what lawful interest he might have. 1 *Salk.* 208.

For money lent, interest shall be given from the time the money was payable, to the time of liquidating the debt, by the court's giving judgment. 2 *Burr.* 1081, 6.—So on a bill of exchange, it is usual to calculate the interest up to the time when judgment may be entered up. And it is now settled as a general rule, that where a new action may be brought, and a new satisfaction obtained on that, for duties or demands arisen since the commencement of the depending suit, these shall not be included in the judgment on the former action. But where the interest is an accessory to the principal, and the plaintiff cannot bring a new action for interest grown due between the commencement of the action and judgment it shall be included. *Id.* 1086, 7.—As to interest from the time of the original judgment to the affirmance, in case of a writ of error. See *Doug.* 752 in n: 2 *Term Rep.* 57, 59, 78, and the *Stat.* 3 *H. 7. c.* 10.—A jury may, and now frequently do, give interest on book-debts in the name of *damages*. See *Doug.* 676.

Where the plaintiff shall have no more costs than *damages*, unless the jury finds more than 40s. See title *Costs*.

In action upon the case the jury may find less *damages* than the plaintiff lays in his declaration; but ought not to find more, though costs may be increased beyond the sum mentioned in the declaration for *damages*: The plaintiff may release part of the *damages*, upon entering up his judgment. 10 *Rep.* 115. If he does not, but takes judgment for *damages* (exclusive of costs) to a larger amount, than laid in the declaration, it is error, and not within any of the statutes of amendment or jeofails, *Sandiford v. Been.* MSS. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, *viz.* the sum indorsed on the writ and the legal fees of execution. 2 *Term Rep.* 126.

In actions upon any bond, &c. for non-performance of covenants, the jury shall assess *damages* for those the plaintiff proves broken; and the plaintiff may assign as many breaches as he thinks fit. 8 & 9 *W. 3. c.* 11. See titles *Bond*; *Covenants*. In debt for a penalty in articles the jury ought to assess *damages* on the breach assigned, under this statute, and shall not find the debt. 2 *Wils.* 377.

Damages are not to be given for that which is not contained in the plaintiff's declaration; and only for what is materially alleged, 1 *Lill.* 381.

When *damages* double or treble are given in an action newly created by statute; if no *damages* were formerly recoverable, there the demandant or plaintiff shall re-

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cover those *damages* only, and shall not have costs, being a new creation in recompence where there was none before: As upon *Stat.* 1 & 2 *P. & M. c.* 12, for driving of distresses out of the hundred, &c. whereby *damages* are given, the plaintiff shall recover no costs, only his *damages*, because this action is newly given. But in an action upon the *Stat.* 8 *H. 6. c.* 9, of forcible entry, which giveth treble *damages*, the plaintiff shall recover his *damages* and his costs to the treble amount, by reason he was entitled to single *damages* before by the Common law; and the statute, as part of the *damages*, increases the costs to treble; and when a statute increases *damages*, costs shall likewise be increased. 2 *Inst.* 289: 10 *Rep.* 116.

Double, treble *damages*, &c. are allowed, in several cases, by a very great variety of statutes; as, for not setting forth tithes; distresses wrongfully taken; rescous, though if it be not found by the jury, that the plaintiff hath sustained some *damage*, in cases where treble *damages*, &c. are inflicted by law, no *damages* can be awarded. 2 *Danv. Abr.* 449.

How *damages* given to a person sued for an act done in the execution of his office, are to be assessed and recovered, See *Valentine and Fawcett, Harb. v.* 138, 139.

Plaintiff may take judgment *de melioribus damnis* where several *damages* are given, or enter a remittitur. *Sabin v. Long*, 1 *Wils. par.* 1. fo. 30.

The court in their discretion may increase the *damages* in *mayhem*. *Brown v. Seymour, Wils. par.* 1. fo. 5. and *vide* 3 *Salk.* 115: 2 *Inst.* 200: 2 *Danv.* 447, 452.

In what cases double, treble, and quadruple *damages* are given, see the several statutes, and further as to *Damages* in general, *Com. Dig.* in title *Damages*.

DAMAGE-CLEER, *damna clericorum*.] Was a fee assessed of the tenth part in the Common Pleas, and the twentieth part in the King's Bench and Exchequer, out of all *damages* exceeding five marks, recovered in those courts, in actions upon the case, covenant, trespass, battery, &c. wherein the *damages* were uncertain; which the plaintiff was obliged to pay to the probonotary, or the chief officer of the court wherein recovered, before he could have execution for the *damages*: this was originally a gratuity given to the probonotaries and their clerks, for drawing special writs and pleadings; but it is taken away by statute, and if any officer in the King's courts, take any money in the name of *damage cleer*, or any thing in lieu thereof, he shall forfeit treble the value. *Stat.* 17 *Car.* 2. c. 6.

DAMAGE-FEASANT, or *faisant*.] Is when a stranger's beasts are found in another person's ground without his leave or licence, (and without the fault of the possessor of the close, which may happen from his not repairing his fences,) and there doing *damage*, by feeding, or otherwise, to the grass, corn, woods, &c. In which case, the tenant whom they *damage*, may distrain and impound them, as well by night as in the day, lest the beasts escape before taken; which may not be done for rent, services, &c. only in the day-time. *Stat.* 51 *H. 3. stat.* 4: 1 *Inst.* 142. If a man take my cattle, and put them into the land of another, the tenant of the land may take these cattle *damage-feasant*, though I who am the owner, was not privy to the cattle's being there *damage-feasant*; and he may keep them against me till satisfaction of the *damages*. 2 *Danv. Abr.* 364.

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But if one comes to distrain *damage-feasant*, and to seize the cattle, and the owner drives them out before they are taken, he cannot distrain them *damage-feasant*, but is put to his action of trespass; for the cattle ought to be actually upon the land *damage-feasant*, at the time of the distress. 1 *Hyl.* 161: 9 *Rep.* 22. He that hath but the possession of, and no title to the land, may justify taking a distress *damage-feasant*. *Plowd.* 431. If a man puts cattle to pasture at so much a week with another, who after gives notice that he will not have them there any longer; in this case the owner of the ground may distrain them *damage-feasant*, though the cattle be in lawfully at first: so where a lessee holds after his estate is ended. 43 *Ed.* 3: *Keilw.* 69. But the owner of the cattle should have proper notice and reasonable time allowed for taking away his cattle.

Beasts belonging to the plough, or beasts of husbandry, sheep, horses joined to a cart, and it is said a horse with a rider on it, may be distrained *damage-feasant*, though not for rent. 1 *Sid.* 422, 440. But the owner may tender amends, before the cattle are impounded; and then the detainer is unlawful: also if when impounded the pound door is open, the owner may take them out. 5 *Rep.* 76.

A greyhound may be taken *damage-feasant*, running after conies in a warren: so a man may take a ferret that another hath brought into his warren, and taken conies with. If a person bring nets and gins through my warren, I cannot take them out of his hands. 2 *Danv.* 633. But if men are rowing up my water, and endeavouring with nets to catch fish in my *several* piscary, I may take their oars and nets, and detain them as *damage-feasant*, to stop their further fishing; though I cannot cut their nets. *Co. Car.* 228. See titles *Distress*; *Trespass*.

DAM, A boundary, or confinement; as to *dam* up, or *dam* out: *infra damnum suum*, within the bounds or limits of his own property or jurisdiction. *Bract.* lib. 2. c. 37.

DAMISELLA, A light damosell or miss. *Stat.* 12 *Ed.* 1. See *Pimp-Temere*.

DAMNUM ABSQUE INJURIA. If one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school; and this is *damnum absque injuria*, a loss without an injury; but he must not do any thing to disturb the other school. 3 *Salk.* 10.

DAN. Anciently the better sort of men in this kingdom had the title of *Dan*; as the Spaniards *Don*, from the Lat. *Dominus*.

DANEGELT, or DANE GELD, *danegildam*.] Is compounded of the words *dane* and *gelt*, money or tribute, and was a tax of 1 s. and after of 2 s. upon every hide of land through the realm, laid upon our ancestors the Saxons by the Danes, when they lorded it here. *Camd. Brit.* 83, 112. According to some accounts, this tax was levied for clearing the seas of Danish pirates; which heretofore greatly annoyed our coasts; but King *Ethelred* being much distressed by the continual invasions of the Danes, to procure peace, was compelled to charge his people with very heavy payments called *danegelt*, which he paid to the Danes at several times. *Hoveden par. pess. Anal.* 344: *Ingulp.* 510: *Selden's Mare Claus.* 150. This *danegelt* was released by *Edward the Confessor*; but levied again by *William the First* and *Second*: then it was released again by King *Henry the First*, and finally by King *Stephen*.

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DANIELAGE, The law of the *Dance*, when they governed a third part of this kingdom. See further, titles *Merchandise*; *Common-law*.

DANGERIA, A payment in money made by forest tenants, that they might have liberty to plough and sow in time of *parnage* or *malt-feeding*. *Manv. For. Larus*.

DAPIFER, *a dapus ferendo*.] Was at first a domestick officer, like unto our Steward of the Household; or rather Clerk of the Kitchen: but by degrees it was used for any fiduciary servant, especially the chief steward or head bailiff of an honour or manor. There is mention made in our ancient records of *dapifer regis*; which is taken for Steward of the King's Household. *Cowel*.

DARDUS, *i.e.* A dart: In *Wales* an oak is called a *dar*.

DARE AD REMANENTIAM, To give away in fee, or for ever. *Glanv. lib.* 7. cap. 1. This seems to be only of a remainder.

DARREIN, Is a corruption from the Fr. *dernier*, viz. *ultimus*, the last; in which sense we use it: as *darrein continuance*, &c.

DARREIN PRESENTMENT, Last Presentation.] See title *Advowson* III. An assise of *Darrein Presentment* lies when a man, or his ancestors, under whom he claims, having presented a clerk to a benefice, who is instituted; afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is real patron; in which case the patron shall have this writ, (*2 N. R.* 31.) directed to the sheriff to summon an assise or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deposed by the defendant: and, according as the assise determines that question, a writ shall issue to the Bishop; to institute the clerk of that patron, in whose favour the determination is made, and also to give damages, in pursuance of *Stat. West.* 2. (13 *E.* 2.) c. 5. This question, it is to be observed, was, before the *Stat.* 7 *Ann.* c. 13, entirely conclusive, as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last, and his heirs; unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right; which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good) notwithstanding the last presentation by whomsoever made; assises of *darrein presentment*, now not being in any-wise conclusive, have been totally disused; as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual, action. For the assise of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial, whether a man claims title by descent or by purchase. 2 *Hyl.* 355.

DATE, or a DATE. Is the description of the time, viz. the day, month, year of our Lord, year of the reign, &c. in which the deed was made. 1 *Hyl.* 6. But the ancient deeds had no dates, only of the month and the year; to signify that they were not made in haste, or in the space of a day; but upon longer and more mature deliberation. *Bovat.* If in the date of a deed, the year of our Lord is right, though the year of the King's reign be mistaken, it shall not hurt it. *Co. Jac.* 261. A deed was dated 30th March 1701, without *anno Domini* and *anno Regni*; and it

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was adjudged that both the year of the Lord and of the King were implicitly in the deed. 2 *Salk.* 658. A deed is good, though it hath no *date* of the day or place, or if the *date* be mistaken, or though it hath an impossible *date*, as the 30th of *February*, &c. But he that doth plead such a deed, without any *date*, or with an impossible *date*, must set forth the time when it was delivered. 2 *Rep.* 5: 1 *Inst.* 46. If no *date* of a deed be set forth, it shall be intended that it had none; and in such case it is good from the delivery; for every deed or writing hath a *date* in law, and that is the day in which it is delivered: and a deed is no deed till the delivery, and that is the *date* of it. *Mod. Ca.* 244: 1 *Nelf. Abr.* 525.

An impossible *date* of a bond, &c. is no *date* at all; but the plaintiff must declare on the bond as made at a certain time: and if the express *date* be insensible, the real *date* is the delivery. 2 *Salk.* 463. Where there is none, or an impossible *date*, the plaintiff may count of any *date*. 1 *Lill. Abr.* 393. If there be a mistaken *date*, or a *date* be impossible, &c. the plaintiff may surmise a legal *date* in the declaration, whereupon the defendant is to answer to the deed, and not to the *date*. *Telw.* 194. If a deed bears *date* at a place out of the realm, it may be averred that the place mentioned in the deed is in some county in *England*; and here the place is not traversable; without this the deed cannot be tried. 1 *Inst.* 261. A deed may be *dated* at one time, and sealed and delivered at another: but every deed shall be intended to be delivered on the same day it bears *date*, unless the contrary is proved. 2 *Inst.* 674. Though there can be no delivery of a deed before the day of the *date*; yet after, there may. *Telw.* 138. So that a deed may be *dated* back on a time past, but not at a day to come. See title *Deed*.

DATIVE, or DATIF, *dativus*] Signifies that which may be given or disposed of at will and pleasure. *Stat. 9 R. 2. c. 4.*

DAVATA TERRÆ, DAWACH, A portion of land so called in *Scotland*. *Skene*.

DAY, *dies*.] A certain space of time, containing twenty-four hours; and if a fact be done in the night, you must state it in law proceedings, in the night of the same day. The natural day consists of twenty-four hours, and contains the solar day and the night: and the artificial day begins from the rising of the sun, and ends when it sets. See 1 *Inst.* 135. Day, in legal understanding, is the day of appearance of the parties, or continuance of the suit where a day is given, &c. And there is a day of appearance in court by the writ, and by the roll; by writ, when the sheriff returns the writ; by roll, when he hath a day by the roll, and the sheriff returns not the writ, there the defendant, to save his freehold, and prevent loss of issues, imprisonment, &c. may appear by the day he hath by the roll. *Co. Lit.* 135.

In real actions there are *dies communes*, common days; and in all summonses there must be fifteen days after the summons before the appearance; and before the statute of *articuli super chartas*, in all summons and attachment in plea of land, there should be contained fifteen days. *Co. Lit.* 134.

As to offences in *B. R.* if the offence be committed in another county than where the court sits, and the indictment be removed by *certiorari*, there must be fifteen days between every process and the return thereof; but if it

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be committed in the same county where the bench sits, they may sit *de die in diem*; but this they will very rarely do. 1341. There is a day called *dies specialis*, as in an assize in the King's Bench or Common Pleas, the attachment need not be fifteen days before the appearance; otherwise it is before justices assigned; but generally in assizes the judges may give a special day at their pleasure, and are not bound to the common days; and these days they may give as well out of term as within.

There is also a day of grace, *dies gratia*; and generally this is granted by the court at the prayer of the demandant or plaintiff, in whose delay it is; but it is never granted where the King is party, by *aid prius* of the tenant or defendant; nor where any lord of parliament, or peer of the realm is tenant or defendant.

And sometimes the day that is *quarto die post*, is called *dies gratia*, for the very day of return is the day in law, and to that day the judgment hath relation, but no default shall be recorded till the fourth day be past; unless it be in a writ of right, where the law alloweth no day but the day of the return. *Co. Lit.* 135.—See titles *Judgment*; *Term*.

There are several return days in the terms; and if either of them happen upon a Sunday, the day following is taken instead of it; for Sunday is *dies non judicant*; and so is *Ascension day* in Easter term, *St. John Baptist* in Trinity term, *All Saints* and *All Souls* in Michaelmas term, and the *Purification of the Virgin Mary* in Hilary term. 2 *Inst.* 264.—See title *Term*.

Days in Bank are days set down by statute, or order of the court, when writs shall be returned, or when the party shall appear upon the writ served. See *Stat. 51 H. 3. Stat. 2. c. 3*; 32 *Hen. 8. cap. 21*; 16 *Car. 1. c. 6*; and 24 *Geo. 2. c. 48*. And by the statute *de anno bissextili*, 21 *H. 3*, the day increasing in the leap-year, and the day next going before are to be accounted but one day.

It is commonly said that the day of *Nisi prius*, and the day in the Bank, is all one day; but this is to be understood as to pleading, not to other purposes. 1 *Inst.* 135. But after issue found for the plaintiff at the *Nisi prius*, if a day be given in Bank, and the defendant makes default, judgment shall be given against him. 2 *Daro. Ab.* 477. and *vide Id.* 476.

To be dismissed without day, is to be finally dismissed the court: and when the justices before whom causes were depending, do not come on the day to which they were continued, whether such absence be occasioned by death, or otherwise, they are said to be put without day; but may be revived, or recontinued by re-summmons, re-attachment, &c. See *Stat. 1 E. 6. c. 7*. Also by the Common law, all proceedings upon any indictment, &c. whereon no judgment had been given, were determined by the demise of the King, and nothing remained but the indictment, original writ, &c. which were put without day, till re-continued by re-attachment to bring in the defendants to plead *de novo*: though this is remedied by *Stats. 4 & 5 W. 3. c. 18*; 1 *An. c. 8*; by which such process, &c. are to continue in the same force after the King's demise, as they would have done if he had lived. See titles *Discontinuance*, *Process*, *King*.

In action of trespass, if the day laid in the declaration be either before or after the actual day on which the trespass is committed, it is not material, if a trespass be proved. *Co. Lit.* 28; a. But *N. B.* The day laid must be before

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before the first *day* of that term of which the declaration is intituled, or if the trespass be committed within the term, there must be a special memorandum of some particular day, (if by bill) or of some general return day, (if in C. P. or B. R. by original writ) *subsequent* to the day whereon the trespass was committed: and so as to other actions, where the cause of action arises *within* the term. See title *Declaration, Pleading*.

DAY-LIGHT, See titles *Burglary, Robbery*.

DAY-RULE, See *Day writ*.

DAYWERE or LAND. *Diurnal, Diuturna*.] As much arable land as could be ploughed up in one day's work; or one *journey*, as the farmers still call it.

DAY-WRIT, or DAY-RULE; a rule or order of court, permitting a prisoner in custody in the King's Bench prison, &c. to go without the bounds of his prison for *one day*. By a rule of the Court of K. B. *Easter* 30 *Geo.* 3, a prisoner shall not have day rules above *three days* in each term; and to return to prison before nine in the Evening. The King may grant *writs of warrantia diei* to any person, which shall save his default for *one day*, be it in *plea of land* or other action, and be the cause true, or not; and this by his prerogative, *quod nota*. *Br. Prerogative*, pl. 142. cites *F. N. B.* 7.

It is against law to grant liberty to prisoners in execution, by other writs than *day-writs*, (or rules) *Chan. Rep.* 67.

No prisoner committed by B. R. ought to have the benefit of the *day-rule* of going abroad in term-time; for their imprisonment is their punishment for their contempt, or misbehaviour. 2 *Shov.* 88. pl. 80.

One in execution had a *habeas corpus* from the Lord Keeper (which they call a *day-writ*) returnable *three or four days* after its teste. By virtue of this writ, he went to the wine-licence office, but never to any inn of court or Chancery, or to the Lord Keeper's, and this in the vacation. *Per Pemberton Ch. J.* This is a *habeas* out of Chancery, which they may send at any time, and by virtue of the King's writ, the party was brought out of the prison house, and that is justifiable. Then all the day, so long as there was a keeper with him, he was in custody still, and returning to prison at night, it is well enough, and no escape; though Chancery may examine the contempt, that is nothing to B. R. 2 *Shov.* 298. pl. 229.

A prisoner taken on an *escape-warrant* before the sitting of the court the same day, shall be discharged, if his name was entered with the clerk the night before; but not if it was entered the same morning only. 8 *Mod.* 80.

DAYERIA, *Dairy*, from *day, dies*, Sax. *dag*.] Was at first the daily yield of milch cows, or profit made of them. In *Lorrain* and *Champaign* they use the word *dayer*, for the meeting of the *day-labouring* people to give an account of their daily work, and receive the wages of it. A *dairy* in the North is called *milknefs*; as the *dairy-maid* is in all parts a *milk-maid*: she is termed *androcobia* by *Fleta*, lib. 2. cap. 87. and See *Paroch. Antiq.* 548.

DAYS-MAN, In the North of England, an arbitrator, or elected judge, is usually termed a *dies-man*, or *days-man*: and Dr. Hammond says, that the word *day* in all idioms signifies judgment.

DEADLY FEUD, Is a profession of an irreconcilable hatred, till a person is revenged even by the death of his enemy. It is mentioned in *Stat.* 43 *El.* c. 13. And such enmity and revenge were allowed by the old Saxon laws; for where any man was killed, if a pecu-

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niary satisfaction was not made to the kindred of the slain, it was lawful for them to take up arms against the murderer, and revenge themselves on him: and this is called *deadly feud*; which it is conjectured was the original of an *appeal*. *Blount*.—See *Stat.* 43 *Eliz.* c. 13; and this Dict. title *Feud, Malicious Mischief, Felony*.

DEAD PLEDGE, *mortuum vadium*.] A pledge of lands or goods. See *Mortgage*.

DEAF, DUMB, and BLIND. A man who is born deaf, dumb and blind, is looked upon by the law in the same state as an idiot: he being supposed incapable of any understanding; as wanting all those senses which furnish the human mind with ideas. 1 *Comm.* 304: See *F. N. B.* 233.—See titles *Idiot, Lunatic*.

A man who could neither speak nor hear committed felony, and was arraigned and therefore was commanded to prison. *Br. Co. ent.* pl. 216. cites 26 *Edw.* 3. See *Thel. Dig.* 6. lib. 1. c. 7.

One who had made his will, and became ill, and (as it seems) had lost his speech; the same will was delivered in to his hands, and it was said to him, that he should deliver it to the vicar, if it should be his last will, otherwise he should retain it; and he delivered it to the vicar, and this was held a good will. *Thel. Dig.* 6. lib. 1. cap. 7. f. 8. cites 44 *Aff.* 36.—See title *Will*.

It appearing by oath, that the defendant was both senseless and dumb, and therefore could not instruct his counsel to draw his answer; it was ordered that no attachment, or other process of contempt, should be awarded against the defendant for not answering, without special order of the court. *Cary's Rep.* 132, cites 22 *Eliz.* *Altham v. Smith*.

One that is deaf and wholly deprived of his hearing cannot give, and so one that is dumb and cannot speak. Yet (according to the opinion of some) they may consent by signs: but it is generally held, that he that is dumb cannot make a gift, because he cannot consent to it. 1 *Inst.* 107.

If however, a blind man has understanding, he may deliver a deed sealed by him. *Jenk.* 222. pl. 75.

The lord shall have the custody of a copyholder that is deaf and dumb; for else he shall be prejudiced in his rents and services; and adjudged for the grantee of the lord against the prochein amy of the copyholder. *Co. Jac.* 105.

One born deaf and dumb, who signified by signs that she understood what she was about to do, was allowed to levy a fine of lands; by *Bridgman Ch. J.* & all justices. *Cart.* 53.

DEAFFORESTED, *Disafforstatus*.] Discharged from being forest; or freed and exempted from the forest laws. 17 *Car.* 1. c. 16. There is likewise *dewarrenata*, as well as *deafforstatus*; which is when a warren is diswarrened, or broke up and laid in common.

DEAN, *Decanus*; from the Greek *Δευα*, *decem*.] An ecclesiastical governor or Dignitary, so called, as he presides over ten Canons or Prebendaries at the least. And we call him a *Dean*, that is next under the bishop, and chief of the chapter, ordinarily in a cathedral church; the rest of the society being called *capitulum*, the chapter. As there are two foundations of cathedral churches in England, the old and the new, the new erected by King Hen. VIII. so there are two means of creating these Deans: for those of the old foundation, as the *Dean of St. Paul's*, *York*, &c. are exalted to their dignity much like bishops; the

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the King first sending out his *commissio d'office* to the chapter to choose such *Dean*, and the chapter then choosing, the King afterwards yielding his royal assent, and the bishop confirming him, and giving his mandate to install him.

Those of the *new foundation*, whose deaneries were translated from priories and convents, to *Dean and Chapter*, are donative, and installed by a shorter course, by virtue of the King's letters patent, without either election or confirmation; and are visitable only by the Lord Chancellor, or by special commission from the King; but the letters patent are presented to the bishop for institution, and a mandate for installment goes forth. 1 *Inst.* 95: *Dean* 36, 47.

The *new* Deaneries and chapters to *old* bishopricks are eight, viz. *Canterbury*, *Norwich*, *Windsor*, *Exeter*, *Lincoln*, *Worcester* and *Gloucester*. The *new* Deaneries and chapters to *new* bishopricks are five, *Peterborough*, *Shefford*, *Gloucester*, *Bristol* and *Oxford*. 1 *Inst.* 95 *a. n.* 3.

Of the four *Welsh* Cathedrals, two are without Deans; or rather the dignities of Bishop and Dean unite in the same person, the bishop being deemed *quasi-decanus*; and having, it is said, both an episcopal throne, and a decanal stall allotted to him in the choir. Of this kind are the Cathedrals of *St. David's* and *Llandaff*.—*St. Asaph* and *Bangor*, the two other *Welsh* Cathedrals, have the dignity of Dean distinct from that of Bishop, but the patronage of both deaneries is in the respective bishops, they being neither elective by the Chapter, nor donative in the Crown. 1 *Inst.* 95 *a. n.* 4.

In *Ireland* it seems that the King appoints to deaneries, as to bishopricks by letters patent. *Id. ib.*

Various kinds of *Deans*, besides Deans of Chapters, are known to our law; and several divisions seem necessary to distinguish them properly.

Considered in respect of the difference of office, Deans are of six kinds. 1. *Dean of Chapter*, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated *clergy* than chapters. See title *Chapter*.—2. *Dean of Peculiar*; who have sometimes both jurisdiction and cure of souls, as the Dean of *Battel* in *Suffex*; and sometimes jurisdiction only, as the Dean of the *Archdeaconry* in *London*; (See title *Archdeacon*) and the Deans of *Bocking* in *Essex*, and of *Croydon* in *Surry*.—3. *Rural Deans*, who had first jurisdiction over deaneries, as every diocese is divided into archdeaconries and deaneries; but afterwards their power was diminished, and they were only the bishops' substitutes to grant letters of administration, probate of wills, &c. And now their office is wholly extinguished, for the archdeacons and chancellors of bishopricks exercise the authority which *Rural Deans* had through all the dioceses of *England*. 1 *Nat. Hist.* 59 *a. n.* 507, and see 1 *Comm.* 383.—4. *Deans in the Colleges* of our *Universities*; who are officers appointed to superintend the behaviour of the members, and to enforce discipline.—5. *Honorary Deans*; as the Dean of the Chapel Royal at *St. James's*, who is so styled on account of the dignity of the person over whose chapel he presides. As to the chapel of *St. George* in *London*, there being Canons as well as a Dean, it is something more than a mere chapel, and except in name, resembles a collegiate church.—6. *Deans of Priories*; or as they are sometimes called Deans of Bishopricks. Thus the Bishop of *Lon-*

don, is Dean of the Province of *Canterbury*; and to him as such, the Archbishop sends his mandate for summoning the Bishops of his Province, when a Convocation is to be assembled; which may perhaps account for calling him Dean of the Bishops; what the other parts of his office are, the books do not explain, nor do they mention whether there is a Dean for the Province of *York*. See *Lynd.* v. *Gibbs*: 1 *Inst.* 95 (a) in *n.*

Another division of Deans, arising from the nature of their office, is into Deans of *Spiritual* promotions, and Deans of *Lay* promotions. Of the former kind are Deans of Peculiars, with cure of souls, Deans of the Royal Chapels, and Deans of Chapters; though as to these last, a contrary opinion formerly prevailed. Perhaps too, Rural Deans might be added to the number. Of the latter kind are Deans of Peculiars, without cure of souls, who therefore may be, and frequently are, persons not in holy orders.

In respect of the manner of appointment, Deans are—1. *Elective*; as Deans of Chapters of the old foundation; though they are only so (like Bishops) nominally, and in form; the King, being in fact the real patron.—2. *Donative*, as those Deans of Chapters of the New Foundation, who are appointed by the King's letters patent, and are installed, under his command to the Chapter, without referring to the Bishop either for admission, or for a mandate of installment; if that mode of promoting still prevails in respect to any of the new deaneries. Deans of the Royal Chapels are also donative, the King appointing to them in the same way. So too may Deans of Peculiars, without cure of souls, be called; as the Dean of the Arches, who is appointed by commission from the Archbishop of *Canterbury*; but this must be understood in a large sense of the word *donative*, it being most usually restrained to spiritual promotions.—3. *Presentative*; as some Deans of Peculiars with cure of souls, and the Deans of some chapters of the New Foundation, if not all. Thus the Dean of *Battel* is presented by the patron to the Bishop of *Chichester*, and from him receives institution. This Deanery was founded by *William the Conqueror*. He hath ecclesiastical jurisdiction within the liberty of *Battel*, and is presentable by the Duke of *Montagu*, and though instituted and inducted by the Bishop of *Chichester*, is not subject to his visitation. 1 *Nat. Hist.* Thus too the Dean of *Gloucester* is presented by the King to the Bishop, with a mandate to admit him, and to give orders for his installment.—4. *By virtue of another office*; as the Bishop of *London* is Dean of the Province of *Canterbury*; and the Bishop of *St. David's*, is Dean of his own Chapter.

As to further particulars relative to the manner of coming to the possession of Deaneries, see a long and learned historical account in 1 *Inst.* 95 (a) *a. n.* 4; from which it appears that the right to appoint Deans of Cathedral and Collegiate Churches, and the mode of appointing them, must generally depend, almost wholly, upon *charter*, *usage*, or *acts of parliament*; and if a case should, by bare possibility, arise, where neither of those rules could be had recourse to, *foundership* seems the only true criterion of patronage.

In respect of the manner of holding, Deans are either absolute, or in *commendam*. But this applies only to spiritual Deaneries. It is said there are also *Dputy* Deans. A commendatory Dean may, with the Chapter, choose a bishop.

bishop. And if a *Dean* be elected bishop, and before consecration doth obtain dispensation to hold his deanery in commendam, such *Dean* may well confirm, &c. for his old title remains, and therefore confirmations, and other acts done by him, as *Dean*, are good in law. *Latch* 237, 250: *Palm. Rep.* 465.

A *Dean* and Chapter are the bishop's council, to assist him in the affairs of religion, &c. to consult in deciding difficult controversies, and consent to every grant which the bishop shall make to bind his successors, &c.

A *Dean* that is solely seized of a distinct possession, hath an absolute fee in him as well as a bishop. 1 *Inst.* 325. A Deanery is a spiritual promotion, and not a temporal one, though the *Dean* be appointed by the King; and the *Dean* and Chapter may be in part secular, and in part regular. *Dee* 10: *Palm.* 500. As a deanery is a spiritual dignity, a man cannot be *Dean* and Prebendary in the same church. *Dee* 23.

DEATH OF PERSONS. There is a natural death of a man, and a civil death: natural, where nature itself expires, and extinguishes; and civil, is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. By Stat. 19 C. 2. c. 6, If any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent seven years, and no proof made of his being living, such person shall be accounted naturally dead; though if the party be after proved living at the time of extinction of any person, then the tenant, &c. may re-enter, and recover the profits. And by Stat. 6 An. c. 18, persons in reversion or remainder, after the death of another, upon affidavit that they have cause to believe such other dead, may move the Lord Chancellor to order the person to be produced; and if he be not produced, he shall be taken as dead; and those claiming may enter, &c. See further titles *Occupancy*, *Life Estate*.

A man seized in fee of lands, made a lease in reversion to L. D. for ninety-nine years, to commence after the deaths of J. D. and E. D. who had then a lease in possession for the like term, if they or either of them so long lived: the plaintiff positively proved the death of J. D. but as to the death of E. D. the proof was that he had been reputed dead, and nobody had heard of him for fifteen years past; and the defendant not being able to prove that he was alive at any time within seven years, this case was adjudged within the Stat. 19 C. 2. c. 6. *Cartmew* 246.

In law proceedings, the death of either party, between the verdict and judgment, shall not be error; for a judgment be entered in two terms. 16 & 17 C. 2. c. 3. See titles *Amendment*, *Error*.

A Corporation never dies. 1 *Wils.* 184.

Where the plaintiff dies after a verdict and before the day in-bank, though the entry of the judgment be right, yet a *scire facias* must be sued out before execution issue. 1 *Wils.* 302.—See titles *Judgment*, *Execution*.

Where, on the death of parties to a suit, the writ, &c. shall abate, See title *Abatement*.

DEBATING SOCIETIES. See this Dict. title's *Holidays*, *Advertisements*.

DE BENE ESSE. To take or do any thing *de bene esse*, is to accept or allow it as well done for the present; but when it comes to be more fully examined and tried, to stand or fall according to the merit of the thing in its

own nature. As in *Chancery*, upon motion to have one of the less principal defendants in a cause examined as a witness, the Court (not then thoroughly examining the justice of it, or not hearing what may be objected on the other side) will often order such a defendant to be examined *de bene esse*, viz. That his depositions shall be taken, and allowed or suppressed at the hearing of the cause, upon the full debate of the matter, as the Court shall think fit; but in the interim they have a *well-being*, or conditional allowance. 3 *Ch.* 68.

Where a complainant's witnesses are aged, or sick, or going beyond sea, whereby the plaintiff thinks he is in danger of losing their testimony, the Court will order them to be examined *de bene esse*; so as to be valid, if the plaintiff hath not an opportunity of examining them afterwards; as if they die before answer, or do not return, &c. In either of which cases, the depositions may be made use of in the court of *Chancery*, or at law: but if parties are alive and well, or do return, &c. after answer, these depositions are not to be of force, for the witnesses must be re-examined.

So also at Common law, the judges frequently take bail *de bene esse*, that is, to be allowed or disallowed upon the exception, or approbation of the plaintiff's attorney; however, in the interim, they are good, or have a conditional allowance. *Cowd.* Declarations likewise are sometimes delivered *de bene esse*. See titles *Declaration*, *Practice*, *Process*, &c.

DEBENTURE. A soldier's debenture, (*sipendia debita*) is in the nature of a bond or bill, to charge the Government to pay the soldier creditor, or his assigns, the sum due upon the auditing the account of his arrears: it was first ordained by an act made during the Usurpation, anno 1649, and is mentioned in the act of oblivion, 12 C. 2. c. 8. They use debentures likewise in the *Exchequer*; and debentures are given to the King's servants, for the payment of their wages, board-wages, &c. Also there are custom-house debentures, &c.

DEBET ET DETINET, *He oweth and detaineth.*] An action shall be always in the *debet et detinet*, when he who makes a bargain or contract, or lends money to another, or he to whom a bond is made, bringeth the action against him who is bounden, or party to the contract and bargain, or unto the lending of the money, &c. See *New Nat. Br.* 119.—See *post* title *Debt* II.

DEBET ET SOLET. If a person sues to recover any right, whereof his ancestor was disseised by the tenant of his ancestor, then he useth the word *debet* alone in his writ, because his ancestor only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth *debet et solet*, by reason his ancestor bore him, and he himself usually enjoyed the thing sued for, until the present refusal of the tenant. *Reg. Orig.* 140. The writ of *scire facias ad satisfactionem* is a writ of right, in the *debet et solet*, &c. *P. N. B.* 98.

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DEBITUM.] In common parlance is a sum of money due from one person to another. And if an action be brought, and the plaintiff recovers judgment, he may by law take either the person, or his real or personal estate in execution, i. e. the moiety of his real estate, or the whole of the personal, if not more than sufficient for payment of the sum recovered and charges.

DEBT I.

In the legal sense of the word, *debt* is said to be an action which lieth where a man *oweth* another a certain sum of money, either by a debt of record, by *specialty* or by *simple contract*; as on a judgment, obligation, or bargain for a thing sold, or by contract, &c. and the debtor will not pay the debt at the day agreed; then the creditor shall have action of debt against him for the same. See 2 *Comm.* 464. If a man contract to pay money for a thing which he hath bought; and the seller takes bond for the money, the contract is discharged, so that he shall not have action of debt upon the *contract*, but on the *bond*. *New Nat. Br.* 268.

- I. *In what Cases Action of Debt will lie; and by whom, and against whom it may be brought.*
- II. *In what Manner it may be brought; as where in the debt and detinet, and where in the detinet only.*
- III. *How it may be extinguished.*

I. THE legal acceptation of *debt*, is a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill, or note; a special bargain; or rent reserved on a lease, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, (*F. N. B.* 119.) to compel the performance of the contract, and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a *specialty*, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate contract*: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed; for, in case of such an action upon a simple contract, the plaintiff labours under two difficulties; First, the defendant has here the same advantage, as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. 4 *Rep.* 94. Secondly, in an action of debt, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract, whereof the performance is sued for.—But in actions of debt, where the contract is proved or admitted, if the defendant can shew that he has discharged any part of it, the plaintiff shall recover the residue. 1 *Roll. Rep.* 257; *Sulk.* 664: *Comm.* 54.

When also the damages can be reduced by the averment to a certainty, *debt* will lie; as on a covenant to pay so much *per load* for wood, &c. So if in an action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring *debt* for those damages. *Bull. N. P.* (8vo.) 167.—And as to cases in which on actions of debt it is not necessary to prove the exact sum laid in the declaration, See at large *Doug.*

732. *in n.*

If one binds himself in a single obligation, or with condition, to pay money at a day; or to deliver corn, or the like, and do not perform it accordingly, the obligee may bring action of *debt* for it. *F. N. B.* 120. A man acknowledges by deed; that he hath so much of the money of J. S. due to him in his hands; here debt may be brought: and debt will lie on a talley sealed. *F. N. B.* 122: 1 *H.* 6. 55. A. delivers 20*l.* to B. to buy goods, and B. gives a receipt to A. testifying the delivery and receipt of the 20*l.* but doth not promise to deliver the goods, &c. A. may maintain debt upon this receipt. *Dyer* 20: 2 *Eulst.* 256. If one binds himself to pay A. B. 10*l.* at one day, and 10*l.* at another, after the first day action of debt lies for 10*l.* being a several duty. 2 *Darv. Abr.* 501. The nature of the bond, and of the condition, (if there is any) must be carefully attended to, to see if by non-payment of the first sum the bond is forfeited. *Vide Co. Lit.* 292 b.

Action of *debt* lies upon a *parol contract*, and so doth *action on the case*. 1 *Lil.* 403. And *vide* 9 *Rep.* 87. If goods or money are delivered to a third person for my use, I may have action of debt or account for them. 2 *Darv.* 404. Where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: but where a horse, or any goods are thus delivered, there *detinue* lies, because the property is not altered; and the thing is known, whereas money is not. *Owen*, 86: 1 *Nelf. Abr.* 603.

Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the use of the husband. 1 *Lil.* 400. If one delivers meat, drink, or clothes, to an infant, and he promises to pay for them, action of debt, or on the case, will lie against the infant. Though debt may not be brought on an *account stated* with an infant: and what is delivered must be averred to be for the necessary use of the infant. 1 *Lil. Abr.* 401.—See title *Infant*. An attorney shall have action of debt against his client, for money, which he hath paid to any person for the client, for costs of suit, or unto his counsel, &c.

An heir mediate may be sued in debt as if he were immediate heir, &c. The heir may not bring action of debt for a debt due to his ancestor; though it be by *specialty*, by which the party is bound to pay it to him and his heirs: the executor shall nevertheless have the action. *Dyer* 368: *F. N. B.* 120. Action of debt lies not against executors, upon a simple contract made with the testator. 9 *Rep.* 87.

Before the *Stat.* 32 *H.* 8. c. 37, the heirs or executors of a man seised of a *rent-service*, *rent-charge*, &c. in *fee-simple*, or *fee-tail*, had no remedy for the arrearages incurred in the life-time of the owner of such rents: but by that statute, the executors and administrators of tenants in *fee-simple*, *fee-tail*, or for life, of any rent, shall have *action of debt* for all arrearages of rent due in the life of the testator. 1 *Hist.* 162: 2 *Darv.* 492.

A *ferre sole* seised of a rent in *fee*, &c. which is behind and unpaid, takes husband, and the rent is behind again, and then the wife dieth, by the said *Stat.* 32 *H.* 8. c. 37, the husband shall have the arrears due before marriage, and he hath a double remedy for the same. 1 *Hist.* 162.

But by *Stat.* 8 *An.* c. 17, Any person having rent in arrear upon any lease for life or lives, may bring *action*

of

DEBT II.

of debt for such rent, as where rent is due on a lease for years. Action of debt will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract remains, notwithstanding the privity of estate is gone. 3 Rep. 22. But after the death of the lessee, it is then a real contract, and runs with the land. Cro. Eliz. 555. When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of the privity of contract between lessor and lessee. 2 Cro. 227: 1 Nels. Abr. 604. If debt be brought by an executor for arrears of rent ended, it is local still, and must be laid where the land lies. Hob. 37. Action of debt may be had against the lessee in any place; but if it be brought against an assignee, it must be where the land lieth: and upon the privity of contract, it is to be brought against the lessee where the land is. Latch 197, 271: 2 Leon. c. 28.

Debt for rent on a lease against assignee is local. Barker v. Dornier, 1 Show. 191.

In some cases action of debt will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law, for which action will lie. 2 Saund. 343, 366. Debt lieth against a sheriff, for money levied in execution. 1 Lil. Abr. 403. Action of debt lies against a gaoler for permitting a prisoner committed in execution to escape; because thereupon the law makes the gaoler debtor: but where the party is not in execution, there action on the case only lies for damages suffered by the escape. 1 Saund. 218: 1 Lil. Abr. 402.

A person may have debt upon an arbitrament: also debt lies for money recovered upon a judgment, &c. And upon a recovery in the superior courts at Westminster, the plaintiff must bring the action in Middlesex, the record being there; but a *fi. fac.* to execute judgment, must be where the original was, and follow it. New Nat. B. 267, 268, &c.

When judgment is had in the King's Bench, and a writ of error brought in the Exchequer chamber, or in Parliament; yet an action of debt will lie on the judgment: in this case, if the plaintiff levies part of his money, by *elegit*, he may likewise bring debt for the residue. 1 Sid. 184, 236.

Whatever the laws order any one to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money, as are assessed by the jury, and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment; (1 Rol. Abr. 600, 1;) and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay. This method seems to have been invented, when real actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias*, to take the defendant's body in execu-

tion for those damages; which process was allowable in an action of debt, (in consequence of the Stat. 25 Ed. 3. c. 17,) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the Courts, as being generally vexatious and oppressive, by harrassing the defendant with the costs of two actions instead of one. 3 Comm. 160.

Debt will lie upon the judgment of a Foreign Court, and the plaintiff need not show the ground of the judgment; but it is not to be declared on as a matter of record, for it is here but of the nature of a simple-contract debt: therefore in such case the judgment is sufficient only to establish a demand, and put the defendant to impeach the justice of it, or show the same to have been unduly or irregularly obtained. And as it is but a simple contract, *assumpsit* will also lie on it.—Walker v. Witter, Doug. 1—6; in which several other cases on the same point are also cited and reported.

If a man recovers debt or damages in London, on action brought there by the custom of the city, which lies not at Common law; when it is become a debt by the judgment, action of debt lies in the courts at Westminster upon this judgment. 2 Danv. 449.

Action of debt will lie for breach of a by-law; or, for amercement in a court-leet, &c. 1 Lil. 400: 5 Rep. 64: Hob. 259. And action of debt is sometimes grounded on an act of parliament; as upon Stat. 2 Ed. 6. c. 13, for not setting out tithes: Stat. 27 El. c. 13, against the hundred for a robbery, &c. Against physicians in London, for practising without licence, by Stat. 14 & 15 H. 8. c. 5.—By assignees of a commission of bankrupt, Stat. 1 Jac. 1. c. 15, &c.—A college shall have action of debt for commons of any student; adjudged, Pasch. 9 Jac. B. R.—And in general, all the cases show that wherever *indebitatus assumpsit* is maintainable, debt also is. Doug. 6. per Buller J.

For debt to a bishop, or parson, after his death, his executors shall have the action: but of a dean and chapter, mayor and commonalty, &c. the successors are intitled to the action of debt. F. N. B. 120. Action of debt lies on a recognisance; so upon a statute-merchant, it being in nature of a bond or obligation: but it is otherwise in case of a statute-staple. 2 Danv. 497.

In bringing this action, it is a general rule, that the party himself, to whom the debt is originally due, whilst he doth live, must bring the action; and after his death, his executors, &c. And the action must be brought against the party himself that doth originally owe the debt, whilst he is living; and after his death, it may be brought against the executor, if he make any; or otherwise against the administrator; and if the Ordinary appoint none, against the Ordinary himself; and if he die possessed of the goods, against his executor, &c. And also against executors of executors *in infinitum*. Dyer 24, 471: 3 Rep. 9: 2 Brownl. 207.

II. The form of the writ of debt is sometimes in the *debet & detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant owes, and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the *debet*, as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the

by will to dispose of their lands; and thus making out thereof. *Heald, 112.*

In debt upon a writ of *habeas corpus*, for maintaining forth claims, Not guilty, or *non est* are good answers. *1 Inst. 61. 81 P.* Because by the action the defendant is charged with wrong, and if he is not guilty of the tort, he does not buy the writ.

In debt upon a writ of *habeas corpus*, the defendant cannot plead the contract was for a less sum, or otherwise than the plaintiff has declared, and traverse the contract in the declaration laid, but may waive his law. *Idem, 19.* See further *Com. Dig.* title *Debt*, and this Dictionary title *Actions, Assumpsit; Information, &c.* And as to setting off mutual debts, See title *Set-off*.

DEBT TO THE KING. Under this word, *debitor* all things due to the King are comprehended, as all rents, fines, issues, and amercements, and other duties required or levied by the sheriff, a for debt in the larger sense signifies whatever any man owes. *2 Inst. 198.* The King's debt is to be satisfied before that of a subject, and until his debt be paid, he may protect the debtor from the arrest of others. And by *Stat. 33 H. 3. c. 39*, all obligations made to the King shall have the same force as a Statute-Staple: *1 Inst. 130.* But by *Stat. 25 E. 3. R. 5. c. 19*, notwithstanding the King's protection, creditors may proceed to judgment against their debtors, with a *cessat executio* till the King's debts be paid. Lands, &c. of the King's debtor and accountant, may be sold as well after his death, as in his life-time: But if the accountant or debtor to the King had a *quietus* during his life, his heir shall be discharged of the debt. *Stat. 27 E. 3. cap. 3.* A person being in debt to the King, purchases a lease to him and his wife, and dies: the term in the wife's hands is liable to the debt. *3 Rep. Abr. 157.* Though it is said if he purchase lands to him and his wife for life, and to their heirs: such lands in the hands of the wife, are not extendible after the husband's death, for the King's debt. *Dyer 255.*

If a tenant in tail, becomes indebted to the King. By receipt of the King's money, or otherwise: unless it be by judgment, recognisance, obligation, or other specialty originally due to the King, or some other to his use; and then dies, the land in the hands of the issue in tail shall not be extended; But it may, in either of those four cases. *7 Rep. 21, 22.* By the Common law, the King for his debt had execution of the body, lands and goods of the debtor. By *Magna Charta, 9 H. 3. c. 8.* the King's debt shall not be levied on lands, where the goods and chattels of the debtor are sufficient to levy the debt; for in such case, the sheriff ought not to extend the lands and tenements of the King's debtor, nor of his heir, &c. *2 Inst. 19.* Also pledges shall not be distrained, when the principal is sufficient: Though in both cases it must be made appear to the sheriff, in the one, that there are goods and chattels enough, and in the other, that the sheriff may levy the King's debt on the principal. *Ibid.* Sheriffs having received the King's debt, upon their next account are to discharge the debt, on pain to forfeit treble value; and the sheriffs are to give tallies to the King's debtors on payment. *Stat. 2 Ed. 1. c. 19.* See *Stat. 25 E. 3. c. 13*, regulating the sale of extended estates; on motion to the Court of Exchequer, by the Attorney General. See further also title *Execution, King's Prerogative, and Com. Dig.* title *Debt, ad fin.*

The King's debtor committed by the Court of Exchequer to the Fleet, brought into *H. R.* by *habeas corpus*, Vol. I.

and surrendered in discharge of his bail, only by warrant again to the Fleet by *ut habeas corpus* from the Exchequer. *1 Will. 212.*

DEBTOR-EXECUTOR. If a person indebted to another makes his creditor or debtor his executor, or if such creditor obtains letter of administration to his debtor, he may retain sufficient to pay himself before any other creditors, whose debts are of equal degree. *Plowd. 543.* See title *Executors*.

DEBTORS. A work of the method of *Old Dictionary* is by no means adapted to political institutions or the propriety of imprisonment for debt—nor to historical details of the proceedings of foreign nations on the subject. The Legislature, who are the proper, and indeed, by the legal judges, of what regulations on the subject are necessary, have repeatedly interfered for the relief of *debtors, unfortunate debtors*, (too generally a small part of the number confined,) by *insolvent acts*; and the liberty of the subject, in this particular, has in the present age been much favoured by the laws relative to *arrests, and the Arrests; Prisoners*. What further, in a *Commodious* sense like *Great Britain* may be safe and necessary, will not be done without any hints or suggestions of private persons; whose opinions, however respectable, can be of very little public weight.

By *Stat. 25 Geo. 3. c. 45*, for the Courts of Conscience in London, *Middlesex* and *Somerset*, the provisions of which are extended by *Stat. 26 Geo. 3. c. 38*, nearly *veridim verbis*, to all Courts for the recovery of small debts;—No debtor committed to gaol for a debt not exceeding 10*l.* shall be kept in custody in any private *wharfhouse*, more than *twenty days*;—nor for a debt between that and 40*l.* more than *forty days*;—then to be discharged without payment of fees, on forfeiture by the gaoler of 5*l.*—In case only of fraudulent concealment of money or goods by the debtor, the time of confinement may be enlarged, in the first instance to 30 days, and in the latter to 60.

DEBTS, PAYMENT OF. See title *Assets; Executors; Mortgage*.

DECEIT, [Deceit.] A subtle trick or device, whereunto may be referred all manner of craft and collusion, used to deceive and defraud another, by any means whatsoever, which hath no other or more proper name than *deceit* to distinguish the offence. *Wyl. Syn. 487. 68.*

There is a writ called a *Writ of Deceit* that lies for one that receiveth injury or damage from him that doth any thing *deceitfully* in the name of another person; by which he is deceived or injured, which writ is either original or judicial. *Reg. Orig. 112. Old Nat. Br. 50.*

Deceit is an offence at common law, and by statute; and all practices of defrauding or endeavouring to defraud another by his rights are punishable by fine and imprisonment; and if by cheating by pilory, &c. See title *Obtort*. Serjeants, counsellors, attorneys, and others doing any manner of *deceit*, are to be imprisoned a year and a day; also pleaders by *deceit* shall be expelled the court. *Stat. 3 Ed. 1. cap. 29.*

If a fine be levied by *deceit*, or if one recover land by *deceit*, the fine, and the recovery, shall be void. *3 Rep. 77.* and if a man be attorney for another in a real action against the defendant, and afterwards by collusion between such attorney and the defendant, the attorney makes default, by which the land is lost, the tenant who lost the land shall have a writ of *deceit* against the attorney.

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F. N. B. 95. So writ of deceit lies to set aside a fine and recovery in C. B. of lands in ancient demesne. 2 *Wils.* 17.

In a *præcipe quod reddat*, if the sheriff return the tenant summoned, where he was not summoned, by which the defendant loseth his land by default at the grand capé returned; the tenant shall have a writ of *deceit* against him who recovered, and against the sheriff for his false return; and by that writ the tenant shall be restored unto his land again: and the sheriff shall be punished for his falsity. **F. N. B. 97.** If a man bring a writ of *deceit* against him that recovers in the first action, and the sheriff return him summoned, upon which for non-summmons in that action on finding the same the recovery is reversed; in this case the defendant shall not have writ of *deceit* to recover the land again, if he were not summoned: but he shall have his remedy against the sheriff. *Roll. Abr.* 621. And where *debt* was brought, and the defendant pleaded in abatement, and the plea was over-ruled, the attornies on both sides by *deceit* between them, to the end the plaintiff might recover his debt, entered another judgment when it should have been a *respondens offer*; and it was held that the writ of *deceit* would not lie to reverse the record, but only to recover damages. *ibid.* 622.

If in a suit or action, another person shall come into court and pretend he is party to the suit, and so let judgment be had, or some other damage done to the party himself; or if one have cause to have an action, and another brings it in his name, and lets judgment go by non-suit, or the like; the injured party may have this writ of *deceit*. **F. N. B. 96:** *March* 48.

If any one forge a statute, &c. in my name, and sueth a *capias* thereupon, for which I am arrested; I shall have a writ of *deceit* against him that forged it, and against him who sued forth the writ of *capias*, &c. And if a person procure another to sue an action against me to trouble me, I shall have a writ of *deceit*. **F. N. B. 95.**

There are many frauds and *deceits* provided against by statute, relating to artificers, bakers, brewers, victuallers, false weights and measures, &c. which are liable to penalties and punishment in proportion to the offence committed. And writ of *deceit* lies in various cases, for not performing a bargain; or not selling good commodities, &c. 1 *Inst.* 357.

On almost all occasions, where a person is deceived or injured, and where anciently remedy was sought by the writ of *deceit*, an action on the case for damages, in nature of a writ of *deceit* is now more usually brought. And indeed it is the only remedy for a lord of a manour in or out of ancient demesne, to reverse a fine or recovery had in the king's court, of lands lying within his jurisdiction, which would otherwise be thereby turned into frank-fee. And this may be brought by the lord against the parties and *cestui que use* of such fine and recovery; and thereby he shall obtain judgment not only for damages (which are usually remitted) but also to recover his court and jurisdiction over the lands, and to annul the former proceedings. 3 *Lev.* 415, 419: *Rast. Ent.* 100 b: *Lutw.* 711, 749.

DECENNARY, A town or tithing consisting (originally) of ten families of freeholders. Ten tithings composed an *hundred*. The institution of *decennaries* (or *frankpledges*) is imputed to *Alfred*. In these decennaries the whole neighbourhood or tithing of freemen were mutually pledged for each other's good behaviour. 1

114. See post *Deciners*.

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DECEM TALES. When a full jury doth not appear at a trial at bar; then a writ goes to the sheriff *apponer decem tales*, &c. whereby a supply is made of jurymen to proceed in the trial. See title *Jury*.

DECIES TANTUM, A writ that lies on *Stat.* 38 E. 3. c. 12, against a juror, who hath taken money of either party for giving his verdict to recover ten times the sum taken. See title *Jury*. This writ also lies against *embracers* that procure such an inquest; who shall be further punished by imprisonment for a year. *Reg. Orig.* 188: **F. N. B.** 171: *Stat.* 38 E. 3. cap. 12.

DECIMATION, *Decimatio*.] The punishing every tenth soldier by lot, was termed *decimatio legionis*: it likewise signifies tithing, or paying a tenth part. There was a *decimation* during the time of the *Usurper* 1655.

DECINERS, DECENNIERS, OR DOZINERS, *Decennarii*.] In our ancient law, such as were wont to have the oversight of the *Friburghs*, or views of *frank-pledge*, for the maintenance of the King's peace; and the limits or compass of their jurisdiction was called *Decenna*, because it commonly consisted of ten households; as every person, bound for himself and his neighbours to keep the peace, was stiled *Decennier*. *Bract. lib.* 3. *tract.* 2. c. 15.

These seem to have had large authority in the time of the Saxons, taking knowledge of causes within their circuits, and redressing wrongs by way of judgment, and compelling men thereunto, as appears in the laws of King *Edward the Confessor*, *Lambard*, *Numb.* 32. But of late *decennier* is not used for the chief man of a *dizein*, or *dozein*; but he that is sworn to the king's peace, and by oath of loyalty to the prince, is settled in the society of a *dozein*.

A *dozein* seemed to extend so far as a leet extendeth; because in leets the oath of loyalty is administered by the steward, and taken by all such as are twelve years old, and upwards, dwelling within the precinct of the leet where they are sworn. **F. N. B.** 161. There are now no other *dozeins* but leets; and there is a great diversity between ancient and modern times, in this point of law and government. 2 *Inst.* 73. See 1 *Comm.* 114: 4 *Comm.* 252: and ante *Decennary*.

DECLARATION.

Declaratio, Narratio.] A legal specification, on record, of the cause of action, by a plaintiff against a defendant.

In the King's Bench, when the defendant is brought into court by bill of *Middlesex*, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge the defendant with whatever injury he thinks proper, unless he has held him to bail by a special *ac etiam*; which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* to secure the defendant's person, it was the ancient practice, and is therefore still warrantable, in the Common Pleas, to sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close: and when the defendant is once brought in upon this writ, the plaintiff declares in what action the nature of his true injury may require; as in an action of covenant, or on the case for breach of contract, or other less forcible transgression: (2 *Ventr.* 159.) unless, by holding the defendant to bail on a special *ac etiam*, he has bound himself to declare accordingly. 3 *Comm.* 293. See titles *Ac etiam*; *Capias*; *Common-Pleas*.

In

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In either case, the declaration should correspond with the process, in the names and descriptions of the parties: for if there be a material variance, the court will set aside the proceedings: unless where the process is taken out against the defendant by a wrong name, and he appears by his right name, there the plaintiff may declare against him by the name in which he appears, stating that he was arrested by the other name: for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial. 3 Term Rep. 611.

The substantial rules of pleading according to which declarations are to be drawn are founded in strong sense and the soundest and closest logic, and so appear when well understood and explained; though by being misunderstood and misapplied, they are often made use of as instruments of chicane. 1 Burr. 319.

Rules respecting the form of the Declaration.—The parties plaintiff or demandant, defendant or tenant, ought to be well named.—The time of a matter charged in the declaration ought to be certainly alledged: and therefore in *assumpsit*, the day being omitted on which the promise is made, it is bad. *Til. 94: Pl. Com. 24.*—A certain place ought to be alledged where every fact material and traversable was done. *Kitch. 226.*—The gift, and every thing, that is of the essence of the plaintiff's action, must be set forth in the declaration. That seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment. *Doe. Pl. 85.*—If the declaration be not sufficient on which to found a judgment, this may be moved in arrest of judgment after verdict. *Ibid.*—The declaration must shew a title in the plaintiff. See *Cro. Eliz. 325: Moor. 598.*—In all cases where an interest or estate commences upon condition, the plaintiff ought to shew it in his declaration, and aver the performance of it, but when the interest of the estate passes presently, and vests in the grantee, and is to be defeated by condition; there the plaintiff may count generally, and the condition shall be pleaded by him who is to take advantage of it. 7 Co. 10: *Lit. Rep. 418.*

The declaration must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance. *Co. Lit. 303: Cro. Jac. 361: 2 Bulst. 214: Cro. Eliz. 33, 441: 2 Saund. 319.*—If a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alledged, especially if it be not of an entire demand. 10 Co. 115: *Rel. Abr. 784, 5; 2 Sbro. 103: 1 Salk. 133: Vide 3 Burr. 1235.*

For preventing unnecessary length of declarations, it has been specially ordered, that in actions of covenant, the declaration is not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion.—In actions of slander, long preambles to be forborn, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special inducement, or *colloquium*.—In actions upon general statutes, the declaration not to repeat the statute, but to conclude "against the form of the statute in such case made and provided."—In actions of debt upon judgment had in the Courts at Westminster, to recite only the judgment; but if on a judgment had by, or against an executor or

administrator, then the action of debt upon that judgment, to repeat the declaration and judgment. *R. M. 1654. § 13.*—In a declaration on action founded on a deed, the plaintiff need not set forth more than that part which is necessary to entitle him to recover. *Cowp. 665.* And it will be sufficient to state the substance and legal effect even of such part; which is shorter, and not liable to mis-recitals and literal mistakes. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion) and what cannot: where the declaration contains impertinent matter, foreign to the cause, and which the Master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the Court and need not be proved. But if the very ground of the action is misstated, as where the plaintiff undertakes to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal: for then the case declared on is different from that which is proved, and he may recover *secundum allegata et probata*. *Doug. 665. Briflow v. Wright and another*; and the notes there.

Of Declarations, in Chief, De bene esse, and By-the-by.—There are two ways in which the plaintiff may declare, the one on the return day of the writ, which is called, *de bene esse*, conditionally, until special, or common bail be filed; the other after the day for filing common bail, or when the defendant has justified his bail, which is called in chief. If to speed the cause, the former is the best way of proceeding. And a rule to plead may be given on the same day.—When a Declaration is filed *de bene esse*, till common bail or appearance entered, or till special bail be filed, notice that it is so filed must be given to the defendant in writing. *Impey K. B.*

The plaintiff cannot declare in chief, unless common bail be filed by the defendant, or plaintiff has done it for him. *Smith v. Painter, 2 Term Rep. 719: 1 Term. Rep. 635: Cooke v. Raven.* And it must be filed the term the writ is returnable. *Hardw. 138.*

When the defendant has filed common or special bail for himself, any person may deliver or file a Declaration against him by-the-by, at any time during the term wherein the process against the defendant is returnable, *sedente curia*; and the practice hath been, that the plaintiff, at whose suit the process is, might declare against the defendant in as many actions as he thinks fit, before the end of the next term, after the return of the process. *Impey K. B. 177. See 4 Burr. 2180.*

Of the time of declaring.—The plaintiff must declare before the end of the term next after the return of the process; or the defendant may sign a *non-pros* (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual. *Stat. 13 Car. 2. c. 2. § 5.* And no rule to declare need be given in *K. B.* either by bill or original.

By the general rules of law, a plaintiff must declare against a defendant within twelve month after the return of the writ. But by the rules of the court, if he do not deliver his Declaration within two terms, the defendant may sign judgment of *non-pros*. Though unless he takes such advantage of the plaintiff's neglect, the plaintiff may still deliver a Declaration within the year. 2 Term Rep. 112: 3 Term Rep. 123. The defendant cannot sign a *non-pros*, unless he enter his appearance within the term the writ is returnable. *Hardw. 138: 2 Term*

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Rep. 719. To prevent a *non-pros* being signed, the plaintiff may get a Side-bar rule, if the defendant is not in custody, the last day of the second term, for time to declare, until the first day of the next term; and he may have as many rules as he likes, from term to term, but there must be two in a term, viz. one from the first day of the term to the last day, and the other from the last day to the first day of the next term. But the defendant may, if he thinks proper, move the court, that the last rule may be peremptory. *Imry, K. B.*

In all Notices of Declarations, care is to be taken that the cause be properly named, as well as the court in which the suit is instituted; and in notices of Declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead to such Declaration. *R. T. 1 Geo. 2.*

Of entitling, and laying the day and place in Declarations.—It is usual when the cause of action will admit of it, to entitle the Declaration generally, of the term in which the writ is returnable; but it should always be entitled, after the time when the cause of action is stated to have accrued: therefore where the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the Declaration should be entitled of a subsequent day in that term, and not of the term generally; for as a general title refers to the first day of the term, upon such a title it would appear, that the action was commenced before the cause of it accrued. Yet where the cause of action was stated to have accrued on the first day of the term, the court on demurrer held, that the declaration might be entitled of the term generally, for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued, before the actual delivery of the Declaration. *1 Term Rep. 116: Vide 2 Lev. 176: and 3 Term Rep. 624.*

If the cause of action arises within the term the Declaration is of, then do not entitle it as of the term generally, but make a special day after the cause of action accrued, as, "Thursday next after the Morrow of All Souls, in Michaelmas Term, in the 32d year of the reign of King George 3." instead of "Michaelmas Term" generally.

If the plaintiff declares on a note, the day is material, and an essential part of the agreement, from which he cannot vary; so on a bond or other writing; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the Declaration. *Str. 21: Fide Co. Lit. 283: Plowd. Com. 24 a.*

In other cases, as in trespass, assault, battery, &c. the day is immaterial, but is in general laid after the cause of action accrued, and before the term or time of which the Declaration is intitled.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c. affecting land, the plaintiff must lay his Declaration, or declare his injury to have happened in the very county and place where it really did happen; but in transitory actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the writ

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must be had in that county in which the Declaration is laid. *3 Comm 294. See titles Action; Venue.*

In action of debt, upon a bond, the plaintiff in his declaration must alledge a place where the bond was made, because the jury should come from that place; and if this be omitted, the declaration is ill. *Dyer 15, 39: 1 Nelf. Abr. 619.*

It is good to lay large and sufficient damages in declarations; and damages shall not be given for that which is not contained in the declaration, and only for what is materially alledged. *10 Rep. 115: 1 Lill. Abr. 381.*

Where a declaration is defective, it is sometimes aided by the statutes of amendment and *jeofails*, &c. but they help only matters of form, not matters of substance. *5 Rep. 35. See titles Amendment: Practice.*

On filing Declarations, copies thereof are served on the defendants or their attorneys, &c. And by an order of all the judges, (*12 W. 3.*) the plaintiff's attorney is not obliged to deliver the defendant's attorney the original Declaration; but instead of it, is to deliver a true copy of the Declaration; upon delivery or tender whereof, the defendant's attorney shall pay for such copy after the rate of *4 d. per sheet*, &c. and if any person refuse to pay for the copy tendered, the said copy is to be left in the office, with the clerk that keeps the files of Declarations, and thereupon the plaintiff's attorney giving rule to plead, may, for want of a plea, sign judgment; and before any plea shall be received, the defendant's attorney is to pay for the copy of the declaration,

And by another order, (*Trin 2 Geo. 2.*) in every cause, where special or common bail is filed, and notice given to the plaintiff, a copy of the Declaration shall be delivered to the attorney for the defendant, who shall pay for it according to the usual rate; but if the defendant's attorney, or his clerk in his absence, refuses to pay for such copy; or if it happens the habitation of the attorney for the defendant, be unknown to the attorney for the plaintiff; then it shall be lawful to leave the copy with the officer of the court appointed for filing Declarations, which shall be good, giving notice, &c.—There are several other rules of Court as to the filing and delivering Declarations, &c. for which see the several books of Practice, and further this Dict. titles *Practice: Process, Prisoner, &c.*

DECREE. The judgment of a court of equity on any bill preferred. See title *Chancery*.

A decree in Chancery is of the like nature with a judgment at Common-law. *Chan. Rep. 234.*

Where there is but one witness against the defendant's answer, the plaintiff can have no decree. *1 Vern. 161.*

Where no ordinary process upon the first decree will serve for the execution thereof, there must be a new bill to pray execution of the first decree by a second decree. *2 Chan. Rep. 127, 128. See title Chancery.*

Verbal agreement, though subsequent to the decree, yet shall not stay the execution of it, but the remedy must be by original bill. *2 Chan. Cases 8.*

Whenever a decree is entered by consent, the merits of it shall never after be enquired into, unless there be an objection, that the word consent be struck out of the order. *MS. Norcot v. Norcot.*

Several questions and disputes were heretofore warmly agitated, as to the authority of the Master of the Rolls to hear and determine causes; and as to his general power

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power in the Court of Chancery: to quiet which, it was declared by *Stat. 3. Geo. 2. c. 30.* that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or allowed by the Lord Chancellor; and so as they shall not be enrolled till the same are signed by his Lordship.

If either party to the suit thinks himself aggrieved by a decree, he may petition the Chancellor for a *re-hearing*, whether it was heard before the Chancellor himself or any of the Judges sitting for him, or before the Master of the Rolls. For in all cases it is the Chancellor's decree and must be signed by him before it is enrolled; which is done of course, unless a *re-hearing* be desired. Every petition for a *re-hearing* must be signed by two counsel, usually such as have been concerned in the cause; certifying that they apprehend the cause is proper to be *re-heard*. And upon the *re-hearing*, all the evidence taken in the cause, whether read before or not, is then admitted to be read; because it is the decree of the Chancellor himself, who only sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of either evidence or argument may be supplied. *Gill. Rep. 151, 2.*—But after the decree is once signed and enrolled, it cannot be *re-heard* or rectified but by Bill of Review, or by appeal to the House of Lords.

A Bill of Review, may be had upon apparent error in judgment, appearing upon the face of the decree; or by special leave of the court, upon oath made, of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a Bill of Review. *3 Comm. 454.* See further this Dict. title *Chancery*; and *Vin.* title *Decree*.

On a new bill to carry a decree into execution, the Court may vary and alter what is thought proper; but on a *re-hearing*, no farther than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is, if the petition be only against one or two particulars. *Sol. Cases in Chan. 13, 14.*

The rule of court is, that on appeal the whole cause is open; but on a *re-hearing*, only so much as is petitioned against; if all do not petition, it is open only to the petitioners. *S. C. C. 24.*

Decree may be altered upon proper application, the same term it is pronounced, without a *re-hearing*.—No original bill can be to vacate a decree signed and enrolled.—Matters, proper to be excepted to upon the Master's report, shall never be objected to a decree after the report confirmed. *7 Vin. Abr. 400.*

A decree gained by fraud, may be set aside by petition, as well as a judgment at law by motion; *a fortiori* may such decrees be set aside by bill. *3 P. Wms. 111.* If a decree be obtained and enrolled, so that the cause cannot be *re-heard*, then there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on matters subsequent thereto, as a release, or a receipt discovered since. *3 P. Wms. 374.*

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DECRETALS. *Decretales.*] A volume of the *Canon Law*, so called, containing the decrees of sundry Popes; or a Digest of the canons of all the councils that pertained to one matter under one head. See title *Canon Law*.

DECURIARE. To bring into order. *Mon. Ang. tom. 1. p. 243.*

DEDBANA. *Deed-bane Sax.*] An actual homicide, or manslaughter. *Leg. H. 1. c. 85.*

DEDI. This word amounts to a warranty in law; as if it be said in a deed or conveyance, That A. B. hath Given, &c. to C. D. it is a warranty to him and his heirs. *Co. Lit. 304.* Also *dedi* imports a power of giving any thing. *Hob. 12.* See titles *Conveyance*; *Deed*.

DEDICATION-DAY. *Festum Dedicationis.*] The feast of dedication of churches, or rather the feast-day of the Saint and Patron of a church; which was celebrated not only by the inhabitants of the place, but by those of all the neighbouring villages, who usually came thither; and such assemblies were allowed as lawful: It was usual for the people to feast and drink on those days; and in many parts of England, they still meet every year in villages for this purpose, which days are called *Feasts* or *Wakes*. *Cowel.*

DEDIMUS POTESTATEM. Is a writ or commission given to one or more private persons, for the speeding some act appertaining to a judge, or some court: And it is granted most commonly upon suggestion, that the party who is to do something before a judge, or in court, is so weak that he cannot travel; as where a person lives in the country, to take an answer in Chancery; to examine witnesses in a cause depending in that court; to levy a fine in the *Common Pleas*, &c.—On renewing the commission of the peace, there cometh a writ of *dedimus potestatem* out of Chancery, directed to some ancient justice, to take the oath of him, which is newly inserted. See title *Justices*.

DEDIMUS POTESTATEM DE ATTORNATO FACIENDO. As the words of writs do command the defendant to appear, &c. anciently the judges would not suffer the parties to make attornies in any action or suit, without the King's writ of *Dedimus Potestatem*, to receive their attornies: But now by statutes, the plaintiff or defendant may make attornies in suits without such writs. *New Nat. Br. 55, 56.* See title *Attornies*.

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FACTUM.] An instrument in parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained: And it consists of three principal points, *writing, sealing and delivery*; writing, to express the contents; sealing, to testify the consent of the parties; and delivery, to make it binding and perfect. *Terms de Ley.*

I. What a Deed is.

II. The Requisites to make a good Deed.

III. How a Deed may be avoided.

IV. Shortly, of the inrolling, exposition and pleading of Deeds.

I. A DEED is a Writing sealed and delivered by the parties. *1 Inst. 171.* It is sometimes called a charter, *carta*, from

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From its materials; but most usually, when applied to the transaction of private subjects, it is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be stopped by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed. *Plowd.* 434. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles, *inftar dentium*, like the teeth of a saw, but at present in a waving line) on the top or sides to tally, or correspond with the other; which deed, so made, is called an *Indenture*. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, beginning at the middle and continuing to the contrary ends, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa*, or hand-writings. *Mirror*, c. 2. § 27; the word *chirographum* or *cyrographum* being usually that which is divided in making the indentures of a fine. See title *Chirograph*.—But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. See further 1 *Inst.* 229 (a) in n.—When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *Original*, and the rest are *Counterparts*; though of late it is most frequent for all the parties to execute every part, which renders them all originals. A deed made by one party only is not indented, but *poll'd* or shaved quite even; and therefore called a *deed-poll*, or a single deed. *Litt.* § 371, 2.

A *deed poll* is said to be a deed testifying that only one of the parties to the agreement hath put his seal to the same, where such party is the principal or only person, whose consent or act is necessary to the deed: and it is therefore a plain deed, without indenting, and is used when the vendor, for example, only seals, and there is no need of the vendee's sealing a counterpart, because the nature of the contract is such, as to require no covenant from the vendee, &c. *Co. Lit.* 55.

The several parts of deeds by indenture, are belonging to the feoffor, grantor, or lessor, who have one; the feoffee, grantee, or lessee, who have another; and some other persons, as trustees, a third, &c. and the deed-poll which is single, and of but one part, is delivered to the feoffee, or grantee, &c.

All the parts of a deed indented, in judgment of law, make but one intire deed; but every part is of as great force as all the parts together, and they are esteemed the mutual acts of either party, who may be bound by either part of the same, and the words of the indenture are the words of either party, &c. But a *deed-poll* is the sole deed of him that makes it, and the words thereof shall be said to be his words, and bind him only. *Plowd.* 434, 421; *Litt. f.* 370.

II. 1. THE FIRST REQUISITE of a deed is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, of subject matter to be contracted for; all which must be expressed by sufficient names. *Co. Lit.* 35. So as in every grant, there must be a grantor, a grantee, and a thing granted; in every lease, a lessor, a lessee, and a thing demised.

Some persons are disabled to contract by Common-law, and some by statute; some absolutely, and some *secundum quid* only; as in case of infants, feme coverts, idiots, persons non compos mentis, aliens, tenants in tail, ecclesiastical persons, and others; some of which may not make any deeds or estates by them at all, others but so and to limited and qualified. *Stat. 32 Hen. 8. cap. 28.*—See tit. *Leases*.

Disabilities to make deeds, &c. are chiefly amongst persons of non-sane memory, infants, aliens, women who have husbands, men who have wives, &c. persons born deaf and dumb, persons attaint of treason or felony, or, in a *praemunire*, clerks convicted, tenant in tail, ecclesiastical persons, as bishops, parsons, and the like, with respect to lands, &c. which they hold as such; joint-tenants, tenants in common, coparceners, disseisors, disseisees, &c. See these several titles.

He who has only an estate for his own or another's life, or a lease for years of land, may give, grant, or charge it at his pleasure for so long as his estate lasts; and it will be good to all purposes, and against all persons for that time.

And a man who has an estate in land to him and his wife, and his heirs, may make what estate he will of it, and this will be good against all but his wife, and that for her life only. 7 *Co. 12*: *Co. Lit.* 42: *Park.* § 182.

The King for the greatness of his person, is disabled to take by deed *in pais*; and therefore if a feoffment be made to him there, and livery of seisin be made upon it, this will be void; but *he is to take by matter of record*, which is of an higher nature than a deed. *Fitz. Feud and Feoffment* 21.

Leases made to the King by colleges, deans and chapters, or any other, having a spiritual or ecclesiastical living, against the *Stat. 13 Eliz. c. 10*, are restrained by the same act, as well as leases made to common persons. 5 *Co. 14*.

The names of the parties to deeds serve to distinguish persons, and to make the person intended certain; yet mistakes in this, unless they be very gross, will not hurt, *nihil facit error nominis cum de corpore constat*. *Bulst.* 21, 22: 2 *Bulst.* 302, 303: *Co. Lit.* 3: *Park.* § 36.

But if the name of baptism or surname be mistaken, as *John* for *Thomas*, &c. this is dangerous. *Moor* 407, 897. And see 2 *Bulst.* 70: *Park.* § 39.

It is also prudent to add the addition of each party, as the place of residence, with his or her degree, profession, or mystery.

There are many descriptions of grantors and grantees; as (1) Proper names of baptism and surnames, and the names of corporations, or bodies politic or corporate. (2) Names of dignities, offices, and the like. And these (of both sorts) will admit a description made good by reputation. And so land will pass to one, by the name of a son, who is a *bastard*; so to one by the name of a wife, who

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who is *not* a wife, 27 Ed. 3. 85; *Bulst.* 3; if they be reputed or known by that name. *Hob.* 32.

There must be such a person in *esse* at the time of the deed made as is named, and the parties must be able to give, and capable to receive that which is given or granted by the deed. *Plowd.* 345; *Co. Lit.* 2, 3; *Perk.* 43, 52.

And therefore if an annuity be granted to the right heirs of J. S. he being then living, this is void; for there is none such, nor can be whilst he lives. *Perk.* § 52. See *Cro. Car.* 22.

If a man gets another name by common esteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 Co. 36: *Co. Lit.* 3; *Perk.* § 41.

The mistake is less dangerous where any other part of the deed, or some other addition, shall make the person intended certain. 6 Co. 36: *Co. Lit.* 3; *Perk.* § 40.

As to the subject-matter of Contracts, Grants, &c. See this Dict. title *Grant*, and other proper titles.

2. The deed must be founded upon good and sufficient consideration. Not upon an usurious contract, (*Stat.* 13 Eliz. c. 8,) nor upon fraud or collusion, either to deceive purchasers *bona fide*, (*Stat.* 27 Eliz. c. 4,) or just and lawful creditors; (*Stat.* 13 Eliz. c. 5;) any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also or other grant, made without any consideration, is as it were, of no effect; for it is construed to inure, or to be effectual only to the use of the grantor himself. *Perk.* § 533. The consideration may be either a *good* or a *valuable* one. See further title *Consideration*, and *post.* III.

In deeds, the *consideration* is a principal thing to give them effect: and the foundation of deeds ought always to be honest. That a deed was executed upon a corrupt agreement, *debors* the deed, may be averred in pleading. See the case of *Collins and Blantem*, a new and very peculiar case. 2 *Willf.* 341, &c.

3. The deed must be *written*, or (as is the case at present with many instruments, such as *Bonds*, *Policies of Insurance*, &c.) *printed*; for it may be in any character, or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. *Co. Litt.* 229: *F. N. B.* 122.

All the matter and form of a deed, must be written *before* the sealing and delivery of it; for if a man seals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter shall be written in it, which is done accordingly, yet this will not make it a good deed. *Co. Litt.* 171: *Perk.* §. 118, 119: See *Moor* 28: *Hesley* 136, 7.

A deed may be written in any hand, as in text, court or Roman hand; or in any language, as in *Latin* or *French*, and is as good as a deed written in *English*, and in a secretary hand. 2 Co. 3.

It may be written either in a piece of loose paper or parchment, or in a paper or parchment sewed in a book. *Bio. Oblig.* 67: *Co. Litt.* 137, 139.

A deed must also have the regular *Stamps*, imposed on it by the several statutes, for the increase of the public revenue; else it cannot be given in evidence.

Formerly many conveyances were made by *parol*, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the *Stat.* 29 Car. 2. c. 3, enacts, that no lease, estate, or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases not exceeding three years from the making, and whereupon the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent, lawfully authorised in writing. See title *Frauds*.

4. The matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement, and bind the parties; which sufficiently must be left to the courts of law to determine. *Co. Litt.* 225. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in *Deeds*, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; therefore they shall be recapitulated in their usual order: See 1 *Inst.* 6.

It may in the first place be generally observed with regard to the words requisite in a deed; that they depend upon the estate intended to be conveyed. If a man would purchase lands or tenements *in fee-simple*, it behoves him to have these words in his purchase, *To have and to hold to him and to his heirs*; for these words, *his heirs*, (only) make the estate of inheritance, in all feoffments and grants. But this is to be understood of natural bodies: for if lands be given to a sole body politic or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there, to give him an estate of inheritance in his politic or corporate capacity, he must use these words, *To have and to hold to him and his successors*. *Co. Litt.* 8, &c.

If an *estate-tail* is intended to be created, the words must be, *To have and to hold to him and to the heirs of his body*. See title *Fee*.

The insertion of the word *heirs* or *successors*, as the case requires, is therefore absolutely necessary in conveyances of estates of inheritance; for if a man purchase lands by these words, *To have and to hold to him for ever*, he has but an estate for term of life. See *Co. Litt.* 8 b, &c.

We may now proceed more particularly to observe on the formal and orderly parts of a Deed.

The *Premises* are used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

Next come the *Habendum* and *Tenendum*. The office of the *habendum*, is properly to determine what estate or interest is granted by the deed; though this may be performed, and sometimes is performed in the premises.

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or other alteration in any material part; unless a memorandum be made thereof at the time of execution and attestation. 11 *Rep.* 27.—2. By breaking off, or defacing the seal. 5 *Rep.* 23.—3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of a lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it.—4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand; as a husband where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like.—5. By the judgment or decree of a court of judicature. This was anciently the province of the court of *Star-chamber*, and now of the Chancery: when it appears that the deed was obtained by fraud, force, or other foul practice: or is proved to be an absolute forgery. *Toib.* 24: 1 *Ventr.* 348. In any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive.

More particularly.—If there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it, this will not hurt the deed.

But in such cases it is policy to make a memorandum of it upon the back of the deed, and to give the witnesses notice of it, (this is now usually done in the attestation of the deed thus: *Sealed and delivered, the word—being first interlined, &c.*) For otherwise, if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and it cannot be proved to be done before the sealing and delivery of it, especially if it be a deed poll, it is very suspicious. *Co. Lit.* 37, 225: *Park.* § 125, 126, 127, 128, 155.

Where an estate cannot have its essence without a deed, there, if the deed is rased in any material part, after the delivery, it makes the estate void: but if the estate may have essence without a deed, then, notwithstanding it is created by deed, and that deed is rased, it shall not destroy the estate, but the deed. 1 *Nels. Abr.* 625.

When a chose in action is created by deed, the destruction of such deed is the destruction of the duty itself; as in case of a bond, bill, &c. though it is not so, where an estate or interest is created by a deed. 3 *Salk.* 120.

If a deed be suppressed, on proof made that it came to the party's hands, and of its contents, the person injured, will have the same benefit to hold the estate, as if the deed could be produced. 2 *Vern.* 280. A person committed for burning a deed, see 2 *Vern.* 561: *Abr. C. of Eq.* 169. An indorsement on a deed, at the time of the sealing and delivery, is a part of the same: but if an indorsement be after the delivery, it is a new deed. *Mosh. Cusl.* 237.

Deeds, if fraudulently made; when got by corrupt agreement, as on usurious contract; and when made by force or duress, &c. are void: so they are for uncertainty, and by reason of infancy, coverture, or other disability in the makers, &c. 2 *Roll. Abr.* 28: 1 *Inst.* 253: 11 *Rep.* 27.

A deed may be good in part, and void in part; or good against one person, and void as to another: if all the parts of a deed may by law stand together, no one part shall make the whole void. And if a deed by any construction of law be construed to have legal operation, the law will not make it utterly void, though it may not

operate according to the purport of the deed: also the law will transpose and marshal clauses in deeds, to come at their true meaning; but not to confound them. Where the words of a deed may have a double intentment, one standing with law, and the other contrary to it, the intentment that standeth with law shall be taken. 1 *Lil. Abr.* 421: 1 *Inst.* 42, 217: 1 *Shep. Abr.* 540.

IV. DEEDS of Bargain and Sale are to be inrolled, by *Stat.* 27 *Hen.* 8. c. 16. A copy of a bargain and sale inrolled, shall be as sufficient as the original deed, by *Stat.* 10 *An.* c. 18. *sect.* 3. But estates in fee are now generally granted and conveyed by indentures of lease and release. All deeds are to be registered in the counties of York and Middlesex. *Stat.* 2 & 3 *An.* c. 4: 5 *An.* c. 18: 6 *An.* c. 35: 7 *An.* c. 20: 8 *Geo.* 2. c. 6: 25 *Geo.* 2. c. 4. And it is much to be wished that registers were universally established throughout the kingdom. See further titles Bargain and Sale, Conveyance, Inrollment, &c.

It may here be cursorily observed, that of conveyances by the Common law, some may be called original, or primary conveyances; which are such by means whereof the benefit or estate is created, or first arises: others are derivative, or secondary; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are,—1. Feoffment;—2. Gift; 3. Grant;—4. Lease;—5. Exchange;—6. Partition. Derivative, are,—7. Release;—8. Confirmation;—9. Surrender;—10. Assignment;—11. Defeasance.—See those titles, and also particularly title Conveyance, and 2 *Comm.* 295,—310.

There are four grounds for the exposition of deeds. 1. That they may be beneficial to the taker. 2. That where the words may be employed to some intent, they shall never be void. 3. That the words be construed according to the intention of the parties, and not otherwise; and the intent of the parties shall take effect, if it may possibly stand with law. 4. That they are to be consonant to the rules of the law. And deeds shall have a reasonable exposition, without injury against the grantor, to the greatest advantage of the grantee. They are to be expounded upon the whole, and if the second part contradicts the first, such second part shall be void; but if the latter part expounds or explains the former, which it may do, both of them shall stand. *Plowd.* 160: *Raym.* 142: 6 *Rep.* 30: 1 *Inst.* 313: 1 *Roll. Rep.* 375.

The first deed of a person, and last will, stand in force. In deeds indented, all parties are elopped, or concluded, to say any thing against what is contained in the deed. 1 *Inst.* 45. And where a deed is by indenture between parties, none can have an action upon that deed, but he who is a party to it; but where it is a deed-poll, one may covenant with another who is not a party to it, to do certain acts, for the non-performance whereof he may bring an action. 2 *Lev.* 74.

Where a man justifies title under a deed, he is to produce the deed: if a deed is alledged in pleading, it must be shewed to the court, that the Court may judge of the validity of it, and whether there are sufficient words to make a good contract; and when it is shewn to the court, the deed shall remain in court all the term, in the hands of the *custos brevium*; but at the end of the term, it shall be delivered to the party. If the deed is denied, it must remain

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remain in court till the plea is determined. 10 Rep. 88: Wood 235. A deed, set forth with a *profert hic in curia*, remains in court in judgment of law all that term; and any person may, during that term, have benefit by it, though he hath it not ready to shew: the adverse party may take any advantage by the deed that it will afford him. 5 Rep. 74: 1 Nelf. 625.

But now the deed is not actually brought into court, but generally remains in the hands of the party's attorney, who gives oyer and copy of it to the attorney of the other party, if demanded.

DEEDS, stealing of. At Common-law, bonds, bills, and notes, which concern mere *choses in action*, were held not to be such goods whereof larceny might be committed: but by Stat. 2 Geo. 2. c. 25, they are put upon the same footing, with respect to larcenies, as the money they were meant to secure. See titles *Felony*; *Robbery*.

DEEMSTERS, from the Sax. *dema*, a judge or umpire.] Are a kind of judges in the *Isle of Man*, who, without process, or any charge to the parties decide all controversies in that island; and they are chosen from among themselves. *Cam. Brit.*

DEER-FALD, A park, or deer-fold; Sax. *deer*, *fera*, and *fald*, *stabulum*. Cowel.

DEER-HAYES, Are engines, or great nets made of cords to catch deer; and no person not having a park, &c. shall keep any of these nets, under the penalty of 40s. a month. Stat. 19 H. 7. c. 11. See title *Game*.

DEER-STEALERS Much of the law relating to these offenders is implicated in the general rules relative to hunting in forests, &c. for which see this Dict. title *Game*, more at large.

Several ancient statutes have been made to punish *Deer-stealers*; and a very severe one 9 Geo. 1. c. 22, known by the name of the *Black Act* against those and other offenders.—See title *Black Act*.

See the Statutes 3 E. 1. c. 20, against trespassers in parks: 21 Ed. 1. ff. 2, *de malefactoribus in parvis*: 1 H. 7. c. 7, of unlawful hunting in parks by night: 1 Jac. 1. c. 27, against sellers and buyers of deer who are to forfeit 40s. Stat. 5 Geo. 1. c. 28, by which wounding or killing deer in a park is punishable with transportation.

The above (except the last statute 5 Geo. 1. c. 28.) are at least superseded in use if not repealed by Stat. 16 Geo. 3. c. 30; which though like some others of the game laws inaccurately penned, or copied on record, is now generally pursued for the punishment of *Deer stealers*.

By this Stat. 16 Geo. 3. c. 30, If any persons shall hunt, or take in a snare, or kill or wound any red or fallow deer in any forest, chase, &c. whether inclosed or not; or in any inclosed park, paddock, &c. or be aiding in such offence, they shall forfeit 20*l.* for the first offence; and also 30*l.* for each deer wounded, killed or taken. A game-keeper offending to forfeit double.—For a second offence offenders shall be transported for 7 years. § 1. Justices to transmit convictions to the sessions. § 2.—Justices may grant warrants to search for heads, skins, &c. of stolen deer and for toils, snares, &c. and persons having such in their possession to forfeit from 30*l.* to 10*l.* at the discretion of the justices. §§ 4, 5, 6.—Persons unlawfully setting nets or snares, to forfeit for the first offence from 10*l.* to 5*l.*—and for every other offence from 20*l.*

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to 10*l.* § 7.—Persons pulling down pales or fences of any forest, chase, park, paddock, wood, &c. subject to the penalties annexed to the first offence for killing deer, § 8.—Dogs, guns and engines may be seized by park-keepers; and persons resisting shall be transported for seven years. § 9.—Penalties may be levied by distress; in default of which offenders to be committed for twelve months. § 11. &c.—No *certiorari* to be allowed, unless the party convicted become bound to the prosecutor in 100*l.* to pay him all costs and damages and to the Justice in 60*l.* to prosecute the *certiorari* with effect. § 19, 20: and see § 23, by which latter § it seems that convictions are not removeable by *certiorari* on mere points of informality, in case the facts alleged are sufficient to support the conviction.—See *Burn's Just.* tit. *Game V. 1. ii.*—1 Hawk. P.C. c. 27. § 60: and this Dict. title *Certiorari*.—Appeal given to the sessions § 21, &c.—Prosecutions limited to 12 months from the time of the offence committed. § 25.

By Stat. 28 Geo. 2. c. 19, destroying gosh, furze and fern in forests and chases, being the covert for deer, subjects the offenders to a penalty from 5*l.* to 40*s.* or to 3 months' imprisonment.

DE ESSENDO QUIETUM DE TOLONIO, Is a writ that lies for those who are by privilege free from the payment of toll; on their being molested therein. F. N. B. 226. See titles *Corporation*; *Toll*.

DE EXPENSIS MILITUM, A writ commanding the sheriff to levy the expences of a knight of the shire for attendance in parliament, being 4*s.* per diem by statute; and there is a like writ de expens. civium & burgensium, to levy 2*s.* per diem, for the expences of every citizen and burges of parliament. See Stat. 23 Hen. 6. cap. 14: 4 Inst. 46: and further title *Parliament*.

DE FACTO, Signifies a thing actually done; that is done in deed. A king *de facto* (in fact) is one that is in actual possession of a crown, and hath no lawful right to the same; in which sense it is opposed to a king *de jure*, (of right,) who hath right to a crown, but is out of possession. 3 Inst. 7.

DEFAMATION, *defamatio*.] Is when a person speaks scandalous words of another, as of a magistrate, &c. whereby they are injured in their reputation; for which the party offending shall be punished according to the nature and quality of his offence; sometimes by action on the case at common law, sometimes by statute, and sometimes by the ecclesiastical laws.

Defamation is also punishable by the spiritual courts; in which courts it ought to have three incidents. viz. First, It is to concern matters spiritual, and determinable in the ecclesiastical courts; as for calling a man heretick, schismatick, adulterer, fornicator, &c. Secondly, that it be a matter spiritual only; for if the *defamation* concern any thing determinable at the common law, the ecclesiastical judges shall not have cognisance thereof. And Thirdly, although such *defamation* be merely spiritual, yet he that is defamed cannot sue for damages in the ecclesiastical courts; but the suit ought to be only for punishment of the fault, by way of penance. *Terms de Leg.* See titles *Action*; *Courts-Ecclesiastical*; *Prohibition*.

DEFAULT, Fr. *defaute*.] Is commonly taken for non-appearance in court, at a day assigned; though it extends to any omission of that which we ought to do. *Bract. lib. 5. trac. 3.* Co. Lit. 259. If a plaintiff makes default in appearance

DEFAULT.

appearance in a trial at law, he will be non suited: and where a defendant makes *default*, judgment shall be had against him by *default*. See titles, *Judgment*; *Non suit*.

Tenant in tail, tenant in dower, by the curtesy, or for life, losing their lands by *default*, in a *precipe quod reddat* brought against them; they are to have remedy by the writ *quod ei deforciet*, &c. Stat. Westm. 2. c. 4. And in a *quod ei deforciet*, where the tenant joined issue upon the mere right, and the jury appearing, the defendant made *default*; it was adjudged, that in such case final judgment shall be given: but if the tenant had made *default*, it would be otherwise, for then a *petit cap* must issue against him, because it may so happen that he may save his *default*. 1 Nels. Abr. 627.

By *default* of a defendant, he is said to be generally out of court to all purposes, but only that judgment may be given against him: and no judgment can be afterwards given for the defendant. *Ibid.* 628.

When two are to recover a personal thing, the *default* of one is the *default* of the other: *contra*, where they are to discharge themselves of a personalty; where the *default* of the one is not the *default* of the other. 6 Rep. 25: 1 Litt. Abr. 425. In an action of debt, if the process be determined against one, and the other appears; he shall be put to answer, notwithstanding the *default* of his companion. 2 Dum. Abr. 480. Where the baion is to have a corporal punishment for a *default*, there the *default* of the wife shall not be the *default* of the husband: but otherwise it is where the husband is not to have any corporal punishment by the *default*. *Ibid.* 472. 473.

If a defendant impair to another day in the same term, and make *default* at the day, this is a departure in despite of the court: and when the defendant after appearance, and being present in court, upon demand makes departure, it is in despite of the court. Co. Lit. 139.

Suffering judgment to go by *default*, is an admission of the contract declared on. Sta. 612. After the inquest is taken by *default*, the defendant can make no suggestion on the roll. Sta. 46.

Default, and *laver of default*, made a large title in the old books of law. See Stat. 52 H. 3. c. 9, 13, 18, 24: 3 E. 1. c. 1: 42, &c.

DEFAULT IN CRIMINAL CASES. An offender indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes *default*; here the inquest in case of felony shall never be taken by *default*, but a *capias ad audiendum judicium* shall issue, and if the party is not taken, an *exigent*; and if he appear on that writ, and then make *default*, an *exigi facias de novo* may be granted: but where upon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 2 Hale's Hist. P. C. 202.

DEFAULT OF JURORS. If jurors make *default* in their appearance for trying of causes, they shall lose and forfeit issues, unless they have any reasonable excuse proved by witnesses, in which case the justices may discharge the issue for *default*. Stat. 35 H. 8. c. 6. See title *Jury*.

DEFEASANCE. From the Fr. *defaire*, to defeat or undo] Is of two sorts. 1. A collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. In this manner mortgages were in former times

DEFEASANCE.

usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void, on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and therefore only indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though when *uses* were afterwards introduced, a revocation of such uses was permitted by courts of Equity. But things that were merely executory or to be completed by matter subsequent, (as rents of which no seisin could be had till time of payment; annuities, conditions, warranties and the like,) were always liable to be recalled by defeasances made subsequent to the time of their creation.—2. A Defeasance on a bond, recognisance, or judgment recovered, is a condition which when performed defeats that, in the same manner as the foregoing Defeasance of an estate.—It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently by a subsequent deed. This like the condition of a bond when performed, discharges and disincumbers the estate of the obligor. 2 Co. Inst. 327; 342: See 1 Inst. 236, 7: 2 Sand. 47.

The Defeasance may generally (as in the case of a bond, &c.) be indorsed on the back of the deed.

To make a good Defeasance it must be, 1. By deed; (in the case of indorsement by a *deed-poll*;) for there cannot be a Defeasance of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most material part thereof; or in case of indorsement refer thereto. 3. It is to be made between the same persons that were parties to the first deed. 4. It must be made at the time, or after the first deed, and not before. 5. It ought to be made of a thing *defensible*. 1 Inst. 236: 3 Lev. 234.

Inheritances executed by livery, such as estates in fee, or for life, cannot be subject to Defeasance afterwards, but at the time of making the feoffment, &c. only: but executory inheritances, such as leases for years, rents, annuities, conditions, covenants, &c. may be defeated by Defeasance made after the things granted. And it is the same of obligations, recognisances, statutes, judgments, &c. which are most commonly the subject of Defeasance, and usually made after the deed whereto they have relation. Plowd. 137: 1 Rep. 113.

If a man acknowledge a statute to another, and enters into a Defeasance, that if his lands in such a county should be extended, the statute should be void; the Defeasance, will be good and not repugnant, because it is by another deed: but the condition of a bond not to sue the obligation is void for repugnancy, being in the same deed. Moor 1035. Although the condition of an obligation, where it is repugnant to it, be void; it is otherwise in case of a Defeasance, made after the bond, for this shall be good notwithstanding: as where the obligee afterwards grants by deed to the obligor, that he will not sue thereon at all; or not till such a time, or that it shall be discharged, &c. 20 H. 7. 24: Fitz. Bar. 71.

Where

DEFESANCE.

Where a *proviso* goes by way of *Defesance* of a covenant, it must be pleaded on the other side, otherwise, where by way of explanation, or restriction of the covenant. 2 Salk. 574.

If *A.* be bound in bond to *B.* in 20*l.* and he makes a *Defesance* to *C.* that if he pay him the like sum, the obligation made by *A.* shall be void; this is no good *Defesance*, because it is not made between the same parties: though if a statute be entered into, to husband and wife, and the husband alone make a *Defesance*, it may be good. 14 H. 8. 101: 2 Shep. Abr. 488.

A statute, &c. may be *defesanced* on condition of performing a will, and paying legacies to other persons. 1 Cro. 837. If a *Defesance* of a statute be made, and after another *Defesance* is made by the same parties, the first *Defesance* becomes void thereby; and the second only is in force, as in case of a will. 2 Dan. s. Abi. 481. Where a statute is acknowledged to two persons, and one of them makes a *Defesance*, it is said to be a good discharge. *Ibid.* 480. If execution be sued out before the time in a *Defesance* is past, it shall be set aside. 1 Lil. 426.

In a *Defesance* of a deed of lands, the person to whom made covenants that on payment of a certain sum, on such a day, he will transfer and re-convey the estate back again; and that the maker shall enjoy, till default, &c. If the *defesance* be of a judgment, he covenants that on payment of the money, he will enter satisfaction on the record; if of a statute or bond, that on payment it shall be void, &c. See titles *Conveyance: Deed; Mortgage.*

DEFENCE, in its true legal sense, signifies, not a justification, protection, or guard, which is now its popular signification; but merely an *opposing* or *denial* [from the French *défendre*,] by the defendant of the truth or validity of the plaintiff's complaint. It is a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in the defendant's plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or in the vulgar acceptance, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. And therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment, (*Russell v. Enr.* 251.) and in *assise* of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defence. *Booth of Real Actions*, 118. In writs of entry, where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies his right, *ius suum*, that is (as it seems though with a small grammatical inaccuracy) the right of the demandant, the only one expressly mentioned in the pleadings; or else denies his own right to be such, as is suggested by the count of the demandant. And in writs of right the tenant always comes and defends the right of the demandant and his seisin, *ius prædicti* S. et seisinam ipsius, (*Co. Enr.* 182.) or else the seisin of his ancestor, upon which he counts, as the case may be, and the demandant may reply, that the tenant unjustly *defends* [*i. e.* denies] his, the demandant's right, and the seisin on which he counts. *Nov. Narr.* 230. edit. 1534. All which is extremely clear, if we understand by *defence* an *opposition* or *denial*, but it is otherwise inexplicably difficult. The true reason of this,

says *Booth*, unaccountably, I could never yet find. *Booth on Real Act.* 94, 112.

The Courts were formerly very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment: *Co. Lit.* 127. And therefore the book entitled *Novæ Narrationes* or *The New Talys*, [edit. 1534,] at the end of almost every count, *narratio*, or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waived all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behove him, he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced; though they still seem to be law, if insisted on. 3 Comm. 296—8.

A defendant cannot plead any plea, before he hath made a defence; though this must not be intended absolutely, for in a *fine facias*, a defence is never made. 3 Lev. 182.

See further titles *Pleading; Abatement, &c.*

DEFEND, *defendere*.] In our ancient laws and statutes signifies to forbid; and there is a statute intitled, *Statutum de defensione portandi armis* &c. 7 Ed. 1. In divers parts of England we commonly say, *God defend*, instead of *God forbid*. *Blount*.

DEFENDANT, *defendens*.] The party that is sued in a *personal action*; as *tenant* is he that is sued in an *action real*.

DEFENDEMUS, An ordinary word used in grants and donations; and hath this force, that it binds the donor and his heirs to defend the donee, if any one go about to lay any incumbrance on the thing given, other than what is contained in the deed of donation. *Bract. lib. 2. c. 16.* See title *Warranty*.

DEFENDER OF THE FAITH, *fidei defensor*.] A peculiar title belonging to the King of England, as *Catholic*, to the King of Spain; and *Molt Christian* to the King of France, &c. These titles were given by the *Pope of Rome*; and that of *Defensor Fidei* was first conferred by *Pope Leo* the Tenth on King Henry the Eighth, for writing against *Martin Luther*, and the bull for it bears date *quinto Idus Octob.* 1521. *Lord Herbert's Hist. Hen. VIII.* 105. But the Pope, on King Henry's suppressing the houses of religion, at the time of the *Reformation*, satily sentenced him to be deprived of his title, and deposed from his crown; though in the 35th year of his reign this title, &c. was confirmed by parliament; which hath continued to be used by all succeeding Kings to this day. *Leg. Constitutis*, 47, 48.

DEFENDERE SE *per Corpus suum*, To offer duel or combat as a legal trial and appeal. *Bract. lib. 3. cap. 26.* See title *Battle*.

DEFENDERE UNICA MANU. Words signifying to wage law, and a denial of the accusation upon oath. See *Manus*, *Wages of Law*.

DEFENSA. A park or place fenced in for deer, and defended as a property for that use and service. *H. Knighton, sub. ann.* 1352.

DEFENSIVA,

DEFENSIVA, A Lord or *Earl*, of the *Marches*; who were the wardens or *defenders* of their country. *Cowel*.

DEFENSO. That part of any open field or place that was allotted for corn and hay, and upon which there was no common or feeding, was anciently said to be *in defenso*: so of any meadow ground, that was laid in for hay only. It was likewise the same of a wood, where part was inclosed and fenced up, to secure the growth of the underwood from the injury of cattle. *Mon. Angl. Tom. 3. p. 305.—Cowel*.

DEFENSUM, An inclosure of land, or any fenced ground. *Mon. Angl. Tom. 2. p. 114*.

DEFORCEMENT. *Deforciamentum*.] A species of injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful. 3 *Comm. 172*.

For that at first the with-holding was with force and violence, it was called a *deforcement* of the lands or tenements: but now it is generally extended to all kind of wrongful with-holding of lands or tenements from the right owner.—There is a writ called a *quod ei deforciat*, which lieth where tenant in tail, or tenant for life, loseth by default, by the *Stat. Westm. 2. c. 4*, he shall have a *quod ei deforciat* against the recoveror; and yet he cometh in by course of law. 1 *Inst. 331, b*. See title *Quod ei deforciat*—and as to entries with actual force, tit. *Forcible Entry*.

Deforcement in its most extensive sense, is *nomen generalissimum* signifying the holding of any lands or tenements to which another person hath a right. *Co. Litt. 277*. So that this includes as well an *abatement*, an *intrusion*, a *disseisin*, or a *discontinuance*, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradictinghish from these, it is only such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as falls not within any of those terms. As in case where a lord has a seignory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is with-held from him; here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; nor does it at all bear the nature of any species of *discontinuance*; but being neither of these four, it is therefore a *deforcement*. *F. N. B. 143*. If a man marries a woman, and during the coverture is seised of lands, and aliens, and dies; is disseised, and dies; or dies in possession; and the *alienee*, disseisor, or heir, enters on the tenements, and doth not assign the widow her dower; this is also a *Deforcement* to the widow, by with-holding lands to which she hath a right. *F. N. B. 147*. In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestuy que vie*; and the lessee or any stranger, who, was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder, or reversion, this is likewise a *Deforcement*. *Finch L. 263: F. N. B. 201, 5, 6, 7*.

Deforcements may also arise upon the breach of condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands:

this is such a fraud on the man's part, that the law will not allow it to develt the woman's right of possession, though his entry being lawful, it does develt the actual possession, and thereby becomes a *Deforcement*. *F. N. B. 205*.

Deforcements may also be grounded on the disability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps possession; now, as the alienation is voidable, this possession as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a *Deforcement*. *Finch L. 264: F. N. B. 192*. The same happens, when one of non-sane memory aliens his lands or tenements, and the alienee enters and takes possession, this may also be a *Deforcement*. *Finch L. 264: F. N. B. 202*.

Another species of *Deforcement* is, where two persons have the same title to land, and one of them enters and keeps possession against the other, as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a *Deforcement*. *Finch L. 293, 4: F. N. B. 197*.

Deforcement may also be grounded on the non-performance of a covenant real; as if a man seised of lands, covenants to convey them to another, and neglects or refuses to do so, but continues possession against him; this possession being wrongful, is a *Deforcement*. *F. N. B. 146*. In levying a fine of lands, the person, against whom the fictitious action is brought, upon a supposed breach of covenant, is called the *deforciant*. And, lastly, by way of analogy, keeping a man by any means out of a freehold Office is construed to be a *Deforcement*; though, being an incorporeal hereditament the deforciant has no corporal possession. So that whatever injurious with-holding the possession of a freehold is not included under *abatement*, *intrusion*, *disseisin*, or *discontinuance*, (See those titles) is comprised under *Deforcement*. 3 *Comm. 172, 4*.

DEFORCEOR, *deforcior*, from the French *forceur*, *expugnator*.] One that overcometh, and casteth out by force. *Britton, cap. 53: Old Nat. Brev. fol. 118: Bract. lib. 4. cap. 1*. See title *Deforcement*.

DEFORCIANT, Mentioned in the *Stat. 23 El. c. 3*, is the same with a *deforceor*. See title *Deforcement*.

DEFORCIATIO, Is used for a distress, or holding of goods for satisfaction of a debt. *Paroch. Antig. 293*.

DEGRADATION, *degradatio*.] An ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts of *degrading*, by the *Canon law*; one *summary*, by word only; the other *solemn*, by stripping the party *degraded* of those ornaments and rights which are the ensigns of his order or degree. *Selden's Titles of Hon. 787*.

Degradation is otherwise called *deposition*; and in former times the *degrading* of a clerk was no more than a displacing or suspension from his office: but the *Canons* have since distinguished between a *deposition* and a *degradation*; the one being now used as a greater punishment than the other, because the bishop takes from the criminal all the badges of his order, and afterwards delivers him to the secular judge, where he cannot purge himself of the offence whereof he is convicted, &c.

There

There is likewise a degradation of a Lord, or a Knight, &c. at Common law; when they are attainted of treason; as Hil. 18 Ed. 2. Andrew Harclay, Earl of Carlisle, who was also a Knight, was degraded, and when judgment of treason was pronounced against him, his sword was broken over his head, and his spurs hewn off his heels, &c. And there is a degrading by act of parliament; for by Stat. 13 Car. 2. cap. 16, William Lord Mordaunt, Sir Henry Mildmay, and others, were degraded from all titles of honour, dignities, and preeminences, and none of them to bear or use the title of Lord, Knight, Esquire, or Gentleman, or any coat of arms for ever after. See title *Peers*.

DEHORS, Fr. *without*.] A word used in ancient pleading, when a thing is *without* the land, &c. or *out* of the point in question. Vide *Hors de son fief*.

DE INJURIA SUA PROPRIA, *absque tali causa*. Are words used in replications, in actions of trespass. 1 Lil. Abr. 427. When one justifies by command or authority derived from another, or if a defendant justifies by authority at Common law, as a constable by arrest for breach of the peace; or if he justifies by act of parliament, &c. the plaintiff may reply, that he did it *of his own wrong, without any such cause as the defendant has alleged*. Cro. Eliz. 539: 2 Salk. 628. See and this Dict. titles *Trespass*; *Pleading*.

DEI JUDICIUM. The old Saxon trial by ordeal was so called: because they thought it an appeal to God, for the justice of a cause, and verily believed that the decision was according to the will and pleasure of Divine Providence. *Domest.* See title *Ordeal*.

DEIS. The high table of a monastery. See *Dagus*.

DELATURA, *Saxon*.] An accusation: and sometimes it hath been taken for the reward of an informer. *Leges H. 1. c. 46: Leges Hen. 20, apud Brompton.*

DEL CREDERE. A commission *del credere* is an undertaking by an insurance-broker, for an additional premium, to insure his principal against the contingency of the failure of the under-writer. See *Grove & al^s v. Lubbois*, 1 Term Rep. 112.

DELEGATES, Commissioners of appeal appointed by the King under the Great Seal, in cases of appeals from the Ecclesiastical Court, &c. by Stat. 25 Hen. 8. c. 19. See title *Count-Ecclesiastical*, 6.

DELF. From the Sax. *delfan*, to dig, or delve.] A quarry or mine, where stone or coal, &c. are dug. Stat. 31 Eliz. 7. The word *delve* for dig, is still retained in some parts of this kingdom.

DELIVERANCE. When a criminal is brought to trial, and the clerk in court asks him whether he is *Guilty*, or *Not guilty*, to which he replies *Not guilty*, and puts himself on God and his country, the clerk wishes him a good deliverance.

DELIVERY OF DEEDS, See titles *Date*; *Deed*.

DEMAND, Fr. *demande*, Lat. *postulatum*.] A calling upon a man for any thing due. There are two manner of demands, the one in deed, the other in law: in deed, as in a *preceptum quod reddat*, there is an express demand. Every entry on land, distress for rent, taking of goods, &c. which may be done without words, is a demand in law. 8 Rep. 153.

It is also said there are three sorts of demands; one in writing without speaking, and that is in every *preceptum*; one without writing, being a verbal demand of the person, who is to do or perform the thing; and another

made without either word or writing, which is a demand in law, in cases of entries on lands, &c. As an entry on land, and taking a distress, are a demand in law of the land and rent, so the bringing an action of debt for money due on an obligation is a demand in law of the debt. 1 Lil. 432: 1 Nelf. Abr. Debts, claims, &c. are to be demanded and made in time, by the statute of Limitations, 21 Jac. 1. c. 16, and other statutes; or they will be lost by law. See title *Limitation of Actions*.

Where there is a duty, which the law makes payable on demand, no demand need be made; but if there is no duty till demand, in such case there must be a demand, to make the duty. 1 Lil. 432: Cro. Eliz. 548. Upon a penalty the party need not make a demand, as he must in the case of a *nomine pame*; for if a man be bound to pay 20 l. on such a day, and in default thereof to pay 40 l. the 40 l. must be paid without demand. 1 Mod. 89. If a man leases land by indenture for years, reserving a rent payable at certain days, and the lessee covenants to pay the said rent at the days limited; the lessor is intitled to his rent, without demand, for the lessee is obliged to pay it at the days, by force of his covenant. 2 Dav. Abr. 101. But if a lessor makes a lease rendering rent, and the lessee covenants to pay the rent, being lawfully demanded, the lessee is not bound to pay the rent, without a demand, *Ibid.* 102.

A person makes a lease for life, or years, reserving a rent upon condition, that if the lessee doth not pay the rent at the day, that then without any demand it shall be lawful for the lessor to re-enter; by this special agreement of the parties, the lessor may enter on non-payment of the rent, without any demand. 2 Dav. Abr. 100. A lease for years, with condition to be void, on non-payment of the rent, is not void unless the rent be demanded; and an interest shall not be determined, without an actual demand, Hob. 67, 331: 2 Mod. 264. But now by the statutes relative to rents an ejectment may be maintained without an actual entry. See Stat. 4 Geo. 2. c. 28. § 2: 11 Geo. 2. c. 19. § 16: and this Dict. titles *Ejectment*; *Lease*; *Rent*.

A demand is to be legal, and made in such manner as the law requires: if it be for rent of a messuage and lands, it ought to be made at the messuage, at the fore door of the house, the most notorious place: where lands and woods are let together, the rent is to be demanded on the land, as the most worthy thing, and on the most public part thereof: if wood only be leased, the demand must be made at the gate of the wood, &c. 1 Inst. 201: Popb. 58: Vide *Dyer* 51: 1 Leon. 425: Cro. Eliz. 209.

He that would enter for a condition broken, which tends to the destruction of an estate, must,—1. Demand the rent.—2. Upon the land, if there is no house.—3. If there is a house, at the fore door; though it is not material whether any person be in the house or no.—4. If the appointment is at any other place off the land, the demand must be at that place.—5. The time of the demand is to be certain, that the tenant may be there, if he will, to pay the rent: and the last time of demand of the rent, must be such a convenient time before the sun-setting of the last day of payment, as the money may be numbered. The lessor or his sufficient attorney is to remain upon the land, the last day on which the rent due ought to be paid, until it be so dark that he cannot,

DEMAND.

cannot see to tell the money: and if the money thus demanded is not paid, this is a denial in law, though there are no words of denial; upon which a rent may be made. *2 Inst.* 201, 202; 4 *Rep.* 73.—See further title *Entry*: As to demand of lands, See title *Fine*.

As a release of suits is more large than of quarrels or actions; so a release of demands is more large and beneficial than either of them. By a release of all demands, all executions, and all freeholds, and inheritances, executory, are released: by a release of demands to the disseisor, the right of entry in the land, and all that is contained therein, is released. And he that releaseth all demands, excludes himself from all actions, entries, and seizures; but a release of all demands, is no bar in a writ of error to reverse an outlawry. 8 *Co.* 153, 154.—See title *Release*.

DEMANDANT, *petens*.] All civil actions are prosecuted either by demands or plaintiffs, and the pursuer is called demandant, in actions real; and plaintiff, in personal actions: in a real action, lands, &c. are demanded. *Co. Lit.* 127.

DEMEINE, DEMAIN, DEMESNE, *Fr.*—*Lat.* *dominium, domanium*; also written *domaine*, and signifieth *patrimonium domini*.] *Demeins* according to common speech, are the lord's chief manor place, with the lands thereto belonging; *tenementales*, which he and his ancestors have from time to time kept in their own manual occupation, for the maintenance of themselves and their families; and all the parts of a manor, except what is in the hands of freeholders, are said to be *demeins*. Copyhold lands have been accounted *demeins*, because they that are the tenants hereof are judged in law to have no other estate but at the will of the lord; so that it is still reputed to be, in a manner, in the lord's hands; but this word is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised at a rack-rent, and such other land appertaining to the manor, which belongeth to free or copyholders. *Bract. lib. 4. tract. 3. c. 9: Fleta, lib. 5. cap. 5.* As *demeins* are lands in the lord's hands manually occupied, some have thought this word derived from *de manu*; but it is from the *Fr. demaine*, which is used for an inheritance, and that comes from *dominium*, because a man has a more absolute dominion over that which he keeps in his hands, than of that which he lets to his tenants. *Blount*.

Domanium properly signifies the King's lands in France, appertaining to him in property: and in like manner do we in some sort use it here in England; for all lands, it is said, are either mediately or immediately held of the Crown; and when a man in pleading would signify his land to be his own, he saith, that he is seised thereof in his *demein*, (or rather *demesne*) *as of fee*; whereby is meant, that although his land be to him and his heirs, it depends upon a superior lord, and is held by rent or service, &c. *Lit. lib. 1. cap. 1.* From this it hath been observed, that lands in the hands of a common person cannot be true *demesnes*: and certain it is, that lands in the possession of a subject, are called *demeins* in a different sense from the *demein* lands of the Crown. For *demeins*, or *domains*, in the hands of a subject, have their derivation à *dmo*, because they are lands in his possession for the maintaining of his house: but the *domains* of the Crown are held of the King, who is absolute lord, hav-

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ing proper *dominion*; and not by any feudal tenure of a superior lord, as of fee. *Wood's Inst.* 139.

Demein is sometimes taken in a special signification, as opposite to *frank-fee*: for example, Those lands which were in the possession of King Edward the Confessor are called *ancient demains*, or *ancient demesne*, and all others *frank free*; and the tenants which hold any of those lands are called *tenants in ancient demain*, or *ancient demesne*, and the others *tenants in frank-fee*, &c. *Kitch.* 98. See title *Ancient Demesne*.

DEMISE, *demisso*.] Is applied to an estate either in fee, for term of life, or years, but most commonly the latter: it is used in writs for any estate. 2 *Inst.* 483. The word *demise*, in a lease for years, implies a warranty to the lessee and his assignee; and upon this word action of covenant lies against the heir of the lessor, if he oust the lessee: it binds the executors of the lessor, who has fee-simple, or fee-tail, where any lessee is evicted, and the executor hath assets; but not the lessor for life's executors, without express words, that the lessee shall hold his whole term. *Dyer* 257: *Jenk. Cent.* 35.—See titles *Lease*; *Covenant*.

The King's death is in law termed, the *demise* of the King, to his royal successor, of his crown and dignity, &c. See *King*.

DEMISE AND REDEMISE, The conveyance by *demise* and *redemise* is where there are mutual leases made from one to another on each side, of the same land, or something out of it; and is proper upon the grant of a rent charge, &c.

DEMURRER, from the *Lat. demorare, Fr. demeurer*.] A pause or stop, put to any action upon a point of difficulty, which must be determined by the Court, before any farther proceedings can be had therein: for in every action the point of controversy consists either in *fact* or in *law*; if in *fact*, that is tried by the jury; but if in *law*, that is determined by the Court.

A *demurrer* therefore, is an issue upon matter of law. It confesses the facts to be true, as stated by the opposite party; but denies that by the law arising upon those facts, any injury is done to the plaintiff; or that the defendant has made out a lawful excuse; according to the party which first demurs, (*demoratur, moratur in lege*) rests or abides in law upon the point in question. As, if the matter of the declaration be insufficient in law, (as by not assigning any sufficient trespass, &c.) then the defendant demurs to the declaration.—If on the other hand the defendant's excuse or plea be invalid, (as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right,) here the plaintiff may demur to the plea: and so in every other part of the proceedings.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exception to the form or manner of pleading, the party demurring, must by *Stats.* 27 *Eliz. c. 5: 4 & 5 Ann. c. 16*, set forth the causes of his demurrer. See titles *Amendment*, *Pleading*.—And upon either a *general* or *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer; and then the

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the parties are at issue in point of law; which issue, as above mentioned, the judges of the court before which the action is brought must determine. 3 Comm. 314: Finch L. lib. 4. c. 40: 1 Inst. 71.

A demurrer may be to the writ, (i. e. the original, where the proceedings are by original,) to the count, or declaration, or to any part of the pleadings.

A demurrer is admitting the matter of fact, since it refers the law arising on the facts, to the judgment of the Court; and therefore the fact is taken to be true on such demurrer, or otherwise the Court has no foundation on which to make any judgment. Gilb. Hist. of C. P. 55.

As a demurrer at Common law did confess all matters formally pleaded; so now by the statutes a general demurrer does confess all matters pleaded, though informally. Hob. 233. But a special demurrer admits only facts well pleaded.

Demurrers are general, without shewing any particular causes: or special, where the causes of demurrer are particularly set down: and the judgment of the court is not to be played upon an insufficient declaration or plea, otherwise than by a demurrer; when the matter comes judicially before the court. If in pleadings, &c. a matter is insufficiently alledged, that the court cannot give certain judgment upon it, a general demurrer will suffice; and for want of substance, a general demurrer is good: but for want of form, there must be a special demurrer, and the causes specially assigned. The practice is now, on a special demurrer, to take advantage of any real error, though not expressed, in the causes assigned.

A man who demurs generally, shall take advantage of all matters which are requisite to shew a good right or title in the plaintiff. Ploud. Com. 66 a: Hob. 301.

If a man demurs for form, he must shew specially the causes of demurrer. 2 Rol. 330: Stat. ubi supra: R. M. 1654. § 17.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer-book himself, a copy of which he is to deliver to defendant's attorney, and if not paid for on demand, sign judgment. R. Tr. 12 W. 3. In case of a demurrer to a plea, &c. by a plaintiff, the demurrer-book cannot be made up by the defendant, until default made by the plaintiff. R. Tr. 11 W. 3.

Demurrers likewise, are either in actions at law, or in suits in equity.

A Demurrer in Equity, is nearly of the same nature with a demurrer in law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill: as for want of sufficient matter of equity therein contained: or where the plaintiff upon his own shewing appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour. For any of these causes, a defendant may demur to a bill in equity; and if on demurrer the defendant prevails, the plaintiff's bill shall be dismissed; if the demurrer be over-ruled, the defendant is ordered to answer. 3 Comm. 446.

It is allowed a good cause of demurrer in Chancery, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes, and make a multiplicity of suits. Vern. 29.

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If an original bill be brought for matters, part of which are in a former bill and decree, and part new, or by way of supplemental bill; the court will, on a demurrer to so much as was contained in the former decree, send it to a master to see what was, and what was not in the first bill, and allow the demurrer accordingly. Gilb. E. R. 184. See farther, title Chancery.

After the plaintiff and defendant have joined issue in fact, which goes to the whole, neither of them can demur, without consent of the other. But there may be a demurrer to evidence. Though now it is more usual to take exceptions to evidence at the bar at Nisi prius, or tenns, which is tantamount to a demurrer. If doubts arise, cases are made, or points reserved, and a verdict taken, subject to the opinion of the court. See post. title Demurrer to Evidence.

If a defendant pleads to part, and demurs to part; the demurrer should first be determined, and the issue last; because upon the trial of the issue, the jury may assess damages as to both. Palm. 517. Where there is a demurrer in part, and issue is joined upon the other part, and the plaintiff hath judgment on the demurrer; here he may enter a Non-prof. as to the issue, and proceed to a writ of enquiry upon the demurrer: but otherwise he cannot have such writ of inquiry. 1 Salk. 219: See 1 Stra 532, 574.

If there be three counts in the declaration, to which there is a general demurrer; if any one of the counts be good, judgment must be for the plaintiff, if such count can be joined with the other two. 1 Wyl. 252.

A demurrer is to be signed, and argued on both sides by counsel. After a demurrer is joined, the plaintiff having entered it on the roll, delivers the roll to the Secondary, and makes a motion for a Consilium or day to argue it, which the court grants of course, on the Secondary's reading the record; then the demurrer must be entered by the plaintiff in the court-book with the Secondary, who, on his rule sets down the day appointed for argument, at least four days before the demurrer is argued: and paper-books, containing all the proceedings at length, which are afterwards entered on record, are made and delivered to the judges, two days before argument. See Imp. K. B.

The demurrant argues first, and the Court will hear but two counsel on a day, viz. one of a side; and, if desired on either side, (unless the case be very plain,) the court will hear further arguments the next term. If the major part of the judges of the court cannot determine the matter on the demurrer, it is to be sent into the Exchequer-chamber to be determined by all the judges of England. 1 Inst. 71. Demurrers are now frequently put in for delay. In such cases, the party wishing to avoid the delay, makes up four demurrer books, and delivers to the judges, two days before the day when judgment is moved for; which is given of course without argument.

When the Court gives judgment on demurrer in debt for the plaintiff in the action, the judgment is for the plaintiff to recover his debt, costs and damages; but if it be in action on the case, a writ of inquiry of damages must be awarded, before the plaintiff can have final judgment. If judgment on the demurrer is for the defendant in the action, the judgment is, that the plaintiff take

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nothing by his writ, bill, &c. and that the defendant go without day. *Wood's Inst.* 603.

General *demurrer* being entered, it cannot be afterwards waived, without leave of the court, but a special *demurrer* generally may, unless the plaintiff hath lost a term, or the assizes by the defendant's *demurring*. *Impey, K. B.*

DEMURRER TO EVIDENCE. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alledged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue, as the case may be. 1 *Inst.* 72: 5 *Rep.* 104. This draws the question of law from the cognizance of the jury to be decided, *as it ought*, by the court, out of which the record is sent. 3 *Comm.* 372.

So if the plaintiff brings witnesses to prove a fact, and a matter of law ariseth upon it; if the defendant admits their testimony to be true; there also the defendant may demur in law; and so may the plaintiff demur upon the defendant's evidence. And in these cases, the counsel for the plaintiff and defendant agree the matter of fact in dispute; and the jury are discharged; and the matter of law is referred to the judges to determine.

But where evidence is given for the King, in an information or other suit, and the defendant offers to demur upon it, the King's counsel are not obliged to join therein; but the Court ought to direct the jury to find the special matter. And, indeed, because juries of late usually find a doubtful matter specially, *demurrers upon evidence* are now seldom used. See 5 *Rep.* 104: 1 *Inst.* 72: 2 *Jur.* 426.

If the Court doth not agree to a *demurrer to evidence* in a civil cause; they ought to seal a *bill of exceptions*, &c. 9 *Rep.* 13—See title *Bill of Exceptions*.

DEMURRER TO INDICTMENTS. This is incident to criminal cases, as well as civil, when the fact as alledged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment; by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alledged to be. Thus, for instance, if a man be indicted for feloniously stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held, (2 *Hal. P. C.* 257,) that if on demurrer, the point of law be adjudged against the prisoner, he shall have judgement and execution, as if convicted by verdict. But this is denied by others; (2 *Hawk. P. C. c.* 32. § 5, 6;) who hold, that in such case he shall be directed and received to plead the general issue, *Not guilty*, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers to the opinion of the court, whether it be felony or no; and upon the fact thus shewn, it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty. 2 *Hal. P. C.* 225. And this seems to be a case of the same nature, being for the most part

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a mistake in point of law, and in the conduct of his pleading; and though a man, by mis-pleading, may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used; since the same advantages may be taken upon a plea of Not guilty; or afterwards in arrest of judgment, when the verdict has established the fact. See *Smith v. Bowen, Mich. 7 An.* in which case the demurrer was continued on the record with a *cesset triatio exitus*, &c. and after the demurrer was determined against the defendant, a *Vener* was awarded. See *Salk.* 59, 60: *Dyer* 38: 2 *Hawk. P. C. ubi supra* in n: 4 *Comm.* 333, 4.

DEMY-SANGUE, Half blood: where a man marries a woman, and hath issue by her a son, and the wife dying he marries another woman, by whom he hath also a son; now these two sons, though they are called *brothers*, are but *brothers of the half-blood*, because they had not both one father and mother: and therefore by law they cannot be heirs to one another; for he that claims freehold as heir to another by descent, must be of the whole blood to him from whom he claimeth. *Terms de Ley.*—See titles *Descent*, *Executor*.

DEN, from the Sax. *Den*. i. e. *Vallis*, *Locus Sylvestris*.] The name of places ending in *den*, as *Biddenden*, &c. signify the situation to be in a valley, or near woods. *Blount*.

DEN AND STROND, Is a liberty for ships or vessels to run or come ashore: and King *Ed. 1.* by charter granted this privilege to the Barons of the *Cinque Ports*. *Placit. temp. Ed. 1.*

DENA TERRÆ, A hollow place between two hills; and the word *dena* is used for a little portion of woody ground, commonly called a coppice. *Domesday*.

DENARII, A general term for any sort of *pecunia numerata*, or ready money. *Pavob. Antiq.* 320.

DENARII DE CARITATE, Customary oblations made to *Cathedral Churches* about the time of *Pentecost*, when the parish priests, and many of their people went in procession to visit their mother church: this custom was afterwards changed into a settled due, and usually charged upon the parish priest; though at first it was but a gift of charity, or present, to help to maintain and adorn the bishop's see. *Cartular. Abbat. Glaston. MS. f.* 15.

DENARIUS, An *English* penny: it is mentioned in the *Stat. Ed. 1. de compositione mensurarum*, &c.

DENARIUS DEI, God's penny, or earnest money given and received by the parties to contracts, &c. *Cart. Ed. 1.* The earnest money is called *Denarius Dei*, or God's penny, because, in former times, the piece of money so given to bind the contract, was given to God, i. e. To the church, or the poor.

DENARIUS S. PETRI, An annual payment of one penny from every family to the Pope, during the time that the Roman Catholic religion prevailed in this kingdom, paid on the feast of St. Peter. See *Peter-Pence*.

DENARIUS TERTIUS COMITATUS, Of the *fines* and other profits of the county-courts, originally when those courts had superior jurisdiction before other courts were erected, two parts were reserved to the King, and a third part or penny to the Earl of the county; who either received it in specie at the assizes and trials, or had an equivalent composition for it out of the *Exchequer*. *Paroib. Antiq.* 418.

DENBERA,

DENBERA, From the Sax. *Den*, a vale, and *berg*, a barrow or hog. A place for the running and feeding of hogs, wherein they are penned; by some called a *Swinecomb*. *Convel.*

DENIZEN, See title *Alien*.

DENSHIRING OF LAND, Is the casting parings of earth, turf, and stubble into heaps, which when dried are burnt into ashes, for a compost on poor barren land. This method of improvement is used on taking in and inclosing common and waste ground; and in many parts of England is called *burn-beating*, but in *Staffordshire* and other counties, they term it *denshiring of land*.

DE NON DECIMANDO Molus. To be discharged of tithes. See *Modus Decimandi*.

DE NON RESIDENTIA CLERICI REGIS, An ancient writ where a person was employed in the King's service, &c. to excuse and discharge him of *non-residence*. 2 *Inst.* 624.

DENTRIX, A fish with many teeth. *Chart. Hen. 6. Monast. Ramsey.*

DEODAND, *Deo dandum*.] By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the King to be applied to pious uses, and distributed in alms by his high almoner, though formerly destined to a more superstitious purpose. 1 *H. P. C.* 419: *Fleta lib. 1. c. 25*.

It seems to have been originally designed as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to Holy Church, in the same manner as the apparel of a stranger who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due, where an infant under the age of discretion is killed by a fall from a cart or horse, or the like, not being in motion; whereas, if an adult person falls from thence, and is killed, the thing is certainly forfeited. 3 *Inst.* 57: 1 *H. P. C.* 422. Such infant being presumed incapable of actual sin, and therefore not needing a deodand to purchase propitiatory masses. 1 *Comm.* 300.

Thus stands the law, if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal of his own motion, kill as well an infant, as an adult; or if a cart run over him, they shall in either case be forfeited as deodands; which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner; and therefore he is properly punished by such forfeiture. *Bract. l. 3. c. 5*.

Where a thing not in motion is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a Deodand. 1 *H. P. C.* 422.—But wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over his body,) but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increase the pressure of the wheel,) are forfeited. 1 *Hawk. P. C. c. 26*.

It matters not whether the owner of the thing moving to the death of a person were concerned in the killing or not: for if a man kills another with my sword, the sword

is forfeited. *Dr. & Stud. d. 2. c. 51*. And therefore in all indictments for homicide, the instrument of death, and the value, are presented and found by the Grand Jury; (as that the stroke was given by a certain penknife, value 6d.) that the King or his grantee may claim the Deodand. For it is no Deodand, unless it be presented as such by a jury of twelve men. 3 *Inst.* 57: 5 *Rep.* 110: 1 *Inst.* 144.

No Deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the Common law: but if a man falls from a boat or ship in fresh water and is drowned, it hath been said that the vessel and cargo are in strictness of law a Deodand. 3 *Inst.* 58: 1 *H. P. C.* 423: *Moll. de Jur. Marit.* 2. 225.

Juries however have of late perhaps too frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing to have been the occasion of the death. But in such cases, although the finding by the jury be hardly warrantable by law, the court of K. B. hath generally refused to interfere on behalf of the Lord of the Franchise, to assist so unequitable a claim. *Test. on Homic.* 266.

Deodands, as well as other forfeitures in general, wrecks, treasure-trove, &c. may be granted by the King to particular subjects as a Royal Franchise: and indeed they are for the most part granted out to the lords of manors or other liberties; to the perversion of their original design. 1 *Comm.* 299. & *seq.*

If a man riding over a river, is thrown off his horse by the violence of the water, and drowned, his horse is not Deodand; for his death was caused *per cursum aquæ*. 2 *Co.* 483.

If a person wounded by any accident, as of a cart, horse, &c. die within a year and a day after, what did it, is Deodand: so that if a horse strikes a man, and afterwards the owner sells the horse, and then the party that was stricken dies of the stroke, the horse, notwithstanding the sale, shall be forfeited as Deodand. *Plowd.* 260: 5 *Rep.* 110.

Things fixed to the freehold; as a bell hanging in a steeple, a wheel of a mill, &c. unless severed from the freehold, cannot be Deodands. 2 *Inst.* 281. And there is no forfeiture of a Deodand, till the matter is found of record, by the jury that finds the death; who ought also to find and appraise the Deodand. 5 *Rep.* 110: 1 *Inst.* 144. After the coroner's inquisition, the sheriff is answerable for the value, where the Deodand belongs to the King; and he may levy the same on the town, &c. Wherefore the inquest ought to find the value of it. 1 *Hawk. P. C.*

Grants of Deodands how to be inrolled, 3 & 4 *H. & M. c. 22. sect. 1*. The goods and chattels of *felio de se*, &c. were likewise anciently held to be Deodands, and are now forfeitable to the Crown. See title *Felio de se*. 1 *Lit.* 443.

DE ONERANDO PRO RATA PORTIONIS, A writ where a person is distrained for rent, that ought to be paid by others proportionably with him. *F. N. B.* 234. If a man hold twenty acres of land, by fealty and twenty shillings rent; and he aliens one acre to one person, and another acre to another, &c. the lord shall not distrain one alienee for the whole rent, but for the rate and value of the land he hath purchased, &c. And if he be distrained for more, he shall have this writ. *Nova Nat. Br.* 586.

DEPARTURE.

DEPARTURE. A term of law properly applied to a defendant, who first pleading one thing in bar of an action, and being replied unto, in his rejoinder, quits that and shews another matter, contrary to, or not pursuing his first plea, which is called a *departure from his plea*; also where a plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a *departure*. *Plowd.* 7, 8: 2 *Inst.* 147. But if a plaintiff in his replication *depart* from his count, and the defendant takes issue upon it; if it be found for the plaintiff, the defendant shall take no advantage of that *departure*: though it would have been otherwise, if he had demurred upon it. *Ravn.* 86: 1 *Lil. Abr.* 444.

If a man plead a general agreement in bar, and in his rejoinder alledge a special one, this is a *departure* in pleading: and if an action is brought at Common law, and the plaintiff by his replication would maintain it by virtue of a custom, &c. it hath been held a *departure*. 1 *Nelf. Abr.* 638. Where a matter is omitted at first, it is a *departure* to plead it afterwards. *Ibid.* If in covenant, the defendant pleads performance; and after rejoins that the plaintiff ousted him, it is a *departure* from his plea. *Raym.* 22. In debt upon bond for performance of covenants in a lease, the defendant pleaded performance; and afterwards in his rejoinder set forth that so much was paid in money, and so much in taxes, &c. upon demurrer, it was adjudged a *departure* from the plea; because he had pleaded performance, and afterwards set forth other matter of excuse, &c. 1 *Salk.* 221.

Debt upon bond for performance of an award, made for payment of money; if the defendant plead performance, and the plaintiff having replied and assigned a breach of non-payment, &c. the defendant rejoins that he is ready to pay the money at the day, &c. this is a *departure* from his plea; for performance is payment of the money; and payment, and ready to pay, are different issues. *Sid.* 10: 4 *Leon.* 79. In debt upon bond for non-performance of an award; the defendant pleads that the award was, that he should release all suits to the plaintiff, which he had done; the plaintiff replies that such an award was made, but that the award was further, that the defendant should pay to the plaintiff such a sum, &c. the defendant rejoins that true it is, that by the award he was to pay the plaintiff the said sum, but that the award was also, that the plaintiff should release to the defendant all actions, &c. which he had not done; on demurrer this was held a *departure* from the plea, being all new matter. 2 *Bull.* 39: *Godb.* 155: 1 *Nelf.* 637. After *nullum fuerunt arbitrium*, the defendant cannot plead that the award is void, without being a *departure* from the former plea: and if where *ad idem agitur* is pleaded, then the award is set forth, and a joinder that it was not tendered, it is a *departure*. 1 *Lev.* 133: *Lut.* 385.

A *departure* must be always from something that is *material*; or it will not be allowed: if in trespass for taking goods, the plaintiff reply, that after the taking, the defendant converted them to his own use, this being an abuse, makes a trespass; and the conversion is either trover or trespass at the plaintiff's election, so that by his replication he may make it trespass, and be no *departure*. 1 *Salk.* 221, 222. In circumstances of time, &c. laid as to promises, the plaintiff is not tied to a precise

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day; for if the defendant by his plea, force the plaintiff to vary, it is no *departure* from his declaration. 1 *Nelf.* 640, 641. And if another place be mentioned in the replication, in action of debt; as this is a personal thing, it is no *departure*, because he who is indebted to another in one place, is so in every place. *Sid.* 228.

If new matter which explains or fortifies the bar be rejoined by the defendant, it is not a *departure*. 1 *Wils.* 8; 97, 8: *Co. Lit.* 304 a.

A *departure* being a denial of what is before admitted, is a saying and un saying, and for that an issue cannot be joined upon it, it is bad for the incertainty. 1 *Lil.* 444. See further titles *Pleading: Novel Assignment: Trespass*.

DEPARTURE IN DESPITE OF THE COURT, and entry of it. See title *Default*.

DEPARTURE OF GOLD AND SILVER, The *parting* or dividing of those metals, from others that are coarser. See *Stat.* 4 *H.* 7.

DEPOPULATIO AGRORUM, Destroying and ravaging a country; an offence where the benefit of clergy was denied at common law. 2 *Hals. Pl.* 333. See title *Clergy, benefit of*.

DEPOPULATION, Depopulatio.] Is a wasting or destruction; a desolation or unpeopling of any place, by fire, sword, pestilence, &c. 12 *Rep.* 30.

DEPOPULATORES AGRORUM, These were great offenders, by the ancient common law; so called, because by prostrating and ruining of houses for habitation of the King's people, they, as it were, *depopulated* towns and villages, leaving them without inhabitants. See *Stat.* 4 *Hen.* 3. c. 2: 3 *Inst.* 204. and title *Clergy, benefit of*.

DEPOSITION, Depositio.] The testimony of a witness, otherwise called a *deponent*, put down in writing by way of answer to interrogatories exhibited for that purpose, in Chancery, &c. Proof in the High Court of Chancery is by *depositions* of witnesses; and the copies of such regularly taken and published, are read as evidence at the hearing. For the purposes of examining witnesses in or near London there is an examiner's office appointed: but for such as live in the county, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there, upon their own oaths; and, if foreigners, upon the oaths of two skilful interpreters. And it hath been established that the deposition of an Heathen who believes in the Supreme Being taken by commission in the most solemn manner according to the custom of his own country may be read in evidence. 1 *Aik.* 21.—The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the Court of Chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena*, as in the courts of Common law, to appear and submit to examination. And when their depositions are taken they are transmitted to the court with the same care that the answer of a defendant is sent. 3 *Comm.* 449.

After a witness is fully examined, the examinations are read over to him, and the witness is at liberty to alter, or amend any thing; after which he signs them, and then, and not before, the examinations are complete, and good evidence. 1 *P. Wms.* 415. The same practice prevails in the *Commons*, in *Ecclesiastical* causes.

Where

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Where a witness was examined in a cause in Chancery, and, before signing his examination died, the Master of the Rolls, upon advising with the Master in Chancery then in court, denied the making use of the *depositions*, as being not perfect. 1 P. Wms. 414.

But where, after an order for publication, defendant examined a witness, and then perceiving the irregularity (it being after publication) the defendant on the *usual affidavit* by himself, his clerk in court, and solicitor, that they had not seen, nor would see any of the *depositions*, got an order to re-examine this witness; but before re-examination the witness died; upon affidavit of this, Id. Ch. Parker ordered that the defendant might make use of the *depositions*, the re-examination being prevented by the act of God. 1 P. Wms. 415.

Depositions in the Chancery after a cause is determined, may be given in evidence in a trial at bar in B. R. in a suit for the same matter, between the same parties, if the party that *deposed* be dead; but not otherwise, for if he be living, he must appear in person in court to be examined, &c. 1 Lil. Abr. 445.

See further as to the admission of written *depositions* in evidence at Common law. Bull. N. P. 229, 239—242, and this Dict. title *Evidence*.

Depositions of informers, &c. taken upon oath before a coroner, upon an inquisition of death; or before justices of peace on a commitment or bailment of felony, may be given in evidence at a trial for the same felony; if it be proved on oath that the informer is dead, or unable to travel, or kept away by the procurement of the prisoner; and oath must be made that the *depositions* are the same that were sworn before the coroner or justice, without any alteration. 2 Hawk. P. C.

Depositions taken before a coroner, cannot be given in evidence upon an appeal for the same death; because it is a different prosecution from that wherein they were taken: And it has been adjudged, That the evidence given by a witness at one trial, could not, in the ordinary course of justice, be made use of against a criminal, on the death of such witness, at another trial. 2 H. P. C.

The examinations of witnesses abroad, and of such as are aged or going abroad *de bene esse*, to be read in evidence, if the trial should be deferred till after their death or departure, are now very frequently effected by mutual consent in trials at Common law, if the parties are open and candid: and this may also be done indirectly at any time, through the channel of a Court of Equity: but such a practice has never yet been adopted directly as a rule of a court of law. Yet where the cause of action arises in *India*, and a suit is brought thereupon in any of the courts of *Westminster*, the Court may issue a commission to examine witnesses upon the spot, and transmit the *depositions* to England. Stat. 13 Geo. 3. c. 63.

DEPOSITION is used in the law in another sense, viz. To signify the depriving a person of some dignity, See titles *Degradation*; *Deprivation*.

Deposition is also taken for death; and dies *depositionis*, the day of one's death. Litt. Dict.

DEPRIVATION, *Deprivatio*.] A depriving or taking away; as when a bishop, parson, vicar, &c. is deposed from his preferment. Of *deprivations* there are two sorts, *deprivatio à beneficio*, and *ab officio*; the *deprivation à beneficio* is when for some great crime, &c. a minister is wholly deprived of his living: And *deprivation ab officio*

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is where a minister is for ever deprived of his orders, which is also called *deposition* or *degradation*; and is commonly for some heinous offence meriting death, and performed by the bishop in a solemn manner. Blount. See *Degradation*.

Deprivatio à beneficio is an act of the Spiritual Court, grounded upon some crime or defect in the person deprived by which he is discharged from his spiritual promotion or benefice, upon sufficient cause proved against him. 1 Nelf. Abr. 641.

Deprivation may also be by a particular clause in some act of parliament: the deprivation of bishops, &c. is declared lawful by statute 39 Eliz. c. 8. And by the King's commission, as he hath the supremacy lodged in him, a bishop may be deprived: for since a bishop is vested with that dignity by commission from the King, it is reasonable he should be deprived, where there is just cause, by the same authority: but the canons direct, that a bishop shall be deprived in a synod of the province; or, if that cannot be assembled, by the archbishop; and twelve bishops at least, not as his assistants, but as judges. It has been adjudged, that an archbishop may deprive a bishop for simony, &c. for he hath power over his suffragans, who may be punished in the archbishop's court for any offence against their duty. 1 Salk. 134. See title *Bishop*.

The causes of *deprivation* are many: if a clerk obtain a preferment in the church, by simoniacal contract; if he be an excommunicate, a drunkard, fornicator, adulterer, infidel, schismatic or heretick; or guilty of murder, manslaughter, perjury, forgery, &c. If a clerk be illiterate and not able to perform the duty of his church; if he is a scandalous person in his life and conversation; or bastardy is objected against him: if one be a mere layman, and not in holy orders; or under age, viz. the age of twenty-three years; be disobedient and incorrigible to his ordinary; or a con-nonformist to the canons; if a parson refuse to use the Common Prayer, or preach in derogation of it; do not administer the Sacraments, or read the Articles of Religion, &c. See titles *Parson*; *Clergy*.

If any parson, vicar, &c. have one benefice with cure of souls, and take plurality, without a faculty or dispensation: or if he commit waste in the houses and lands of the church, called *Dilapidations*, all these have been held good causes for *deprivation* of priests. Degg's *Parson's Counselor*, 98, 99, &c. 3 Inst. 204. See titles *Advowson*, II; *Chaplain*; *Cession*. And refusing to use the Common Prayers of the church, plurality of livings, &c. are causes of *deprivation ipso facto*, in which case the church shall be void, without any sentence declaratory; and avoidances by act of parliament need no declaratory sentence: But in other cases there must be a declaratory sentence. Dyn. 275. See title *Parson*.

Where a benefice is only voidable, but not void before sentence of *deprivation*, the party must be cited to appear; there is to be a libel against him, and a time assigned to answer it, and also liberty for advocates to plead, and after all a solemn sentence pronounced: Though none of these formalities are required, where the living is made *ipso facto* void. Can. 122. If a *deprivation* be for a thing merely of ecclesiastical cognizance, no appeal lies; but the party has his remedy by a commission of review, which is granted by the King of mere grace. Moor 781.

DEPUTY,

DEPUTY.

DEPUTY, *Deputatus*.] One that exercises an office, &c. in another man's right; whose forfeiture or misdemeanor, shall cause him, whose deputy he is, to lose his office. The Common law takes notice of deputies in many cases, but it never takes notice of under-deputies; for a deputy is generally but a person authorised, who cannot authorise another. 1 *Lill. Abr.* 446. A man cannot make his deputy in all cases; except the grant of the office justify him in it, and where it is to one, to execute by deputy, &c.

And there is a great difference between a deputy and assignee of an office; for an assignee hath an interest in the office itself, and doth all things in his own name; for whom his grantor shall not answer, unless in special cases. But a deputy hath not any interest in the office, but is only the shadow of the officer, in whose name he doth all things. And where an officer hath power to make assigns, he may implicitly make deputies. And a sheriff may make a deputy, or under-sheriff, although he have not such express words in his patent. 9 *Rep.* 49.—*Cowel*.

A deputy can not make a deputy; because it implies an assignment of his whole power, which he cannot assign over; but he may empower another to do a particular act. 1 *Salk.* 96: *Lit.* 379.

Judges cannot act by deputy, but are to hold their courts in person; for they may not transfer their power over to others. 2 *Hawk. P. C. c.* 1. § 9. But it has been adjudged, that recorders may hold their courts by deputy. 1 *Lev.* 76. The office of *Custos Brevium* and Chirographer in C. B. cannot be executed by deputy. 1 *Nelf. Abr.* 644. A steward of a court may make a deputy; and acts of an under-steward's deputy have been held good in some cases. *Cro. Eliz.* 534.

A coroner ought not to execute his office by deputy, it being a judicial office of trust; and judicial offices are annexed to the person. 1 *Lil.* 446. If the office of parkership be granted to one, he may not grant this to another; because it is an office of trust and confidence. *Terms de Ley*.

A bailiff of a liberty, may make a deputy. *Cro. Jac.* 240. And a constable may make a deputy, who may execute the warrant directed to the constable, &c. 2 *Danv.* 482. See title *Constable*.

When an office descends to an infant, idiot, &c. such may make a deputy of course. 9 *Rep.* 47. Where an office is granted to a man and his heirs, he may make an assignee of that office; and by consequence a deputy.

A Deputy of an office, hath no interest therein, but doth all things in his master's name, and his master shall be answerable; but an assignee hath an interest in the office, and doth all things in his own name, for whom his grantor shall not answer, unless in special cases. *Terms de Ley*.

A superior officer must answer for his deputy in civil actions, if he is not sufficient: but in criminal cases it is otherwise, where deputies are to answer for themselves. 2 *Inst.* 191, 466: *Dott. & Stud. c.* 42.

DE QUIBUS SUR DISSEISIN, A writ of entry, See *F. N. B.* 191.

DER, From the Sax. *Dior*, *Fera*.] The names of places beginning with this word, signify that formerly wild beasts herded there together.

DERAIGN or **DEREYN**, *Difiationare*; *dirationare*.] Seems to be derived literally from the Fr. *deraigner* or *deranger*, To confound and disorder, or to turn out of course or displace; as *deraignment* or departure out of

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religion. *Stat.* 31 *H. 8. cap.* 6. And *deraignment* and discharge of their profession. *Stat.* 33 *H. 8. c.* 29. Which is spoken of those religious men that forsook their orders or profession; and so doth *Kitcher* use it, where he says the lessee entered into religion, and afterwards was *derained*. p. 157.

In our Common Law this word is used diversly; but generally to prove, viz. to *deraign* that right, *deraign* the warranty, &c. *Glanv. lib.* 2. *cap.* 6: *F. N. B.* 146. If a man hath an estate in fee with warranty, and enfeoffs a stranger with warranty, and dies; and the feoffee vouches the heir, the heir shall *derain* the first warranty, &c. *Plowd.* 7. And jointenants and tenants in common shall have aid, to the intent to *deraign* the warranty paramount. 31 *H. 8. cap.* 1: See *Bracton, lib.* 3. *tract.* 2. *cap.* 28. *Britton* applieth this word to a summons that they be challenged as defective, or not lawfully made, *cap.* 21. And *Skene* confounds it with our waging and making of law. See *Lex Derainia*.

Perhaps this word *deraign*, and the word *deraignment* derived from it, may be used in the sense of to prove and a proving, by disproving of what is asserted in opposition to truth and fact.

DERELICT, *Derelictus*.] Any thing forsaken or left; or wilfully cast away. *Derelict* lands suddenly left by the sea belong to the King: but if the sea shrink back so slowly that the gain be by little and little, i. e. by small and imperceptible degrees, it shall go to the owner of the lands adjoining. See 2 *Comm.* 261.

DESCENDER, *Writ of formdon* in. A writ which lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them and dies; the heir in tail shall have this writ against him, who is then the actual tenant of the freehold. *F. N. B.* 211, 212, See title *Formdon*.

DESCENT, or HEREDITARY SUCCESSION;

Lat. Descensus: Fr. *Discent*; in which latter way the term is usually spelt in all old law books.] The title whereby a man, on the death of his ancestor, obtains the freehold estate of such ancestor, by right of representation, as his Heir-at-law.—It is otherwise defined; The order or means whereby lands or tenements are derived unto any man from his ancestor.—An Heir is he upon whom the law casts the estate immediately on the death of his ancestor; and the estate so descending, is in law called the Inheritance. See 2 *Comm.* 200. *lib.* 2. *c.* 14; from whence much of the following matter is abridged.

It may not be an useless preliminary observation, that the law of *Descents of real estates*, is totally distinct from that of the *Distribution of personal property*; for which latter see title *Executor* III: V. 8.

Descent, being created by law, and the most ancient title, it is termed the worthiest means by which land can be acquired; and an Heir is in by that, in preference to a grant, or devise, &c. which are called titles by purchase. It is a rule in law, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, either by conveyance or devise; for if he devise lands to one who is the heir at law, the devise is void, and he shall take by descent. *Dyer* 54, 126. And it is the same where the lands will come to the heir, either in a direct or collateral line; or where the heir comes to an estate by way of limitation, when the word heirs is not a word

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word of purchase. *Ibid.* A father hath two sons by several venters, and devises his land to his wife for life, and after her decease to his eldest son; though the son doth not take the estate presently on the death of his father, he shall be in by descent, and not by purchase, and the devise shall be void as to him. *Style* 148: 1 *Nelf. Abr.* 645. But it is said he may make his election, and take by devise, if he pleases.

A man being seised of lands which he had by the mother's side, devised them to his heirs on the part of his mother; and it was adjudged, that the devisee shall take by descent. 3 *Lev.* 127. And when the heir takes that which his ancestor would have taken if living, he shall take it by descent, and not by purchase. 3 *Danv.* 557. But generally, where an estate is devised to the heir at law, attended with a charge, as to pay money debts, &c. in such case he takes by purchase, and not by descent. Though conditions to pay money have been construed only a charge in equity; and that they do not alter the descent at Common law. 1 *Lut.* 593. 1 *Salk.* 241. See further, titles *Limitation*; *Purchase*; *Estate*; *Will*.

If one die seised of land, in which another hath right to enter, and it descends to his heir; such descent shall take away the other's right of entry, and put him to his action for recovery thereof. *Stat.* 32 *H. 8. cap.* 33. *Co. Lit.* 237. But a descent of such things as lie in grant, as advowsons, rents, commons in grofs, &c. puts not him who hath right to his action. *Co. Lit.* 237: 2 *Danv. Abr.* 561. And a descent shall not take away the entry of an infant; nor of a feme covert, where the wrong was done to her during the coverture. 2 *Danv.* 563.

The Doctrine of Descents, or law of inheritance in fee-simple, is a point of the highest importance, and is indeed the principal object of the law of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work.

In order therefore to treat a subject of this universal consequence the more clearly, it seems better to lay aside such matters as will only tend to cause embarrassment and confusion. The question, who are, and who are not capable of being heirs, comes more properly under the titles *Heir*; *Attainder*; *Escheat*; which see. We may also pass over the frequent division of descents, into those by Custom, Statute and Common law. As to descents by particular customs, as to all the sons in gavelkind, or to the youngest in Borough English, see those titles, and title Custom; and as to descents by statute, or fees-tail per formam doni, in pursuance of the Stat. of Westm. 2; see titles Estate; Limitations; Tenures.

As the law of Descents depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, briefly, the true notion of this kindred or alliance in blood.

CONSANGUINITY, or kindred, is defined by the writers on these subjects to be *vinculum personarum ab eodem scriptis descendendum*; the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity, is that which subsists between persons, of whom one is descended in a direct line from the other, as between a man and his father, grandfather, and great grandfather, and so upwards, in the direct ascend-

ing line: or between a man and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father is related in the first degree, and so likewise is the son; grandfire and grandson in the second; great grandfire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon, as in the Common law.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stipes*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if a man hath two sons, who have each a numerous issue; both these issues are lineally descended from him as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

The very being of collateral consanguinity, consists in this descent, from one and the same common ancestor. Thus A. and his brother are related; Why? Because both are derived from one father: A. and his first cousin are related; Why? Because both descended from the same grandfather; and his second cousins' claim to consanguinity is this, that they are both derived from one and the same great grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

The method of computing these degrees in the canon law, which our law has adopted (*Co. Litt.* 23,) is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus A. and his brother are related in the first degree; for from the father to each of them is counted only one; A. and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz. his own grandfather, the father of A.

The learned Commentator then proceeds to lay down a series of Rules, or Canons of Inheritance, according to which, estates are transmitted from the ancestor to the heir, with an explanatory comment.

I. THE FIRST RULE is, that *Inheritance shall lineally DESCEND* to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ASCEND.

By law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est heris viventis*. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. *Heirs apparent* are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the Common law be heir to the father whenever he happens to die. *Heirs presumptives* are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated

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seated by the contingency of some nearer heir being born: as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may hereafter be cut off by the birth of a son. Nay even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally devested by the birth of a posthumous son. *Bro. tit. Descent* 58.

And besides this case of a posthumous child, if lands are given to a son who dies, leaving a sister his heir; if the parents have at any distance of time afterwards another son, this son shall devest the descent upon the sister, and take the estate as heir to his brother. *Co. Lit. 11: Doct. & Stud. d. 1. c. 7.* So the same estate may be frequently devested by the subsequent birth of nearer presumptive heirs, before it fixes upon an heir apparent. As if an estate is given to an only child, who dies; it may descend to an aunt, who may be stripped of it by an after-born uncle; on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother, the heir apparent. *Christian's note on 2 Comm. 208.*

It seems determined that every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. *1 Inst. 11. in u: 2 Wils. 526.*—See further as to the entry of a posthumous heir, *Watkinson Descent, c. 4.*

No person can properly be such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had *actual seisin* of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or receiving rent from a lessee of the freehold: (*Co. Litt. 15:*) or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like. *Co. Litt. 11.* But he shall not be accounted an ancestor, who hath had only a bare right or title to enter, or be otherwise seised. The seisin therefore of any person, thus understood, makes him the root, or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem. Flet. l. 6. c. 2. § 2.*

Though it be necessary the ancestor be *seised*, yet it is not required that the seisin continue till the death of such ancestor: for if he had been seised at any time during his life, and afterwards disseised, still if he had not parted with his right or property, his heir shall inherit. *1 Inst. 237 b.*—See *Watkinson Descent.* If the hereditaments descending be in reversion or remainder, expectant on an estate of freehold, the heir may obtain what will be equivalent to an actual seisin, by granting them over for life or in tail. See *post. VI. as to possessio fratris.*

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be grandfather, father, and son, and the father purchases lands and dies; his son shall succeed him as heir, and not the grandfather, to whom the land shall never *lineally* ascend, but shall rather escheat to the lord. *Litt. § 3.* This rule, that the inheritance shall never *lineally* ascend, clearly appears to be of feudal original, and the propriety of, it

is well defended at some length by the learned Commentator, to whom we refer the reader desirous of investigating the subject, as a matter rather of curiosity than utility.

Though an estate cannot *lineally* ascend, the father may take his son's estate by an *intermediate descent*; for if the son has neither issue, nor brothers or sisters, the estate will descend to an uncle, or some collateral relation, to whom the father may on his decease be the next heir. And in some cases, the father or mother may inherit immediately from a child. As if either of them are cousin to the child; a case of which nature occurs in *2 P. Wms. 613*; where a son died, seised in fee of land, without issue, brother or sister, but leaving two cousins, his heirs at law, one of whom was his own mother, the question was, whether the mother could take as heir to her son. The Master of the Rolls was of opinion, that though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin. See *2 Comm. 212. in n.*

In *1 Inst. 8.* It is said, that if a man hath issue an elder son, born out of the King's allegiance, and after hath another son born within the realm; the younger son shall have lands by *descent* from his father in this case, and not the elder who had never any inheritable blood in him. *Co. Lit. 8.*—But if the father in this case is to be supposed a natural-born subject at the birth of the issue, the child would now be also a natural-born subject by force of *Stats. 7 An. c. 5: 4 Geo. 2. c. 21.* But the children of persons attainted of, or liable to the penalties of, treason, or in the service of a foreign state in enmity with *Great Britain*, are excepted from the benefit of this provision. See *Stat. 25 E. 3. § 2.*, which declares that at Common law, the children of the King wherever born, may inherit. The same statute enables children born abroad to inherit, if at their birth *both* their parents are within the King's allegiance, and their mothers pass the sea, with the licence of their husbands. See *1 Inst. 8. in n.*

Lord Coke also lays it down for law, that if an alien hath issue in *England* two sons, though these sons are *indigenæ*, subjects born, they cannot inherit to each other. But in the case of *Collingwood v. Pace*, this was denied to be law, and it was expressly held that such sons of aliens were inheritable to each other. See *1 Sid. 193: 1 Vent. 413.* And now by *Stat. 11 & 12 W. 3. c. 6.* natural-born subjects may derive a title by descent through their parents, though aliens; but *Stat. 25 Geo. 2. c. 39.* confines the benefit of the former statute to such heirs as shall be living, and capable of taking at the death of the person last dying seised; unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision. Both these acts are extended to *Scotland* by *Stat. 16 Geo. 3. c. 52.* The principle, on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder. See *1 Inst. 8. in n.*—And further this Dict. titles *Alien, Attainder.*

II. A SECOND GENERAL RULE, or canon is, that the *male* issue shall be admitted *before* the female. Thus sons shall be admitted before daughters; or, as our law expresses it, the worthiest of blood shall be preferred. *Hal. H. C. L.*

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235. As if one hath two sons, and two daughters, and dies; first the eldest son, and (in case of his death without issue) then the youngest son shall be admitted to the succession in preference to both the daughters.

The reason of this, as well as of the preceding rule, must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud; inasmuch as females were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations.

III. A THIRD RULE, or Canon of descent, is; that where there are two or more males in equal degree, the eldest son shall inherit; but the females all together.

As if a man hath two sons, and two daughters, and dies; his eldest son shall alone succeed to his estate, in exclusion of the second son and both the daughters; but, if both the sons die without issue before the father, the daughters shall both inherit the estate as coparceners. *Litt. § 5: Hal. C. L. 238.* This rule is also of feudal original, and arose from thence on the establishment of that constitution in England, by William the Conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil wrote, in the reign of Henry II. and it is mentioned in the *Mirror*, (c. 1. § 3.) as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among male children.

However, in Henry III.'s time, we find by *Bracton*, (l. 2. c. 30, 1.) that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands; except in *Kent*, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law; for they were all equally incapable of performing any personal service: and therefore one main reason for preferring the eldest male, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates; was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the Crown; wherein the necessity of a sole and determinate succession, is as great in the one sex, as in the other. 1 *Inst.* 165. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be Countess, but the dignity is in suspense or abeyance till the King shall declare his pleasure; for he, being the fountain of honour, may

confer it on which of them he pleases. *Ibid.*—See titles *Abeyance, Peers.*

IV. A FOURTH RULE, or Canon of descent, is; that the lineal descendants, in infinitum, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great grandchild, (either male or female) of an eldest son, succeeds before a younger son, and so in infinitum. *Hal. H. C. L. 236, 7.* And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, and one dies, leaving six daughters; and then the father of the two sisters dies, without other issue: these six daughters shall take among them exactly as much as their mother would have done, had she been living; that is, a moiety of the lands in coparcenary: so that, upon partition made, if the land be divided into twelve parts, the surviving sister shall have six parts, and her six nieces, one part each.

This taking by representation, is called succession *in stirpes* according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. So if the next heirs of a man be six nieces, three by one sister, two by another, and one by a third; his inheritance by the laws of England, is divided only into three parts, and distributed *per stirpes*, thus; one third to the three elder children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

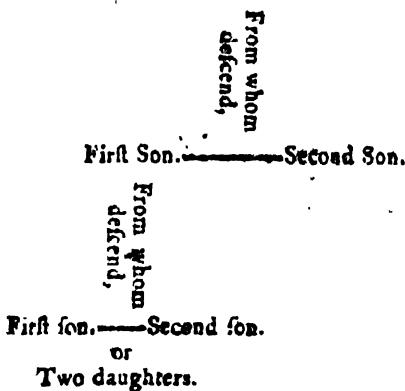
This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males. For if all the children of three sisters were to claim *per capita*, in their own right, as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male, and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters, or else the law in this instance, must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As 1. if a man hath two sons, *A.* and *B.* and *A.* dies, leaving two sons, and then the grandfather dies; now the eldest son of *A.* shall succeed to the whole of his grandfather's estate: and if *A.* had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of *B.* and his issue. But 2. if a man hath only three daughters, *C. D.* and *E.*; and *C.* dies leaving two sons, *D.* leaving two daughters, and *E.* leaving

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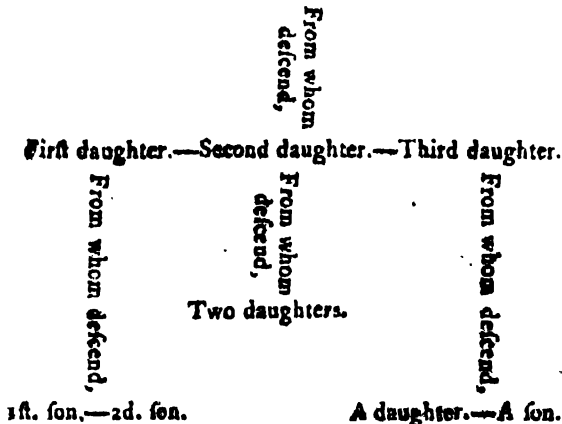
leaving a daughter and a son, who is younger than his sister: here when the grandfather dies, the eldest son of *C.* shall succeed to one third, in exclusion of the younger; and the two daughters of *D.* to another third in partnership; and the son of *E.* to the remaining third, in exclusion of his eldest sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in infinitum.

How far the two immediately preceding, and other, cases in the course of this title may be explained by the following scheme, the student is left to determine. It may perhaps afford a hint for statements in more complicated cases of descent. For regular tables of Consanguinity and Descent, See 1 *Inst*; *The Commentaries*; and *Watkins's Treatise on Descent*.

1. The PERSON dying seised.



2. The PERSON dying seised.



King *John*, however, who kept his nephew *Arthur* from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm. *Hale H. C. L.* 217, 229. But in the time of his son King *Henry III.* the rule was indisputably settled in the manner here laid down, *Braff. l. 2. c. 30. § 2*; and so it has continued ever since. And thus much for lineal descents.

V. A FIFTH RULE is, that, on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the

first purchaser, subject to the three preceding rules. Thus if *A.* purchase land, and it descend to *B.* his son, who dies seised thereof without issue; whoever succeeds to this inheritance, must be of the blood of *A.* the first purchaser of this family. *Co. Litt.* 12. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and these of a similar feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles, which did not originally permit the descent of lands to any but one of the lineal descendants of the first purchaser, who in the case of a *feudum novum*, or estate purchased by the ancestor himself, could only be his own offspring; so that such estate could not descend even to his brother. See this *Dict.* title *Tenures*; I. 3.

But when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even in infinitum, because they might have been of the blood of, that is descended from, the first imaginary purchaser.

Of this nature, are all the grants of fee-simple estates of this kingdom; for there is now in the law of *England*, no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple, is with us a *feudum novum*, to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the Feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to *A.* by descent from his mother; no relation of his father (as such) shall ever be his heir of these lands; and, *vice versa*, if they descended from his father, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, the relations of his father's mother, shall for the same reason never be admitted, but only those of his father's father.

Hence the expression *heir at law* must always be used with reference to a specific estate; for if an only child has taken by descent an estate from his father, and another from his mother; upon his death without issue, these estates will descend to two different persons. So also, if his two grandfathers and two grandmothers, had each an estate, which descended to his father or mother, being only children, then these four estates will descend to four different heirs. 2 *Comm.* 222 in n.

This

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This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the year books; *M. 12 Ed. IV. 14*; *Fitzherbert. Abr. 1. Discent. 2*; *Brook. Ibid. 38*; and *Hale. H. C. L. 243*; "That he who would have been heir to the father of the deceased, (and of course to the mother, or any other real or supposed purchasing ancestor) shall also be heir to the son;" a maxim that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds.

VI. A SIXTH RULE, or canon is, that the *collateral heir* of the person last seised, must be his next collateral kinsman, of the *whole blood*.

First, he must be his next collateral kinsman, either personally, or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other.

When the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman in the paternal line, will inherit before the nearest in the maternal. So that the expression that the *collateral heir*, must be the next *collateral kinsman*, is qualified by the general rules of descent which prefer the male line to the female.

The designation of person, however, in seeking for the next of kin, will come to exactly the same end; (though the degrees will be differently numbered,) whichever method of computation we suppose the law of *England* to use; since the right of representation of the parent by the issue, is allowed to prevail in *infinitum*. Indeed it may be questioned how far the introduction of the computation of kindred, either by the canon or civil law, is of use in the Common-law doctrine of Descents.

This right of representation being established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if *A.* dies without issue, his estate shall descend to his eldest brother, (if more than one) or his representatives; he being lineally descended from *A.*'s father his next immediate ancestor. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of *A.* the lineal descendant of his grandfather; and so on in *infinitum*.

The *eldest brother* of the whole blood shall have land by descent, purchased by a middle or younger brother, if such die without issue; for as to descents between brethren, the eldest is the most worthy of blood to inherit to them as well as to the father. *Lit. 3*: *3 Rep. 40*.

Here it must be observed, that the lineal ancestors though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to

have already passed them, are yet the common stocks from which the next successor must spring.—But though the common ancestor be thus the root of the inheritance, yet it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers, is held to be an *immediate* descent; and therefore title may be made by one brother, or his representatives, to or through another, without mentioning their common father... *Sid. 195*: *1 Fentr. 423*: *1 Lec. 60*: *12 Mod. 619*.

The law takes no notice of the *disability* of the father in case of descent, but only of the immediate relation of brothers and sisters, as to their estates; so that the inability of the father doth not hinder the descent between them: for example; A man had issue a son and a daughter, and was attainted of treason, and died; the son purchased lands and died without issue; and it was adjudged that notwithstanding the attainder of the father, the daughter shall take by descent from her brother, because the descent between them was immediate, and the law doth not regard the disability of the father. *4 Leon. 5*. See *4 Rep. 31*, 124.

Where a person seised of lands, hath issue two daughters, if one of them commits felony, after the father's death, both daughters being alive, a moiety shall descend to one daughter, and the other shall escheat. *Co. Lit. 153*.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is; he must be the nearest kinsman of the *whole blood*; for, if there be a much nearer kinsman of the *half blood*, a distant kinsman of the whole shall be admitted, and the other entirely excluded: nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he is only properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus the blood of *A.* being composed of those of his father and his mother, therefore his brother being from both the same parents hath entirely the same blood with *A.*; or in other words he is his brother of the whole blood. But if, after the death of *A.*'s father, his mother had married a second husband, and had issue by him; the blood of this issue, being compounded of the blood of *A.*'s mother only, on the one part, but of that of the second husband, on the other part, it hath therefore only half the same ingredients with that of *A.* himself; so that such issue is only *A.*'s brother of the half blood; and for that reason they shall never inherit to each other. So also if the father has two sons, *A.* and *B.* by different wives, or wives; these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay even if the father dies, and his lands descend to his eldest son *A.* who enters therein, and dies seised without issue; still *B.* shall not be heir to this estate, because he is only of the half blood to *A.* the person last seised: but it shall descend to a sister (if any) of the whole blood to *A.*; for in such cases the maxim is, that *possessio fratris facit sororem esse heredem*; the seisin or possession of the brother makes the sister to be heir. Yet, had *A.* died without entry then *B.*

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might have inherited; not as heir to *A.* his half brother, but as heir to their common father, who was the person last actually seised. *Hale H. C. L.* 238.

Of some inheritances there cannot be a seisin, or *possessio fratris*: as if the eldest brother dies before a presentation to an advowson, it will descend to the half brother, as heir to the person last seised, and not to the sister of the whole blood. 1 *Bur. Ec.* 11. So of reversions, remainders and executory devises, there can be no seisin or *possessio fratris*; and if they are reserved or granted to *A.* and his heirs, he who is heir to *A.* when they come into possession is entitled to them by descent: that is the person who would have been heir to *A.* if *A.* had lived so long and had then died actually seised. 2 *Woddl.* 256: *Fearne* 418: 2 *Willf.* 29. and see further this title *ad finem* relative to the descent of reversions, &c.—But though a *possessio fratris* cannot properly be of a remainder or reversion expectant upon an estate of freehold, yet by the exertion of certain acts of ownership, as by granting them over for term of life, a *possessio fratris* of them may be made. 8 *Rep.* 35 b: 1 *Inst.* 15 a; 191 b.—There can be no *possessio fratris* of an estate-tail; nor of honorary dignities. Nor of the descent of the crown, and its possessions; nor of a mere right. See *Watkins on Descents.* c. 1. § 4. and the authorities there cited.

The total exclusion of the half blood from the inheritance being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent as of a rule of evidence; an auxiliary rule, to carry a former into execution.

To illustrate this rule by example. Let there be *A.* and *B.* brothers, by the same father and mother, and *C.* another son, of the same mother by a second husband. Now if *A.* dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother *B.* of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or mother. But if *B.* should die before *A.* without issue, *C.* the brother of the half blood is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown; nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case in *feudis antiquis*, where there really did exist a purchasing ancestor, who is forgotten, it is also the case in *feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore, any of the collateral kindred of the real modern purchaser, (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the pur-

chaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all.

This rule as to the exclusion of the half blood, is certainly a very fine-spun and subtle nicety: but, considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than a strict right of collaterals: and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. See this *Dist. title Tenures* III. 5. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser; without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. It seems however that in some instances, the practice is carried farther than the principle upon which it goes will warrant. It is more especially over-strained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters, and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor. This, it must be owned, carries a hardship with it, even upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable, that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors.

It is moreover worthy of observation, that the Crown, (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign. *Plowd.* 245: *Co. Litt.* 15; so that it be the blood of the first monarch, purchaser (or in the feudal language) conqueror, *conqueror*, of the reigning family. Thus it actually did descend from king *Edward VI.* to queen *Mary*, and from her to Queen *Elizabeth*, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king *William the Norman*, and is now (by *Stat. 12 Will. III. c. 2.*) the Princess *Sophia of Hanover*. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent. *Lit.* § 14, 15; because when the lineage is clearly made out, there is no need of this auxiliary proof. Also in titles of honour half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled. 1 *Inst.* 15. See this *Dist. title Peers*. How far it might be desirable to amend the law of descents in one or two instances, and ordain that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and, in cases of new-purchased lands or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience

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inconvenience should be still submitted to, rather than a long established rule should be shaken, is for the Legislature to determine. See further 2 *Comm.* 233. in n.

The rule then, together with its illustration, amounts to this; that in order to keep the estate of *A.* as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

In order then to avoid the confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the proximity and entirety; which is that of dignity, or worthiness, of blood. For,

VII. THE SEVENTH and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female; (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those of the blood of the female, however near;) unless where the lands have, in fact descended from a female.

Thus the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all. *Litt.* § 4. And the relations of the father's father, before those of the father's mother, and so on.—This rule seems to have been established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchaser.

That this was the true foundation of the preference of the agnate or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed: and no relation of his by the father's side, as such, can ever be admitted to them: because he cannot possibly be of the blood of the first purchaser. And so, *converso* if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. 1 *Inst.* 14.—See *Watkins on Descent*, c. 5.

But it has been resolved, that a fine and render of lands, claimed by a party, as heir at law *ex parte materna*, will alter the quality of the estate; so that it shall descend to the heir *ex parte paterna*. 6 *Rep.* 63: *Carthew* 141.

Also if a man seized of land, as heir of the part of his mother, make a feoffment and take back an estate to him and his heirs; this, as a purchase, alters the descent, and if he die without issue, the heir of the part of the father shall inherit it. *Co. Lit.* 12.

The short Result of all the above rules and explanations is, that when a man (A.) dies seized of an estate in fee-simple, it shall,—1. In the first place, descend to his eldest son and heir or his issue.—2. If his line be extinct, then to the second or other sons of A. respectively, in order of birth; or their issue; the issue of an elder brother being still preferred to the person of a younger, that is to say, the children of the second son, to the 3d son himself, and so on.—3. In default of sons, or their issue, then to all the daughters of A. together, or their issue. See ante III. IV.—4. On failure of descendants from A. himself, then to the issue of his father and mother; the eldest brother of the whole blood, or his issue; or on failure of them, the other whole brothers of A. respectively, in order of birth, or their issue; or on failure of them, the sisters of A. of the whole blood

respectively, or their issue.—5. On failure of descendants from the father and mother of A. then to the issue of his grand-father and grand-mother by the father's side; still tracing the line of relationship on the father's side, till it entirely fails; when and not before, recourse must be had to the relations of his mother in the same regular successive order as in the paternal line. See more fully and accurately, 2 *Comm.* c. 14, p. 203.—240; on the whole of this subject, which in some points seems at first intricately intricate; but will soon unfold itself to the researches of the diligent student; who to understand many parts of it should be intimately acquainted with the law of *Tenures*. See that title in this Dictionary.

As to the DESCENT OF REVERSIONS AND REMAINDERS expectant upon estates of freehold, see *Watkins's Essay on the Law of Descents* (1793); from whence some curious observations have already been adopted, and the following extract from which, on this part of the subject, may be deserving attention.

“The principles which apply to the descent of an estate in possession do not apply to the descent of an estate in remainder or reversion, expectant on an estate of freehold, but they apply when the particular estate is only for years: a tenant for years being considered merely as the bailiff of the freeholder and to hold the possession for him. 1 *Inst.* 239. b. n. 2.

“When a reversion or remainder, expectant upon an estate of freehold, continues in a course of descent, without certain acts of ownership exerted, such reversion, &c. still continually devolves, on the death of each particular heir, to the person who can then make himself heir to the donor or purchaser; without any regard to the very heir of the precedent person who succeeded to it by descent; till when the particular estate is determined, it ultimately vests in possession in him, who at such determination, is the right heir of such donor, purchaser or original remainder-man. For as there was no intermediate person actually seized of such reversion or remainder, no one could be the mean of turning its descent, and becoming a new stock or terminus; but such stock must yet be the donor, purchaser or remainder-man, and must so continue, (if no alienation be made) till such estate shall become vested in possession; and consequently, it will be absolutely necessary to prove, on every devolution, a descent, not from the immediate predecessor who took by descent, (for with him, as such, in this case, there is nothing to do) but from the donor, purchaser, or original remainder-man. Whoever, therefore, can make himself heir to such donor, &c. will be entitled to the inheritance in reversion or remainder, though expectant; but yet not so as to be capable of transmitting it to his own right heirs, (as such) except by granting it over; till it becomes vested in possession, by the determination of the particular estate which supported it, or whereon it was expectant, (when it would cease to be a reversion or remainder,) in him who should be, at that time, the right heir of the donor, &c. which person would then become the stock of descent, and him from whom the future pedigree must run on his obtaining an actual seisin of it. See *Fearn's Conting. Rem.* 449: (3d edit.) *Co. Litt.* 11 b; 14 a; 15 a: 3 *Co.* 42: *Cro. Car.* 411—12: 8 *Co.* 96 a: 1 *Co.* 95, 99: *Plowd.* 56, 113, 585, 9: *Brooke's Descent* 2 & 58; *Dome.* 5 & 21; *Scire Fac.* 126: *Cro. Elin.* 334, 5: *Dyer* 129, pl. 63: See 2 *Com. Dig.* title *Copbold*, (K. 11): *Descent* (C. 2.): *Robinson on Gavelk.* Appendix: *Kitch.* 215: 1 *Fen.* 174.

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"So also with respect to contingencies and executory devises.—Thus on a devise to G. in fee; but if he happened to die under the age of twenty-one years, leaving no issue, then to P. in fee; after the decease of the testator, P. died in the life-time of G. who afterwards died under the age of twenty-one and without issue; it was held that the lands vested in P's heir at law, upon the happening of the contingency, (*viz.* on the death of G. under age, and without issue,) but that the interest, while it was contingent, did not so attach in G. who was heir at law to P. on his decease, as to carry it, on his death, to his heir at law, who was not heir at law to P. but that it vested in that person *who was heir at law to P.* (the first purchaser) *at the time of the contingency happening.* See 2 *Willf.* 29. *Goodright and Searle*; and cited also in *Fearne on Con. Rem.* 448. (3d edit.) And see *Cro. Car.* 410, 13; *Hobart* 33; *Plowd.* 485, 9; 3 *Com. Dig. tit. Descent.* (C. 2.)"

See ante VI.—See further as to other points concerning the doctrine of Descents and points involved therewith, titles *Estate*; *Heir*; *Limitation*; *Reversioner*; *Executory Devise* &c.

DESCENT OF CROWN LANDS.—See titles *Descent*; *King*.

DESCENT OF DIGNITIES.—See titles *Descent*; *Peer*.

DESCRIPTION, [*descriptio.*] In deeds and grants there must be a certain description of the lands granted, the places where the lands lie, and of the persons to whom granted, &c. to make them good. But wills are more favoured than grants as to those descriptions; and a wrong description of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nelf. Abr.* 647.

Where a first description of land, &c. is false, though the second is true, a deed will be void: *contra*, if the first be true, and the second false. See 3 *Rep.* 2, 3. 8. 10. 28. 33, 34, &c. See titles *Deed*; *Will*.

DESERTION FROM THE ARMY, See title *Courts-Martial*.

DE SON TORT DEMESNE, See *De injuriâ sua propria*; and titles *Trespass*; *Phinding*.

DESPITUS, A contemptible person. *Fleta, lib. 4. cap. 5. par. 4.*

DESUBITO, To weary a person with continual barkings, and then to bite; which is provided against by old laws. *Leg. Alured.* 26.

DETACHIARE, To seize or to take into custody another person's goods, &c. by attachment or other course of law. *Conuel.*

DETAINDER, See titles *Forcible Entry and Detainer*.

DETERMINATION OF WILL, See title *Estate at Will*.

DETINET, See *Debet & Detinet*.

DETINUE, [*detinendo.*] In the Common law is like *actio depositi* in the Civil law; and is a writ which lies against him, who having goods or chattels delivered to keep, refuseth to re-deliver them. In this action of *detinue* is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn or the like, for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of *detinue*, which is only for the detaining, these points are necessary; See 1 *Inst.* 286; 1. That the defendant came lawfully into possession of the goods,

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as either by delivery to him or by finding them.—2. That the plaintiff have a property.—3. That the goods themselves be of some value.—4. That they be ascertained in point of identity: Upon this the jury, if they find for the plaintiff, assess the several values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods; or, if they cannot be had, their respective values, and also the damages for detaining them. *Co. Ent.* 170: *Cro. Jac.* 681.

There is one disadvantage which attends this action, *viz.* that the defendant is herein permitted to wage his law; (that is, to exculpate himself by oath; See title *Wager of Law*;) and thereby defeat the plaintiff of his remedy; which privilege in this case is grounded on the confidence originally reposed in the bailor by the bailor, in the borrower by the lender, or the like: from whence arose a strong presumptive evidence, that in the plaintiff's own opinion, the defendant was worthy of credit. See 1 *Inst.* 295.

For this and other reasons the action of *detinue* is now much disused, and has given place to the action of *Trover*. See title *Trover*; and also title *Bailment*.

The following cases on the subject of *Detinue*, may prove matter of use as well as of curiosity, and see further *Viner*, title *Detinue*, and *Bull. N. P.* 49—51.

Detinue may be brought for a piece of gold, of the price of 21 s. though not for 21 s. in money; for here is a demand of a certain particular piece. *Bull. N. P.* 50.

If a man receiving money from a banker, put part thereof into his bag, and while he is telling the rest, the bag is stolen; no action of *detinue*, &c. lies; because by putting up the money, he had appropriated it to his own use. *Comb.* 475. A man lends a sum of money to another, *detinue* lies not for it, but debt; but if A. bargains and sells goods to B. upon condition to be void, if A. pays B. a certain sum of money at a day; now if A. pays the money, he may have *detinue* against B. for the goods, though they came not to the hands of B. by bailment, but by bargain and sale. *Cro. Eliz.* 867; 2 *Dauv.* 510.

If a man delivers goods to A. to deliver to B. B. may have *detinue*, for the property is in him: and where he delivers them to B. and after grants them to D. he shall not have *detinue* after the grant, but the grantee shall have it. *Yelv.* 241: 1 *Bulst.* 69. When goods are delivered to one, and he delivers them over to another, action of *detinue* may be had against the second person, and if he delivers them to one that has a right thereto, yet it is said he is chargeable: also if a person to whom a thing is delivered dieth, *detinue* lieth against his executors, &c. or against any person to whom a thing comes. 2 *Dauv.* 511.

A man may have a general *detinue* against another that finds his goods: though if I deliver any thing to A. to re-deliver, and he loses it, if B. finds it and delivers it to C. who has a right to the same, he is not chargeable to me in *detinue*, because he is not privy to my delivery. 7 *H. 6.* 22: 9 *H. 6.* 58.

In actions of *detinue*, the thing must be once in the possession of the defendant; which possession is not to be altered by act of law, as seizure, &c. And the nature of the thing must continue, without alteration, so intitle one to this action. *F. N. B.* 138. If I find goods, and be-
fore

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fore the owner brings his action, I sell them; or they are recovered out of my hands upon an execution, or out-lawry against the owner, &c. he cannot have *detinue* against me. 12 E. 4. 8: 37 H. 8. 13. But action of *detinue* will lie against him that finds goods, if they are wasted by wilful negligence. *Dr. & Stud.* 129.

A man buys cloth or other things of another, on a good and perfect contract; if the seller keeps the things bought, *detinue* lieth. *Dyer* 30, 203. Where one takes my goods into his custody to keep them for me, and refuses to restore them; although he have nothing for the keeping of them, this action will lie. 4 Rep. 84: 29 Aff. pl. 28. If I deliver to one a trunk that is locked, with things in it, and keep the key myself, and something be taken out of it, writ of *detinue* lieth not for this; but if the trunk, and all that is in it be taken away, there it lies. 11 Rep. 89: 4 E. 3.

This action will not lie, where a man delivers goods to me, and I bid him take them again, if he refuses to do it; or where one takes my goods or cattle by wrong as a trespasser; or by way of distress for rent or as damage-feasant, &c. Nor for a horse sick, when it is taken or lent; if he dies of that sickness. *Bro. Latin.* 242: 43 E. 3. 21: 21 E. 4. And if it be a ring that is delivered to another, and he breaks it, it is doubted whether action of *detinue* may lie; because the thing is altered, and cannot be returned as it was: but action on the case lieth. And although, where goods are found, and sold, &c. *detinue* lies not: yet action upon the case of *trover* and *conversion* may be brought. 12 E. 4. 8: 18 E. 4. 22.

DETINUE OF CHARTERS. A man may have *detinue* for deeds and charters concerning land; but if they concern the freehold, it must be in C. B. and no other court. Action of *detinue* lies for charters which make the title of lands; and the heir may have a *detinue* of charters, although he hath not the land: if my father be disseised, and dieth, I shall have *detinue* for the charters, notwithstanding I have not the land; but the executors shall not have the action for them. *New Nat. Br.* 308. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if they be in a chest locked, &c. and I know not their certainty, I may recover them by this writ: so where lands are given to me and J. S. and my heirs, and he dies, if another gets the deeds, and if tenant in tail give away the deed of entail, and then die, his issue may bring a writ of *detinue* of charters. *Co. Lit.* 286: 1 Rep. 2: F. N. B. 138. But if the tenant in fee-simple do give away his deeds of the land, his heir may not have this action: and in case a woman great with child by her deceased husband keeps the charters from his daughter and heir that concern the land, during the time she is with child, this writ will not lie against her. 41 E. 3. 11.

Detinue was brought for a deed, and the plaintiff had a verdict, that the defendant detained the deed, and the jury gave 20*l.* damages, but did not find the value of the deed; and then there issued out a *distingas* to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value: whereupon the jury found a different value from what the first verdict found; and it was adjudged good. *Raym.* 124: 1 Nels. Abr. 649. In *detinue* of charters, if the issue be upon the *detinue*,

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and it is found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, which it appears cannot be had; but it is said it shall be for the plaintiff to recover the land in damages. 2 Rol. Abr. 101: 2 Danv. Abr. 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of lease, the defendant shall not wage his law, as he may in a common action of *detinue*. 1 Inst. 295.

DETINUE OF GOODS IN FRANK-MARRIAGE, is on a divorce between a man and his wife; after which, the wife shall have this writ of *detinue* for the goods given with her in marriage. *Mich.* 35 E. 1: *New Nat. Br.* 308.

DETRACTARI, To be torn in pieces with horses — *Apostata, sacrilegi, & bujismodi, detractari debent & comburi. Flota, lib. 1. cap. 37.* But we know not, now, of any such punishment by our laws.

DETUNICARE, To discover or lay open to the world. *Matth. Westminster.* 1240.

DEVADIATUS, Is where an offender is without sureties or pledges. *Domesday.*

DEVASTAVIT; OR DEVASTAVERUNT BONA TESTATORIS. A writ that lies against executors or administrators, for paying debts upon simple contract, before debts on bonds and specialties, &c. for in this case they are liable to action, as if they had squandered away, or wasted the goods of the deceased, or converted them to their own use; and are compellable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. *Dyer* 232. But if an executor pays debts upon simple contract, before he hath any notice of bonds, it is no *devastavit*; and regularly this notice is by an action commenced against him, for the law doth not oblige him to take notice of it himself, nor of a judgment against his testator, because he is not privy to acts done either by or against him. 1 Mol. 175: 1 Lev. 215.

Where an executor payeth legacies before debts, and hath not sufficient to pay both, it is a *devastavit*. Also where an executor sells the testator's goods at an under-value, it is a *devastavit*; but this is understood where the sale is fraudulent; for if more money could not be had, it is otherwise. *Keilw.* 59: 1 Nels. Abr. 649. Executors keeping the goods of the deceased in their hands, and not paying the testator's debts; or selling them, and not paying off debts, &c. or not observing the law which directs them in the management thereof; or doing any thing by negligence or fraud, whereby the estate of the deceased is misemployed, are guilty of a *devastavit*, or waste; and they shall be charged for so much *de bonis propriis*, as if for their own debt. 8 Rep. 133. But the fraud or negligence of one executor is not chargeable on the rest, where there are several executors. 1 Rol. Abr. 929.

There are some cases in the old books, in which it hath been held, if an executor wastes the goods of the testator, and afterwards makes his executor, and dies, leaving assets, that an action of debt will not lie against the executor of the wasting executor, upon a suggestion of a *devastavit* or waste by the first executor; because it is a personal wrong which died with him. 3 Leon. 241. But in this case there is a difference between a lawful executor, and an executor *de son tort*; for as an executor *de son tort* possesses himself of the goods wrongfully, if he afterwards wastes them, and dies, leaving assets, his executor

ecutor shall be charged upon the suggestion of a *devastavit* in his testator, because he came wrongfully by the goods, and therefore the wrong shall not die with his person. 2 *Lev.* 133—See title *Executor*, V. 1. And before the *Stat.* 30 *Car.* 2. c. 7, it was decreed in equity against the executor of a lawful executor, who had wasted the goods, and died, that such executor should be liable to make good to the creditors of the testator, so much as the first executor had wasted, and so far as he had assets of the said first executor. 1 *Chanc. Rep.* 257.

By the said *Stat.* 30 *Car.* 2. c. 7, it is enacted, That if an executor *de son tort* wastes the goods, and dies, his executors shall be liable in the same manner as their testator would have been, if he had been living. And it has been since adjudged, that a rightful executor, who wastes the goods of the testator, is in effect an executor *de son tort* for abusing his trust; 3 *Mod.* 113. And his executor or administrator is made liable to a *devastavit*, by *Stat.* 4 & 5 *W. & M.* c. 24, which statute makes the *Stat.* 30 *C.* 2. c. 7, perpetual.

Debt lies against an executor in the *debet* and *detinet*, where there is a judgment against his testator, upon a suggestion only, that he had wasted the goods; and this is a more expeditious way than the old method of *sci. fac. inquiry*, which was issued to shew cause why the plaintiff should not have execution against the executor *de bonis propriis*, and thereupon the sheriff returned a *devastavit*, &c. 1 *Lev.* 147: 1 *Nelf.* 653.

A husband is to be charged for waste done by his wife *dum sola*; but the husband is not chargeable after the death of a wife executrix, on suggestion of a *devastavit* in a declaration against him. *Cro. Car.* 603: *Lutw.* 672. And it has been adjudged, that a feme covert executrix cannot do any waste during the coverture; though for waste done by the husband she shall be charged, if she survive him; but then it must be on a judgment obtained against him, and not on a bare suggestion of a *devastavit*, &c. 2 *Lev.* 145. If an executor or administrator confesses judgment, or suffers it to go by default, he thereby admits *assets*, and is estopped to say the contrary in an action on such judgment suggesting a *devastavit*. 1 *Will.* 258.—See titles *Debt*; and further, particularly title *Executor*, VI. 2.

DEVENERUNT, A writ heretofore directed to the escheator on the death of the heir of the King's tenant under age and in custody, commanding the escheator that by the oaths of good and lawful men he inquire what lands and tenements by the death of the tenant came to the King. *Dyer* 360. This writ is now disused; but see *Stat.* 14 *Car.* 2. c. 11, for preventing frauds and abuses in his Majesty's Customs.

DEVEST, *devestire*.] Is opposite to *invest*. As to *invest* signifies to deliver the possession of any thing to another, so to *devest* signifieth to take it away. *Feud. lib.* 1. cap. 7.

DEVISE, from the Fr. *deviser*, to divide or sort into parcels.] A gift of lands, &c. by a last will and testament. The giver is called the *devisor*; and he to whom the lands are given, the *devisee*. A *devise* in writing is, in construction of law, no deed; but an instrument by which lands are conveyed.

To DEVISE, is to give by will.

The word was formerly, particularly applied to bequests of land; but is now generally used for the gift of any legacies whatever.

For the law relating to *Devisees*, as well of real as personal estates, See fully this *Dist.* title *Will*. As to *Executory Devisees*, See title *Executory Devise, Estate, Limitation, Remainder*.

DEVOIRES or CALEIS, Fr. *Devoir*, Duty.] The customs due to the King, for merchandise brought into or carried out of *Calais*, when our staple remained there. *Stat.* 2 *R.* 2. *Stat.* 1. c. 3.—See *Stat.* 34 *Ed.* 1. c. 18.

DEXTRARIUS, One at the right hand of another. And the word *dextrarius* has been used for light horses, or horses for the great saddle; from the Fr. *deffrier*, a horse for service.

DEXTRAS DARE, Shaking of hands in token of friendship; or a man's giving up himself to the power of another person. *Walsingh.* p. 312.

DIARIUM, Is taken for daily food; or as much as will suffice for the day. *Du Cange*.

DIASPERATUS, Stained with many colours. *Mon. rom.* 3. pag. 314.

DICA, A tally for accounts, by number of *tailles*, cuts or notches. *Lib. Rub. Scaccar.* fol. 30.

DICKAR, or DICKER OF LEATHER, Is a certain quantity, consisting of ten hides, by which leather is bought and sold. Vide *Stat.* 51 *H.* 3. *St.* 1. There are also *dickers* of iron, containing ten bars to the *dicker*. This word is thought to come from the Greek *δύναμις*, which signifies ten. *Domesday*.

DICTORES AND DICTUM. The one signifies an arbitrator; and the other the arbitrament. *Malm.* p. 348.

DICTUM DE KENELWORTH. An edict or award, between King Henry the Third and his Barons and others, who had been in arms against him: so called, because it was made at *Kenelworth Castle* in *Warwickshire*, anno 51 *Hen.* 3. It contained a composition of those who had forfeited their estates in that rebellion, which composition was five year's rent of the lands and estates forfeited.

DIEM CLAUSIT EXTREMUM, A writ which issued out of the court of *Chancery* to the escheator of the county, upon the death of any of the King's tenants *in capite*, to inquire by a jury of what lands he died seised, and of what value, and who was the next heir to him. This writ to be granted at the suit of the next heir, &c. for upon that, when the heir came of age, he was to sue livery of his lands out of the King's hands. *F. N. B.* 251.

DIES, See *Day*.

DIES DATUS, Is a day or time of respite given to the defendant in a suit by the court. *Broke*.—See *Day*.

DIES MARCHIÆ, Was the day of congress or meeting of the *English* and *Scotch*, appointed annually to be held on the *marches* or borders, to adjust all differences between them, and preserve the articles of peace. *Tho. Walsingham*, in *Ric.* 2. p. 307.

DIETA, A day's journey. *Fleta*, lib. 4. c. 28; *Bracton*, lib. 3. tract. 2. c. 16.

DIE'T, *conventus*.] A legislative assembly; as the *diet* of the *Empire*, of *Ratisbon*, &c. See this *Dist.* titles *Parliament*, *Wittenagemote*.

DIEU ET MON DROIT, God and my Right; the motto of the royal arms, intimating, that the King of *England* holds his empire of none but God; first given by King *Rich.* 1.

DIEU SON ACT, Are words often used in our old law: and it is a maxim in law, That the act of God, or inevitable

inevitable accident, shall prejudice no man. Therefore, if a house be blown down by tempest, thunder or lightning, the lessee or tenant for life or years, shall be excused in waste: likewise he hath by the law a special interest to take timber, to build the house again for his habitation. 4 Rep. 63: 11 Rep. 82. So when the condition of a bond consists of two parts in the *disjunctive*, and both are possible at the time of the obligation made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part. 5 Rep. 22. And where a person is bound to appear in court, at a certain day, if before the day he dieth, the obligation is saved, &c. See particularly relative to this term, titles *Bailment*, *Carrier*.

DIFFACERE, To destroy: and *diffactio* is a maiming any one. *Leg. H. 1. c. 64, 92.*

DIFFORCIARE RECTUM, To take away, or deny justice. *Mat. Paris. anno 1164.*

DIGEST. The book of Pandects of the Civil law; which hath its name from its containing *Legalia præcepta excellenter Digesta. Du Cange.*—See title *Civil Law*.

DIGNITY, *dignitas*.] Signifies honour and authority; reputation, &c. And dignity may be divided into superior and inferior: as the titles of Duke, Earl, Baron, &c. are the highest names of dignity; and those of Baronet, Knight, Serjeant at Law, &c. the lowest. Nobility only can give so high a name of dignity, as to supply the want of a surname in legal proceedings: and as the omission of a name of dignity may be pleaded in abatement of a writ, &c. so it may be where a peer, who has more than one name of dignity, is not named by the Most Noble. See title *Abatement*. No temporal dignity of any foreign nation can give a man a higher title here than that of Esquire. 2 Inst. 667.—See titles *Addition*; *Descent*; *Peer*.

DIGNITY ECCLESIASTICAL *dignitas ecclesiastica*.] Is defined by the Canonists to be *administratio cum jurisdictione & potestate aliqua conjuncta*; of which there are several examples in *Duarenus, de Sacris Eccl. Sc. lib. 2. c. 6.* *Dignitates ecclesiasticae*, are mentioned in the *Stat. 26 H. 8. c. 31 & 32.* And of church dignities, *Cambden* in his *Britannia*, p. 161, reckons in *England* 544.

DIGNITARIES, *dignitarii*.] Those who are advanced to any dignity ecclesiastical; as a Bishop, Dean, Archdeacon, Prebendary, &c. But there are simple Prebendaries, without cure or jurisdiction, which are not dignitaries. 3 Inst. 155.

DILAPIDATION, *dilapidatio*.] Is where an incumbent on a church living suffers the parsonage house or out-houses to fall down, or be in decay for want of necessary reparation: or it is the pulling down or destroying any of the houses or buildings, belonging to a spiritual living, or destroying of the woods, trees, &c. appertaining to the same; for it is said to extend to the committing or suffering any wilful waste, in or upon the inheritance of the church. *Degge's Purf. Counf. 89.* It is the interest of the church in general to preserve what belongs to it for the benefit of the successors; and the old canons, and our own provincial constitutions require the clergy sufficiently to repair the houses belonging to their benefices; which, if they neglect or refuse to do, the bishop may sequester the profits of the benefice for that purpose, &c. *Right's Clerg. 143.* And by the Canon law, *dilapidations* are made a debt, which is to be satis-

fied out of the profits of the church; but the Common law prefers debt on contracts, &c. before debt for *dilapidations*. *Hern. 136.*

The prosecution in these cases may be brought either against the incumbent himself, or against his executors or administrators; and the executor or administrator of him in whose time it was done or suffered, must make amends to the successor: and if the proceedings are against the incumbent, then they ought to be in the spiritual court. That court may also proceed against an executor, or the successor may have an action of the case or debt at the Common law, in which action he shall recover damages in proportion to the *dilapidations*. 1 Nelf. Abr. 656: *Purf. Counf. 97, 98: Carter 224: 3 Lev. 268.*

It is also said to be good cause of deprivation, if the Bishop, Parson, Vicar, or other ecclesiastical person dilapidates the buildings, or cuts down timber growing on the patrimony of the church unless for necessary repairs. 1 Ro. Rep. 86: 11 Rep. 98: *Godb. 259.* And that a writ of prohibition will also lie against him in the courts of Common law. 3 Bullst. 158: 1 Ro. Rep. 335.

By *Stat. 13 Eliz. c. 10*, if any Parson, &c. shall make a gift of his goods and personal estate to defraud his successor of his remedy for *dilapidations*, such successor may have the same remedy in the spiritual court against the person to whom such gift is made, as he might have against the executors of the deceased parson. And by *Stat. 14 Eliz. c. 11*, money recovered for *dilapidations*, is to be employed in the reparations of the same houses suffered to be in decay, or the party recovering shall forfeit double the value of what he receives, to the King.

If a parson suffers *dilapidations*, and afterwards takes another benefice, whereby his former benefice becomes void, his successor may have an action against him, and declare that by the custom of the kingdom he ought to pay him so much money as shall be sufficient to repair the dilapidations. 3 Lev. 268. In case a parson comes to a living, the buildings whereof are in decay by *dilapidations*, and his predecessor did not leave a sufficient personal estate to repair them, so that he is without remedy, he is to have the defects surveyed by workmen, and attested under their hands in the presence of witnesses, which may be a means to secure him from the incumbrance brought upon him by the fault of his predecessor. *Country Parson's Companion 60.*

DILATORY PLEAS, Are such as are put in merely for delay; and there may be a demurrer to a *dilatory plea*, or issue may be taken on the fact, if false. If the plea is true in fact, and good in law, and is in abatement, the plaintiff must enter up judgment of *causatur*, before he commences a new suit. If the plea is adjudged ill, on demurrer, there must be a *resp. nunciasse*, and defendant must plead another plea. If *verum in fact*, is taken, and found by the jury, for plaintiff, in case, &c. they assess the damages. In *debt*, the judgment for plaintiff is final, &c. The truth of *dilatory pleas* is to be made out by affidavit of the fact, &c. by *Stat. 4 Ann. c. 16. s. 11.*—See title *Pleading*.

DILIGIATUS, Outlawed; *i. e. de lege electus. Leg. Hen. 1. c. 45.*

DILLIGROUT, Pottage formerly made for the King's table, on his coronation day: and there was a tenure in feignancy, by which lands were held of the King, by the service of finding this pottage, at that solemnity. 39 H. 3.

DIMIDIETAS, Used in records for a moiety, or one half.

DIMINISHING the coin. See title *Coin*.

DIMINUTION, *diminutio*.] Is where the plaintiff or defendant, on an appeal to a superior court, alleges that part of the record is omitted, and remains in the inferior court not certified; whereupon he prays that it may be certified by *certiorari*. *Co. Ent.* 232, 242. Of course *diminution* is to be certified on a writ of error; though if issue be joined upon the errors assigned, and the matter is entered upon record, which is made a *confilium*, in this case there must be a rule of court granted for a *certiorari* to certify *diminution*. 1 *Lil. Abr.* 245. *Diminution* cannot be alleged of a thing which is fully certified; but in something that is wanting, as want of an original, or a warrant of attorney, &c. 2 *Lev.* 206: 1 *Nelf. Abr.* 658. And if on *diminution* alleged, and the plaintiff in error certify one original, &c. which is wrong; and the defendant in error certifies another that is true; the true one shall stand. *Ch. Jac.* 577. *Cro. Car.* 91.

After a writ of error brought, and the defendant hath pleaded *in nullo est erratum*, he cannot afterwards alledge *diminution*; because by that plea he affirmeth or alloweth the record to be such as is certified upon the writ of error. *Godb.* 266. But in some cases, *diminution* hath been alleged, after *in nullo est erratum* pleaded, *ex gratia curiæ*; though not *ex rigore juris*. *Palm.* 85. And there is an instance, that the court in such a case hath awarded a *certiorari*, to inform their conscience of the truth of the record in *C. B.* where the defendant in error had not joined in *nullo est erratum*. 1 *Nelf.* 658.—See further title *Judgment, Reversal* of.

DIMISSORY LETTERS, *literæ dimissoriæ*] Are such as are used where a candidate for holy orders has a title in one diocese, and is to be ordained in another: the proper diocesan sends his *letters dimissory* directed to some other ordaining bishop, giving leave that the bearer may be ordained, and have such a cure within his district. *Cowel*.

DIOCESE, *diocesis*.] Signifies the circuit of every bishop's jurisdiction. For this realm hath two sorts of divisions: one into shires or counties, in respect to the temporal state; and another into *dioceses*, in regard to the ecclesiastical state, of which we reckon twenty-one in *England*, and four in *Wales*. *Co. Lit.* 94. Also the kingdom is said to be divided in its ecclesiastical jurisdiction into two provinces of *Canterbury* and *York*; each of which provinces is divided into *dioceses*, and every *diocese* into archdeaconries, and archdeaconries into parishes, &c. *Howell's Inst.* 2.

The bounds of *Dioceses* are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose, there are two rules in the Canon law. In one case, upon a dispute between two bishops upon this head, the direction is, that they proceed in the business, by ancient books or writings, and also by witnesses, reputation, and other sufficient proof: in the other case, where the question was, by whom a church built upon the confines of two *dioceses* should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city, who, before it was founded, baptized the inhabitants, and administered to them other divine offices. *Gibf.* 133.

The jurisdiction of the city is not included in the name of *diocese*, so saith the Canon law: and accordingly, in citations in general visitations, directed to the clergy, it is ordered to cite the clergy of the city and *diocese*. *Gibf.* 133.

A bishop may perform divine offices, and use his episcopal habit, in the *diocese* of another, without leave; but may not perform therein any act of jurisdiction, without permission of the other bishop. *Gibf.* 133.

A clergyman dwelling in one *diocese*, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both; that is, the bishop in whose *diocese* he dwells, may prosecute him; but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop. *Gibf.* 134.—See titles *Bishop*; *Clergy*; *Convocation*.

DISABILITY, *disabilitas*.] An incapacity in a man to inherit any lands, or take that benefit which otherwise he might have done: which may happen four ways; by the act of an ancestor, or of the party himself, by the act of God, or of the law.

1. *Disability*, by the act of the ancestor, is where the ancestor is attainted of treason, &c. which corrupts the blood of his children, so that they may not inherit his estate. See title *Attainder, Descent*.

2. *Disability*, by the act of the party, is where a man binds himself by obligation, that upon surrender of a lease, he will grant a new estate to the lessee; and afterwards he grants over the reversion to another, which puts it out of his power to perform it.

3. *Disability*, by the act of God, is where a person is of non-sane memory, whereby he is incapable to make any grant, &c. So that if he passeth an estate out of him, it may after his death be made void; but it is a maxim in law, *that a man of full age shall never be received to disable his own person*. See title *Lunacy*.

4. *Disability*, by the act of the law, is where a man by the sole act of the law, without any thing done by him, is rendered incapable of the benefit of the law; as an alien born, &c. *Terms de Ley*: 4 *Rep.* 123, 124: 5 *Rep.* 21: 8 *Rep.* 43.—See title *Alien*.

There are also other *disabilities*, by the Common law, of *idocy*, *infancy*, and *coverture*, as to grants, &c. And by statute in many cases: as *papists* are disabled to make any presentation to a church, &c. *Officers* not taking the oaths, are incapable to hold offices: *Forfeigners*, though naturalized, to bear offices in the government, &c. See the proper titles. A person shall not be admitted to *disavow* himself to avoid an office of charge, &c. no more than a man shall be allowed to say that he was an *idiot*, &c. to avoid an act done by himself. *Carth.* 307. As to the disability of *Defenders*, See that title, and title *Non-conformists*. As to pleas of *disability* in the person of the plaintiff, See title *Abatement*.

DISADVOCARE, To deny, or not acknowledge a thing. *Hingham Magna*, cap. 4.

DISAGREEMENT, Will make a nullity of a thing, that had essence before: and *disagreement* may be to certain acts, to make them void, &c. *Co. Lit.* 380.—See title *Agreement*.

DISALT, According to *Littleton*, is to disable a person. *Lit.* title *Discontinuan* &c.

DISBOSCATIO, A turning wood ground into arable or pasture.

DISCARCARE,

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DISCARCARE, From *Dis*, and *Cargo*.] To unlade a ship or vessel by taking out the cargo or goods. *Placit. Parl.* 18 Ed. 1.—See *Carcatus*.

DISCEIT, See *Decit*.

DISCENT, See *Descent*.

DISCHARGE, On writs and process, &c. is where a man is confined by some legal writ or authority, and doth that which by law he is required to do; he is released or discharged from the matter for which he was confined. If one be arrested by a *launt* out of *B. R.* and the plaintiff do not file a declaration against the defendant in prison in two terms, he shall be discharged on common bail. 1 *Lil. Abr.* 470. Also where a defendant on arrest is admitted to *baill*, if the bail bring in the principal before the return of the second *seire facias* issued out against them, they shall be discharged. If an obligor discharges one joint obligor, where several are jointly bound, it discharges the others. *Murb.* 129. And a man may discharge a promise made to himself, &c. *Cro. Jac.* 483.—See titles *Accord*; *Acquittal*; *Habeas Corpus*; *Satisfaction*; *Bond*, &c.

DISCLAIMER, *disclamium*, from *Fr.* *clamer*, with the privative *dis*.] Is a plea containing an express denial, or renouncing of a thing; as if a tenant sue a *replevin*, upon the distress of the lord, and the lord avows the taking, saying the tenant holds of him as of his lord, and that he distrained for the rent not paid, or service not performed: now, if the tenant say he doth not hold of him, this is called a *disclaimer*, and the lord proving the tenant to hold of him, on a writ of right for *disclaimer* brought, the tenant shall lose his land. *Terms de Ley*.

This *Disclaimer* by a tenant, is considered as a civil crime, and punished accordingly, by forfeiture of lands to the lord, on reasons most apparently feudal. *Finch.* 270, 1. So if in any court of record, the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the *last* infeodation; or takes upon himself those rights which belong only to tenants of a superior class. 1 *Iust.* 2: 2: if he affirms the reversion to be in a stranger by accepting his fine, attorning as his tenant, collusive pleading, and the like; such behaviour amounts to a forfeiture of his particular estate. 1 *Iust.* 253: 2 *Comm.* 275: 3 *Comm.* 233.

If a writ of *precipe* be brought against two persons for land, and one of them, the tenant, saith that he is not tenant, nor claims any thing in the lands; this is a *disclaimer* as to him, and the other shall have the whole land. *Terms de Ley*. And when a tenant hath disclaimed, upon action brought against him, he shall not have restitution on writ of error, &c. against his own act; but is barred of his right to the land disclaimed. 8 *Rep.* 62. But a verbal disclaimer shall not take place against a deed of lands: nor shall the disclaimer of a wife during the coverture bar her entry on her lands. 3 *Rep.* 26.

Baron and Feme may disclaim for the wife; though if the husband hath nothing but in right of his wife, he cannot disclaim. 2 *Danv. Abr.* 569. Such person as cannot lose the thing perpetually in which he disclaims, shall not be permitted to disclaim: a bishop, &c. may not disclaim, for he cannot divest the right out of the church. Though in a *quo warranto*, at the suit of the King, against a bishop or others for franchises and liberties, if the bishop, &c. disclaims them, this shall bind

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the successors. *Co. Lit.* 102, 103. If a man be vouched because of a reversion on a lease made by himself, he cannot disclaim: but an heir may disclaim, being vouched upon a lease made by his ancestor. 2 *Danv.* 569.

A person may disclaim in the principal; and not in the incident; as he that is vouched because of a reversion, cannot disclaim in the reversion, saving the seignior, 40 Ed. 3. 27. If the lord disclaims his seignior, in a court of record, it is extinct, and the tenant shall hold of the lord next paramount to the lord disclaiming. *Lit. sec.* 146.

It is said not to be necessary, that the writ of right for disclaimer should be brought against the person that disclaims; for if it be only against him that is found tenant of the land, though he be a stranger, it is not material. 2 *Danv.* 570. By plea of *non-tenure*, nothing is disowned but the freehold, which may be good where the tenant hath the reversion in fee, and not the freehold; but when such tenant disclaims, or pleads non-tenure and disclaims, the demandant shall have the whole, as the whole is disclaimed. *Ibid.*

By Stat. 21 Jac. 1. c. 16. s. 5. In all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim any title to the land, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends before the action brought; and if the issue be found for the defendant, or the plaintiff be nonsuited, the plaintiff shall be barred from the said action, and all suits concerning the same. See title *Pleading*.

Besides these disclaimers by tenants of lands, there are disclaimers in divers other cases: for there is a disclaimer of blood, where a person denies himself to be of the blood or kindred of another, in his plea. *F. N. B.* 102. And a disclaimer of goods, as well as lands; as if a man disclaimeth goods, on arraignment of felony, when he shall lose them, though he be cleared. *Standf. P. C.* 186. In Chancery, if a defendant by his answer renounces the having any interest in the thing in question, this is likewise a disclaimer. See title *Chancery*. And there is a deed of disclaimer of executorship of a will, &c. where an executor refuses, and throws up the same.

DISCONTINUANCE.

DISCONTINUATIO, from *Fr.* *discontinuer*, *cessare*.] An interruption or breaking off. An injury to real property, which consists in the keeping out the true owner of an estate, by a tenant whose entry was at first lawful, but who wrongfully detains the possession afterwards.

This happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is entitled to do: in which case the estate is good, so far as his power extends who made it, but no further. *Finch. L.* 190. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power legally to make, for that by the Common law extends no farther than to make a lease for his own life: in such case, the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail being gone; or at least suspended, and for a while discontinued. For, in this case, on the death of the alienors neither the heir in

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tail, nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the land so aliened: but must bring their writ, and seek to recover possession by law. 3 *Comm.* 172: 1 *Inst.* 325: *F. N. B.* 191, 4.

In the case of a *Disseisin*. (see that title) while the possession remains in the disseisor, it is a mere naked possession unsupported by any right; and the disseisee may restore his own possession, and put a total end to the possession of the disseisor by an entry on the land, without any previous action: but if the disseisor dies, his heir comes to the possession of the estate by a lawful title: it is the same if the disseisor aliens: the alienee comes in by a lawful title. By reason of this lawful title, the heir in the first instance, and the alienee in the second, acquires a presumptive right of possession, which is so far good, that even the person disseised loses by it his right to recover the possession by entry; and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be discontinued. This is the general import of the word *discontinuance*; but in its usual acceptation it signifies the effect of alienations made by husbands seised in right of their wives; by ecclesiasticks seised in right of their church; or by tenants in tail; those being the three instances adduced by *Littleton* of Discontinuance. Thus before the *Stat. 11 H. 7. c. 20*, the alienation of a woman seised of an estate in dower, or of any estate of the gift of her husband, or of any of his ancestors, was said to be a discontinuance: and before the *Stat. 32 H. 8. c. 31: 14 Eliz. c. 8*, recoveries suffered by tenants for life, tenants by the curtesy, or tenants in tail after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See 1 *Rep.* 14.

It is to be observed, that there is a material difference between the situation or title of the alienee of any person, whose alienation makes a discontinuance, and the situation or title of the heir or alienee of a disseisor; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates though not defeasible by entry, are immediately defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, [or rather whose alienation causes a discontinuance,] claims by a person having a lawful estate; and the estate of the alienee is unimpeachable during the life of the alienor. It should also be observed, that a discontinuance extends to those cases only, where a person is dispossessed of an estate of freehold, and where though he has lost his right of entry, he can still recover the possession by action. The peculiar import of the word Discontinuance, where applied to the cases mentioned by *Littleton*, is thus shortly, but forcibly expressed by *Houard*, in his *Ancient Laws of the French*—"An interruption of the right, which one has on an estate, by the sale which another, charged to preserve that right, has made of it."—See 1 *Inst.* 325 4. And the long and learned note there on the doctrine of Discontinuance at large.

By the Common law, the alienation of an husband who was seised in right of his wife, worked a discontinuance of the wife's estate: till the *Stat. 32 H. 8. c. 28*, provided, that no act by the husband alone should work a discontinuance of, or prejudice the inheritance or free-

hold of the wife: but that after his death, she or her heirs may enter on the lands in question. Formerly also, if an alienation was made by a sole Corporation, as a Bishop or Dean, without consent of the Chapter, this was a discontinuance. *F. N. B.* 194. But this is now quite antiquated by the disabling *Stat. 1 Eliz. c. 19: 13 Eliz. c. 10*; which declare all such alienations absolutely void *ab initio*; and therefore at present no discontinuance can be thereby occasioned. 3 *Comm.* 172.

Having said thus much on the general nature of Discontinuance, a title which though of considerable extent in the old law, is now very much abridged by statute, the following selection on the subject may be sufficient in this place: to terrify the enquiring student to *Com. Dig.* title *Discontinuance*, and the other abridgements; for further information when necessary.

A *Discontinuance* taketh away an entry only: and to every *discontinuance* it is necessary there should be a deverting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. *Co. Lit.* 327. And an estate-tail cannot be discontinued, but where he that makes the *discontinuance*, was once seised by force of the intail, where the estate-tail is executed; unless by reason of a warranty. *Lit. Sect.* 637, 641. Also if tenant in tail levies a fine, &c. this is no *discontinuance*, till the fine is executed; because if he dies before execution, the issue may enter. *Co. Lit.* 33: 2 *Darv. Abr.* 572.

A *Discontinuance* may be five ways, viz. by *feoffment, fine, recovery, release and confirmation with warranty*. 1 *Rep.* 44. A grant without livery, or a grant in fee without warranty, are no *discontinuances*: an exchange will not make a *discontinuance*; as if tenant in tail exchanges land with another, that is not any *discontinuance*, by reason no livery is requisite thereon. 2 *Darv.* 57. It is the same of a bargain and sale, &c. And an alteration of such things as lie in grant, and not in livery, works no *discontinuance*; for such grant does no wrong either to the issue in tail, or him in reversion or remainder, because nothing passeth but during the life of tenant in tail, which is lawful; and every *discontinuance* worketh a wrong. *Co. Lit.* 332.

If tenant in tail of a copyhold estate, surrenders to another in fee, this makes not any *discontinuance*, (except there be a custom for it) but the heir in tail may enter; though this hath been a great question. 1 *Leon.* 95: 2 *Darv.* 571. If there be tenant for life, remainder in tail, and remainder in tail, &c. And tenant for life, and he in the first remainder in tail levy a fine, this is no *discontinuance* of either of the remainders. 1 *Rep.* 76. But if there be tenant in tail, remainder in tail, &c. and tenant in tail enfeoffs him in reversion in fee: or where there is tenant for life, remainder in tail, reversion in fee, and tenant for life enfeoffs the reversioner; these are *discontinuances*, because there is a mean or immediate estate. 1 *Rep.* 140: *Co. Lit.* 335: 3 *Darv.* 575.

If there be tenant in tail, remainder to his right heirs, and he makes feoffment in fee, this is a *discontinuance*; though such tenant that made the feoffment, hath the fee in him. 2 *Darv.* 572. A man is tenant for life, the remainder in tail, remainder in fee, and the tenant for life makes a feoffment to him in remainder in fee; this is such a *discontinuance* of the estate-tail, as produceth a forfeiture. 3 *Rep.* 59. If a tenant in tail be disseised, and after,

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after release with warranty to the disseisor, it will be a *discontinuance*: so if he release or confirm to tenant for life. *Lit. Sect. 135: 1 Rep. 44*. And if, where there is a tenant for life, and remainder in tail, the tenant for life levies a fine to his own use; and after tenant for life and he in remainder join in a feoffment by letter of attorney, this is a *discontinuance* of the estate-tail and the fee. *Dyer 327*.

If tenant in tail makes a feoffment in fee upon condition, and the condition is broken, the issue may enter notwithstanding this *discontinuance*. *Lit. 632*. Tenant in tail grants all his estate to another, though without livery and seisin; and if that other person make a feoffment in fee, it will not be a *discontinuance* to take away the entry of him in reversion or remainder. *Lit. 145: 1 Rep. 46: 10 Rep. 97*. A lease is made for life, remainder in tail; and he in remainder in tail disseises the tenant for life, and makes a feoffment in fee, and dies without issue, and then tenant for life dieth; this is no *discontinuance* to him in reversion. *Lit. 146: 1 Brown. 36*. And if tenant in tail of a rent, common, advowson, or the like, grant it in fee, it is not a *discontinuance*: nor where such tenant granteth any thing out of land, &c. *Lit. 138: Finch's Law 193*.

Where a tenant in tail of a manor makes a lease for life, not warranted by *Stat. 32 Hen. 8. c. 28*, of part of the demesnes, this is a *discontinuance* of this parcel; and it is said makes it no parcel of the manor. *2 Rol. Abr. 58*.

There can be no *discontinuance* by tenant in tail of the gift of the Crown, *Stat. 34 & 35 H. 8. c. 20*. Nor by tenant in tail of fee-farm rents, to bar the remainder vested by the statute; *Stat. 22 & 23 Car. 2. c. 24. s. 6*. And some *discontinuances* at Common law are now made bars as to the issue in tail; though they still remain *discontinuances* in some cases, to him in remainder, &c. such as fines, with proclamations by *Stat. 4 H. 7. cap. 24: 32 H. 8. cap. 36*. If the husband levy a fine with proclamations, and dieth, the wife must enter, or avoid the estate of the confuser within five years, or she is barred for ever, by the *Stat. 4 H. 7. c. 24*. For the *Stat. 32 H. 8. cap. 28*, doth help the *discontinuance*, but not the bar. *Co. Lit. 326*. Husband and wife tenant in special tail, the husband alone levied a fine to his own use, and afterwards he devised the land to his wife for life, the remainder over, rendering rent, &c. The husband dies, the wife enters and pays the rent, and dies: in this case it was adjudged, that the fine had barred the issue in tail, but not the wife. *Dyer 351*. The entry of the wife in this case was a disagreement to the estate of inheritance, and an agreement to the estate for life: but if the wife had not waived the inheritance, the estate tail as to the wife had remained. *9 Rep. 135*.

If lands be given to the husband and wife, and to the heirs of their two bodies, and the husband maketh a feoffment in fee, and dieth; the wife is helped by *Stat. 32 H. 8. c. 28*; and so is the issue of both their bodies *1 Inst. 326*. The husband is tenant in tail, the remainder to the wife in tail, the husband makes a feoffment in fee; by this, the husband, by the Common law, did not only discontinue his own estate tail, but his wife's remainder: but by *Stat. 32 Hen. 8. c. 28*, after the death of the husband without issue, the wife may enter by the said act. Though if the husband hath issue, and maketh a feoffment in fee of his wife's land, and his wife dieth;

the heir of the wife shall not enter during the husband's life, neither by the Common law nor by the statute. *1 Inst. 326*.

A *Discontinuance* may be defeated, where the estate that worked it is defeated: as if a husband make a feoffment of the wife's land upon condition, and, after his death, his heir enters on the feoffee for the condition broken; now the *discontinuance* is defeated, and the feme may enter upon the heir, *Co. Lit. 336*.

DISCONTINUANCE OF PLEA, Is where divers things should be pleaded to, and some are omitted: this is a *discontinuance*. *1 Nelf. Abr. 660, 661*. If a defendant's plea begin with an answer to part, and answers no more, it is a *discontinuance*: and the plaintiff may take judgment by *nil dicit*, for what is not answered: but if the plaintiff plead over, the whole action is discontinued. *1 Salk. 139*. Debt upon bond of 500*l.* the defendant as to 225*l.* part of it, pleads payment, &c. And upon demurrer to this plea, it was adjudged that there being no answer to the residue, it is a *discontinuance* as to that, for which the plaintiff ought to take judgment by *nil dicit*. *1 Salk. 180*. Where no answer is given to one part, if the plaintiff pleads thereto, he cannot have judgment according to his declaration; for which reason it may be a *discontinuance* of the whole. *1 Nelf. 660*. But this is helped after verdict by *Stat. 32 H. 8. c. 30*. See titles *Amendment & Pleading*.

DISCONTINUANCE OF PROCESS. This *Discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time as he ought to do, the suit is discontinued; and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist. Antiently by the demise of the King all suits depending in his courts were at once discontinued; but to prevent the expence as well as delay attending this rule of law the *Stat. 1 Ed. 6. c. 7*, enacts that no action shall be discontinued by such death of the King. The continuance of the suit by improper process, or by giving the party an illegal day, is properly a *mis-continuance*.

Where an action is long depending, and continued from one term to another, the continuances must be all entered, otherwise there will be a *discontinuance*; whereupon a writ of error may be brought, &c. *1 Nelf. Abr. 660*. If the plaintiff in a suit doth nothing, it is a *discontinuance*, and he must begin his suit again: and where it is too late to amend a declaration, &c. or the plaintiff is advised to prosecute in another court, he is to discontinue his suit, and proceed *de novo*. But a *discontinuance* of an action is not perfect till it is entered on the roll, when it is of record. *Cro. Car. 236*.

The plaintiff cannot discontinue his action after a demurrer joined, and entered; or after a verdict, or a writ of inquiry, without leave of the court. *Cro. Jac. 35: 1 Lill. Abr. 473*. In actions of debt or covenant, after a demurrer joined, the court will give leave to discontinue, if there be an apparent cause, as if the plaintiff through his own negligence is in danger of losing his debt: but if the demurrer be argued, then he shall not have leave to discontinue; nor where he brings another action for the same cause, and this is pleaded in abatement of the first action. *Sid. 84*.

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It has been ruled, upon a motion to discontinue, that the court may give leave after a special verdict; which is not complete and final; but never after a general verdict. 1 *Salk.* 178. See *Harkn.* 200, 1. So after enquiry executed and returned, *Carth.* 81.

After issue and a verdict plaintiff cannot discontinue without consent of defendant, for if plaintiff will not enter up judgment defendant may. *Salk.* 178.—After demurrer argued and allowed, discontinuance may be allowed on payment of costs. *8 Rep.* 76, 116: 3 *Lev.* 440.

And where a man hath a just cause of action, for a matter of any consequence, and unadvisedly demurs to a plain bar, &c. and defendant joins in demurrer, and it is argued, and the court are of opinion the plea is good in law, tho' it may be false in fact, the court will, even after giving their opinions, but before judgment given, on motion, permit the plaintiff to withdraw his demurrer, on payment of costs, and take issue.

The plaintiff may if he sees occasion discontinue before, or after declaration delivered by a *side bar* rule on payment of costs *N. on R. Mich.* 10 *Geo.* 2. But in replevin the avowant cannot have such rule.

An appeal may as well be discontinued by the defect of the process or proceeding in it, as it may be by the insufficiency of the original writ, &c. For by such defect, the matter depending is as it were out of court. 1 *L'lt.* 473. A *discontinuance* or *miscontinuance*, at common law reverses a judgment given by default; and *discontinuance* upon a demurrer is error; but a *miscontinuance* after appearance is not so. 8 *Rep.* 150: 46 *Ed.* 3. 30.

Discontinuance of process is helped at Common law by appearance, and by *Stat.* 32 *II.* 8. *cap.* 30. All *discontinuances*, *miscontinuances* and negligences therein, of plaintiff or defendant, are cured after verdict. See tit. *Amendment*.

DISCOVERT. The law term for a woman unmarried or widow, one not within the bonds of matrimony. *Law Fr. Dict.*

DISCOVERY. The act of revealing or disclosing any matter by a defendant in his answer to a bill filed against him in a court of equity. See title *Chancery*.

To administer to the ends of justice, without pronouncing a judgment which may affect any rights, the Courts of equity in many cases compel a discovery. This jurisdiction is exercised to assist the administration of justice, in the prosecution or defence of some other suit, either in the Court of Equity itself or in some other court; and a discovery has been compelled to aid the jurisdiction of a foreign court. But if a bill is brought to aid, by a discovery, the prosecution or defence of any proceeding not merely civil, in any other court, as an indictment or information, a Court of Equity will not exercise its jurisdiction to compel a discovery; and the defendant may demur. 2 *Vez.* 398. And in the case of suits merely civil in a Court of ordinary jurisdiction, if that Court can itself compel the discovery required, a Court of Equity will not interfere. 1 *Atk.* 288: 1 *Vez.* 205: 2 *Vez.* 451.

A bill for a discovery must shew an interest in the plaintiff in the subject to which the required discovery relates; and such an interest as intitles him to call on the defendant for the discovery. See *Finch Rep.* 36, 44: 1 *Vern.* 399.

As the object of a Court of Equity in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the

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discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If therefore the plaintiff does not shew by his bill such a case as renders the discovery which he seeks, material to the relief, if he prays relief; or does not shew a title to sue the defendant in some other court; or that he is actually involved in litigation with the defendant or liable to be so; and does not also shew that the discovery, which he prays, is material to enable him to support or defend a suit; he shews no title to the discovery; and consequently a demurrer to the bill for such purpose will be allowed. See *Finch Rep.* 214: 1 *Vez.* 205: 2 *Vez.* 396, 9: 2 *Atk.* 388: 1 *Vern.* 204.

The situation of a defendant may render it improper for a court of equity to compel a discovery; either, 1. because the discovery may subject the defendant to pains and penalties, or to some forfeiture or something in the nature of a forfeiture; or 2. it may hazard his title in a case where in conscience he has at least an equal right with the person requiring the discovery; though that right may not be clothed with a perfect legal title; as to which latter, see 1 *Vez.* 205: 3 *Atk.* 453.—It is a general rule that no one is bound to answer to as to subject himself to punishment, in whatever manner that punishment may arise; (as by pains and penalties, a criminal prosecution, &c.) or whatever may be the nature of the punishment. 2 *Vez.* 245, 451: 1 *Vez.* 246: 1 *Eq. Ab.* 131. p. 10: 1 *Atk.* 450: 2 *Atk.* 393: *Finch* title *Uses* Q. 4: *Tolb.* 135.

But if the plaintiff alone is intitled to the penalties, and expressly waves them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty. 1 *Vern.* 60.—And though a discovery may subject a defendant to penalties, to which the plaintiff is not entitled, and which consequently he cannot wave, yet if the defendant has expressly covenanted, not to plead or demur to the discovery sought, which is the common case with respect to servants of the *East India Company*, he shall be compelled to answer. 1 *Eq. Ab.* 77, 8. Where too a person by his own agreement subjects himself to a payment in the nature of a penalty on his doing a particular act a demurrer, to discovery of that act will not be allowed.

It seems however that a demurrer will be allowed to any discovery which may tend to shew the defendant guilty of any moral turpitude, as the birth of a child out of wedlock. *Park.* 163: but see 2 *Vez.* 451.—But a mother may in some cases be compelled to discover where her child was born, though it may lead to prove the child an alien. 2 *Vez.* 287, 494.

A defendant may likewise demur to a bill which may subject him to any forfeiture of interest; as if a bill is brought to discover whether a lease has been assigned without licence; or whether a defendant entitled during widowhood, or liable to forfeiture of a legacy in case of marriage without consent is married; or to discover any matter, which may subject a defendant intitled to any office or franchise to a *quo warranto*. See *Tolb.* 69: 1 *Vez.* 56: 2 *C. R.* 68: 2 *Atk.* 392: 2 *Vez.* 265: 1 *Eq. Ab.* 131. c. 10.

A defendant may in the same manner demur to a discovery, which may subject him to any thing in the nature of a forfeiture; as to a discovery whether he was educated in the popish religion, by which he might incur the incapacities

incapacities in stat. 11 & 12 W. 3. which the stat. 18 Geo. 3. c. 60. does not entirely remove: or whether a clergyman was presented to a second living which avoided the first. See 3 Atk. 457: 2 Comm. 661: 3 Bac. Abr: 3 Atk. 453.

See further this Dict. title *Chancery*; and Mr. Misford's treatise there cited.

DISCRETION, *Discretia*.] When any thing is left to any person to be done according to his *discretion*, the law intends it must be done with sound *discretion*, and according to law: and the court of B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the *discretion* of those that do them. 1 Lil. Abr. 477.

Discretion is to discern between right and wrong; and therefore whoever hath power to act at *discretion*, is bound by the rule of reason and law. 2 Inst. 56, 298. And though there be a latitude of *discretion* given to one, yet he is circumscribed, that what he does be necessary and convenient; without which no liberty can defend it. Hob. 158. The assessment of fines on offenders committing affrays, &c. and the binding of persons to the good behaviour, are at the *discretion* of our judges and justices of peace. And in many cases, for crimes not capital, the judges have a discretionary power to inflict corporal punishment on the offenders. Infants, &c. under the age of *discretion*, are not punishable for crimes; and want of *discretion* is a good exception against a witness. See title *Age*; and other apposite titles.

To **DISFRANCHISE**, Is to take away one's freedom or privilege: it is the contrary to *enfranchisement*. And corporations have power to *disfranchise* members, in certain cases. See titles *Corporation*; *By-Laws*.

DISHERISON, A *disinheritent*: mentioned in stat. 20 Ed. 1: 8 R. 2.

DISHERITOR. One that *disinheriteth*, or puts another out of his inheritance. Stat. 3 Ed. 1. c. 39.

DISMES, *Ducumæ*.] *Tithes*, or the tenth part of all the fruits of the earth, and of beasts, or labour, due to the clergy. It signifieth also the *tenths* of all *spiritual* livings given to the prince, which is called a *perpetual dime*. Stat. 2 & 3 Ed. 3. cap. 35. And formerly this word (*tithes*) signified a *tax* or tribute levied of the *temporality*. *Hollingsh.* in H. 2. f. 111. For the laws of the *dismes* or *tithes*. See titles *Tithes*; *Taxes*.

DISPARAGEMENT. In the time of the old tenures; the matching an heir in marriage under his degree, or against decency. Co. Lit. 107: *Magn. Chart.* c. 6. See this Dict. title *Tenures*.

TO DISPAUPER. When a person by reason of his poverty, is admitted to sue *in forma pauperis*; if afterwards, before the suit is ended, the same party have any lands or personal estate fallen to him or be guilty of any thing whereby he is liable to have this privilege taken from him, then he is put out of the capacity of suing *in forma pauperis*, and is said to be *dispaupered*. See title *Costs* II.

DISPENSATION. See title *Bishops*; and as to *Dispensations* to hold *pluralities*; see titles *Chaplains*; *Cession*.

DISPENSATIONS OF THE KING. If a *dispensation* by the *Archbishop* of *Canterbury*, is to be in extraordinary matters, or in a case that is new, the *King* and his council are to be consulted: and it ought to be confirmed under the broad seal. The *King's* authority to grant *dispensations* remains as it did at common law; notwithstanding stat. 25 H. 8. c. 21: *Cro. Eliz.* 542, 601. See further as

to the dispensing power of the Crown by *non obstante*, &c. this Dict. title *King*.

DISPERSONARE, To scandalise or disparage. *Blount*.

DISSIGNARE. To break open a seal—*Scipulo patre testamentum dissignatum est. Neubrigenfis*, lib. 2. c. 7.

DISSEISIN. From the Fr. *Disseisin*.]

A species of injury by ouster to the freehold estate of another.—A wrongful putting out of him that is seised of the freehold. 1 Inst. 277. As where a person enters into lands or tenements, and his entry is not lawful, and keeps him that hath the estate from the possession thereof. *Bract. lib. 4. c. 3*. And *disseisin* is of two sorts; either *single disseisin*, committed without force of arms; or *disseisin by force*; but this latter is more properly *deforcement*. *Brit. cap. 42, 43*.

Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted, or pass. *Disseisin* must therefore mean the turning the tenant out of his tenure and usurping his place and feudal relation—Lord *Mansfield* in the case of *Taylor ex dem. Atkins v. Hodge*, 1 Burr. 60: 5 Bro. P. C. 247.

Now however from the several statutes, first restraining and at length abolishing all military tenures, little more is left than the names of *seignior*, *seisin*, *tenure* and *freeholder*, without any precise knowledge of the things originally signified by those terms. *Ibid*.

In the same case Lord *Mansfield* said “*Disseisin* is a complicated fact, and differs from dispossessing. The freeholder by *disseisin* differs from a possessor by wrong.—Though the term *disseisin* happens to be the same, the thing signified by that word as applied to the two cases of *actual disseisin*, or *disseisin by election* is very different.” In this case it was attempted to support a common recovery, by supposing the tenant to the precept, to have gained a freehold by *disseisin*—The nature of a *disseisin* was therefore elaborately investigated by the counsel; and the idea of a freehold being gained thereby, learnedly repelled by Lord *Mansfield*. See further title *Fine*.

Disseisin therefore seems to imply the turning the tenant out of his fee, and usurping his place and relation.—To constitute an *actual disseisin* it was necessary that the disseisor had not a right of entry; (or to use the old law expression that his entry was not congeable;) that the person disseised was at the time of the *disseisin*, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the Lord. But how this substitution was effected, it is difficult, perhaps impossible now to discover. 1 Inst. 266. b. in n; 330. b. in n. the latter a very long and abstruse note on the subject and entering fully into the principles of the case abovementioned.

The injuries of *Abatement* and *Intrusion*, (see those titles) are by a wrongful entry where the possession is vacant; but this of *Disseisin* is an attack upon him who is in actual possession, and turning him out of it. The former were an ouster from a freehold in law; this is an ouster from a freehold in deed. *Disseisin* may be effected either in corporeal inheritances, or incorporeal. *Disseisin* of things corporeal, as of houses, lands, &c. must be by entry and actual dispossession of the freehold. Co. Litt. 181; as if a man enter either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. *Disseisin* of incorporeal hereditaments, as

DISSEISIN.

not be an actual dispossessing, for the subject itself is neither capable of actual bodily possession, nor dispossessing: but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them. But all disseisins of hereditaments incorporeal, are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. *Litt. § 588, 9.* Otherwise as there can be no actual dispossessing, he cannot be compulsively disseised of any incorporeal hereditaments.

And so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy, of an assize of *novel disseisin*, instead of being driven to the more tedious process of a writ of entry. *Heng. Parv. c. 7: 4 Burr. 110.*

The true injury of an actual or *compulsive disseisin* according to what has been already stated seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feudal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when in process of time the feudal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseisin. Afterwards no regard was had to the lord's concurrence, but the dispossessor himself, was considered the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II. to redress such disseisins, as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be seised, merely for the sake of the remedy. *3 Comm. 169. &c.*

By *Magna Charta, c. 29*, No man is to be *disseised* or put out of his freehold, but by lawful judgment of his peers, or by the law of the land: and by *Stat. 32 H. 8. c. 33.* the dying seised of any *disseisor* or of in any lands, &c. having no right therein, shall not be a descent in law to take away an entry of a person having lawful title of entry; except the *disseisor* hath had peaceable possession five years, without entry or claim by the person having lawful title. But if a *disseisor* having expelled the right owner hath such peaceable possession of the lands five years without claim, and continues in possession so as to die seised, and the land descends to his heirs, they have a right to the possession thereof till the person that is owner recovers at law; and the owner shall lose his estate for ever, if he do not prosecute his suit within the time limited by the statute of limitations. *Bac. Elem.* And if a *disseisee* levy a fine of the land whereof he is *disseised*, unto a stranger, the *disseisor* shall keep the land for ever; for the *disseisee* against his own fine cannot claim, and the donee cannot enter, and the right which the *disseisee* had, being extinct by the fine, the *disseisor* shall take advantage of it. *2 Rep. 56.* But this is to be understood, where no use is declared of the fine by the *disseisee*; when it shall

enure to the use of the *disseisor*, &c. by *Bridgman, O. J. 1 Lev. 128.*—See title *Claim Continual.*

If a feme sole be seised of lands in fee, and is *disseised*, and then taketh husband; in this case, the husband and wife, as in right of the wife, have right to enter, and yet the dying seised of the *disseisor*, shall take away the entry of his wife, after the death of the husband. *Co. Litt. 246.* If a person *disseises* me, and, during the *disseisin*, he or his servant cut down the timber growing upon the land, and afterwards I re-enter into the land, I shall have action of trespass against him; for the law, as to the *disseisor* and his servants, supposes the freehold to have been always in me: but if the *disseisor* be *disseised* by another, or if he makes a feoffment, gift in tail, lease for life or years, I shall not have an action against the second *disseisor*, or against those who come in by title: for all the mesne profits shall be recovered against the *disseisor* himself. *11 Rep. 52: Keilw. 1.*

A *disseisor* in assize, where damages are recovered against him, shall recover as much as he hath paid in rents chargeable on the lands before the *disseisin*. *Jenk. Cent. 189.* But if the *disseisor* or his feoffee sows corn on the land, the *disseisee* may take it whether before or after severance. *Dyer 31, 173: 11 Rep. 46.* Where a man hath a house in fee, &c. and locks it, and then departs; if another person comes to his house, and takes the key of the door, and says that he claims the house to himself in fee, without any entry into the house, this is a *disseisin* of the house. *2 Danv. Abr. 624.* If the feoffor enters on the land of the feoffee, and makes a lease for years, &c. it is a *disseisin*, though the intent of the parties to the feoffment, was, that the feoffee should make a lease to the feoffor for life. *2 Rep. 59.* If lessee for years is ousted by his lessor; this is said to be no *disseisin*. *Co. Jac. 678.*

A man who enters on another's land, claiming a lease for years, who hath not such lease, is a *disseisor*: though if a man enters into the house of another by his sufferance, without claiming any thing, it will not be a *disseisin*. *9 H. 6. 21, 31: 2 Danv. 625.* If a person enters on lands by virtue of a grant or lease, that is void in law; he is a *disseisor*. *2 Danv. 630.* A lessee at will, makes a lease for years, it is a *disseisin*, at the election of the lessor at will: but it is the *disseisin* of the lessee at will, not of the lessor for years. *Hill. 7 Car. B. R.* If a man enters into the land of an infant, though by his assent; this is a *disseisin* to the infant, at his election. *11 Ed. 3: 2iff. 87.* And if a person commands another to enter upon lands, and make a *disseisin*, the commander is a *disseisor*, as well as such other; unless the command be conditional, when it may be otherwise. *22 Aiff. 99: 2 Danv. 631.*

If a man forces another to swear to surrender his estate to him, and he doth so, it will be a *disseisin* of the estate. So, forcibly hindring a person from tithing his land, is a *disseisin* of the land. *Co. Litt. 161.* But if one enter wrongfully into the lands of another, and he accepts rent from such person, he shall not afterwards be taken for a *disseisor*. *Dyer 173.* Where any person is disturbed from entering on land, it is a *disseisin*: a denial of a rent, when lawfully demanded, is a *disseisin* of the rent. *Co. Litt. 113.* Also hindring a distress for rent, by force; or making rescous of a distress, are a *disseisin* of the rent. *2 Danv. 624, 625.* An infant, or feme covert, may be a *disseisor*, but it must be by actual entry on lands, &c.

A feme

A *feme covert* shall not be a *disseisor*, by the act of the baron: if he *disseises* another to her use, she is not a *disseisor*; nor if the wife agrees to it during the coverture: yet if after his death, she agrees to it, she is a *disseisor*. 2 *Danv.* 626, 627. *Affises* that lie against *disseisors* are called *writs of disseisin*; and there are several writs of entry *per disseisin*, of which some are in the *per*, and others in *le post*, &c.

After all that has been here said on this head, we must conclude by observing that writs of *assise on disseins*, are now disused; and the feigned action of ejectment is introduced in their place. It is not amiss to be acquainted with this learning, but *trepass* and *ejectment* supply the place of almost every kind of *assise*. See those titles, and title *Assise of Novel Disseisin*.

DISSEISOR, Is in general he that *disseiseth* or puts another out of his land, without order of law: and a *disseisor* is he that is so put out. 4 *Hen.* 4. As the king in judgment of law can do no wrong, he cannot be a *disseisor*. 1 *E.* 5. 8. A *disseisor* is to be fined and imprisoned; and the *disseisor* restored to the land, &c. by *Stat.* 20 *H.* 3. c. 3. Where a *disseisor* is *disseised*, it is called *disseisin upon disseisin*. See title *Disseisin*.

DISSENTERS. Separatists from the Church and the service and worship thereof. Though the experience of the turbulent disposition of these Sectarists occasioned in former times several disabilities and restrictions (perhaps not entirely consistent with the spirit of true Toleration) to be laid upon them by abundance of statutes; (See *statutes* 23 *Eliz.* c. 1: 29 *Eliz.* c. 6: 35 *Eliz.* c. 1: 22 *C.* 2. c. 1;) yet at length the Legislature, with a spirit of true magnanimity, extended that indulgence to *them* which they themselves, when in power, had held to be countenancing schism, and had denied to the church of England. The penalties are conditionally suspended by the *stat.* 1 *W. & M.* 1. c. 18. "for exempting their majesties' protestant subjects, dissenting from the church of England, from the penalties of certain laws," commonly called the *Toleration-act*; which is confirmed by *stat.* 10 *Ann.* c. 2; and declares that neither the laws above-mentioned nor the *statutes* 1 *Eliz.* c. 2. § 14: 3 *Jac.* 1. cc. 4, 5, nor any other penal laws made against Popish recusants (except the *Test Acts*) shall extend to any Dissenters, other than papists, and such as deny the Trinity: Provided. 1. That they take the oaths of allegiance and supremacy; (or make a similar affirmation, being Quakers. See *Stat.* 8 *Geo.* 1. c. 6;) and subscribe the declaration against popery; 2. That they repair to some congregation certified to, and registered in, the court of the bishop or archdeacon, or at the county sessions. 3. That the doors of such meeting house shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts.

Dissenting Teachers, in order to be exempted from the penalties of the *Statutes* 13 & 14 *Car.* 2. c. 4: 15 *Car.* 2. c. 6. 17 *Car.* 2. c. 2: 22 *Car.* 2. c. 1; are also to subscribe the articles of religion mentioned in *Stat.* 13 *Eliz.* c. 12; (which only concern the confession of the true Christian faith, and the doctrine of the sacraments;) with an express exception of those relating to the government and powers of the church, and to infant baptism; or if they scruple subscribing the same, shall make and subscribe the declaration prescribed by 19 *Geo.* 3. c. 44, pro-

testing themselves to be Christians and protestants, and that they believe the scripture to contain the revealed will of God; and to be the rule of doctrine and practice.

Thus, though the crime of non-conformity is by no means universally abrogated, it is suspended and ceases to exist with regard to these *Protestant Dissenters*, during their compliance with the conditions imposed by these statutes; and under these conditions, all persons who will approve themselves no papists or oppugners of the Trinity are left at full liberty to act as their conscience shall direct them, in the matter of religious worship. And if any person shall willfully, maliciously, or contemptuously disturb any congregation, assembled in any church, or permitted meeting-house, or shall misuse any preacher, or teacher there, he shall (by virtue of the same *Stat.* 1 *W. & M.*) be bound over to the sessions of the peace, and forfeit 20 *l.* But by *Stat.* 5 *Geo.* 1. c. 4, no Mayor or principal magistrate, must appear at any dissenting meeting with the ensigns of his office, on pain of disability to hold that or any other office; the Legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility.—Dissenters also who subscribe to the declaration in the *Stat.* 19 *Geo.* 3, are exempted (unless in the case of endowed schools and colleges) from the penalties of the *Stat.* 13 & 14 *Car.* 2. c. 4: & 17 *Car.* 2. c. 2; which prohibit (upon pain of fine and imprisonment) all persons from teaching school, unless they be licensed by the Ordinary, and subscribe a declaration of conformity to the liturgy of the church, and reverently frequent the divine service established by the laws of this kingdom.

Dissenters chosen to any parochial or ward offices, and scrupling to take the oaths may execute the office by deputy, who shall comply with the law in this behalf. *Stat.* 1 *W. & M.* 1. c. 18.—But it appears that they are not subject to fine on refusing to serve corporation offices.—For where a freeman of London, was elected one of the sheriffs, but refused to take the office on account of his being a dissenter, and as such not having received the sacrament according to the rights of the church of England, within a year before his election, an action was brought against him in the Sheriff's Court, for the penalty incurred by such refusal, and a judgment recovered; which judgment was affirmed, in a writ of error brought in the Court of Hustings. But the defendant having obtained a special commission of errors, the Judges Delegates reversed both judgments; and on a writ of error in Parliament, this judgment of reversal was affirmed; the judges being (except one) of opinion that the defendant was at liberty to object to the validity of his election on the ground of his own non-conformity. 3 *Bro. P. C.* (8vo. ed.) 465. *Harrison v. Evans.*

For further matter relative to Dissenters, See title *Non-conformists*; *Oaths*; (wherein of the *Corporation* and *Test Acts*;) *Blasphemy*; *Religion*; *Toleration*; *Quakers*.

DISTILLERS, Of strong waters, spirits, &c. are subject to divers regulations under the Excise laws, in order to avoid frauds in the revenue; for some particulars relative to which see this Dict. title *Spirituous Liquors*; and also title *Excise*.

DISTRESS. I.

DISTRESS,

DISTRESS.] The taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for the wrong committed. 3 *Comm.* 6. The term *Distress* is also applied to the thing taken or distrained.

A man may take a *distress* for homage, fealty, or any services; for fines and amercements; and for damage-feasant, &c. And the effect of it is to compel the party either to *replevy* the *distress*, and contest the taking in an action against the distrainer; or, which is more usual, to compound or pay the debt or duty, for which he was distrained.

There are likewise *distresses* in actions compulsory to cause a man to appear in court: and of these there is a *distress personal*, of a man's moveable goods, and profits of lands, &c. for contempt in not appearing after summoned; and *distresses real*, upon immovable goods. And none shall be distrained to answer for any thing touching their freeholds, but by the King's writ. *Stat. 52 Hen. 3. c. 1.*

Distress is also divided into *finite* and *infinite*: *Finite*, is that which is limited by law, how often it shall be made to bring the party to trial of action, as once, twice, &c. And *infinite*, is without limitation, until the party appears; which is likewise applicable to jurors not appearing: then it hath had a further division into a *grand distress*, and *ordinary distress*; the former whereof extends to all the goods and chattels which the party hath within the county. *F. N. B. 904: Old Nat. Br. 43, 113: Brit. c. 26. f. 52.*

Let us now consider, more particularly;

I. 1. *Who may distrain, and for what*; 2. *And what may be distrained.*

II. *At what Time, and in what Manner, generally the Distress should be made.*

III. *Of the Statutes regulating Distress.*

I. 1. THE MOST USUAL INJURY for which a distress may be taken is, that of non-payment of rent; and it may now be laid down as an universal principle, that a Distress may be taken for ~~any~~ kind of rent in arrear. See *post*. III.—For neglecting to do suit to the lord's court, or other certain personal service, the lord may distrain of common right. *Bro. Distress 15*; 1 *Inst.* 46.—For amercements in a Court Leet, a distress may be had of common right; but not for amercements in a Court Baron, without a special prescription to warrant it. *Brownl.* 36. Another injury, for which distresses may be taken, is, where a man finds beasts of a stranger wandering in his grounds *damage feasant*; doing him hurt or damage by treading down his grails, &c. in which case the owner of the soil may distrain them, till satisfaction made to him for the injury he has sustained.—Lastly, for several duties and penalties inflicted by special Acts of Parliaments, remedy by distress and sale is given. See *post*. III.

Of common right a person may distrain for rents, and all manner of services; and for rent reserved upon a gift in tail, lease for life, years, &c. though there be no clause of *distress* in the deed, so as the reversion be in himself; but on a feoffment in fee, a *distress* may not be taken, unless expressly reserved in the deed. *Co. Lit.* 57, 205; *Doctor and Student*, cap. 9.—See *Co. Lit.* 204.

A man grants a rent out of the manor of D. and further, that if the rent be behind, the grantee shall distrain

for it in the manor of S. this is a rent in the manor of D. and only a penalty on the other manor. 1 *Shep. Abr.* 567. If a person seised of land in fee, demise it to one upon condition to pay his wife 5*l.* a year rent, and if it be behind and in arrear, that she shall distrain for it; the wife may take a *distress* for the rent. *Dyer* 3, 48. There is a lord and tenant by 3*l.* rent and fealty, the lord dies, and his wife is endowed of the thirds of the feignory; here she may distrain for one pound, and the heir for two pounds: so if a rent be divided amongst parceners, each of them may have a *distress* for her part; but this may not be till the partition is made. *Bro.* 45.

If one jointenant make a gift in tail, of the land, reserving a certain rent, and the rent be in arrear; he may not distrain the beasts of the other jointenant. 33 *H. 6.* 35. But if A. and B. are tenants in common, and A. leases his moiety to C. for years, rendering rent, and C. lease it to B. if the rent is behind, A. may take a *distress* of the cattle of B. his fellow tenant in common. 7 *Rep.* 23; *Moor* 558.

To justify taking a *distress*, the party must see he hath good cause to distrain; that he have power to take the *distress*, and from the person from whom he takes it; that the thing, for the quality of it, be distrainable, and he distrain it in due time and place, &c. He who takes a *distress* for another, ought to have good warrant for doing it; and must do it in his name: and a bailiff or servant, may distrain for his master. 1 *Cro.* 748; 2 *Cro.* 436; *Goob.* 110. A *distress* ought to be made of such things whereof the sheriff may make replevin, and deliver again in as good plight and condition as they were at the time of the taking. *Co. Lit.* 47.

2. *Distresses* are to be of a thing valuable, whereof somebody hath a property; things *fræ naturæ*, as dogs, comets, &c. may not be distrained. 1 *Rol. Abr.* 664. 666. It is the same of cattle of the plough, beasts of husbandry, sheep, or horses joined to a cart, with a rider upon it. 1 *Vent.* 36. This means a distress for rent, &c. *contra* of distress *damage feasant*.

Sheep are equally privileged with *averia caruæ*, and cannot be taken if any other distress can be found. See 2 *Inst.* 133.—But it has been adjudged that beasts of the plough may be taken for the poor's rate, under *Stat.* 43 *Eliz.* because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in effect an execution. 1 *Burr.* 579.—See *acc. Saund.* on 22 C. 2. against *Conventicles* 39; referred to in *Com. Dig. Distress*, (C.) but not cited in 4 *Burr.*

A horse with a rider upon his back; or a horse in an inn, or put into a common; an ax in a man's hand, cutting down wood; or any thing a person carries about him; utensils and instruments of a man's trade or profession, or the books of a scholar; corn in a mill, or goods in a market to be sold for the use of the public; materials in a weaver's shop, for making of cloth; another person's garment in the house of a tailor, &c. are not distrainable; nor is any thing that is fixed to the freehold of a house, as a furnace, doors, windows, boards, &c. 1 *Sid.* 422, 440; *Co. Lit.* 47; 2 *Danv. Abr.* 461.

Deer in a private inclosure may be distrained. 3 *Comm.* 8.—Some have thought that a horse on which one is riding may be distrained for *damage feasant*. 2 *Keb.* 596; 1 *Sid.* 440; but the opinion was extrajudicial, and may be

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be questioned; for 1 Ro. Ab. 664. (A.) pl. 4: and the case in 7 E. 3. Fitz. Ab. *Avowry* 199, are directly *contra*. See also Cro. Eliz. 549, 596. Some also have inclined to think that horses drawing a cart laden with corn, though one is riding in the cart, may be distrained for rent; and for that purpose may be severed from the cart, if the person distraining doth not choose to take the cart with the corn also, all of which, as it seems, are equally liable to the distress. See 2 Keb. 529, 596: Raym. 18: 1 Vent. 36: 1 S. d. 422, 440; in which latter book the reporter makes a query, whether the man's being on the cart, should not privilege the whole team.—If ferrets and nets in a warren be taken *damage feasant* it is good; but if they are in the hands of a man, they cannot be distrained, *any more* (says the Reporter) *than a horse on which a man is*; nor can they be distrained if they are out of the warren, 2 E. 2. *Avowry* 182: 7 E. 3. ib. 199.—See *Fin. title Distress*, A.

Gooda, cattle, not of the plough, &c. sheaves of corn; corn in the straw, or threshed; and carts with corn, (but not victuals) hay in a barn, or ricks of hay; money in a bag sealed, though not out of a bag, &c. may be distrained for rent: and so may cattle or goods driving to market, if put into a pasture by the way. Co. Lit. 47: 1 Lutw. 214: Mod. 385. Beasts of the tenant feeding on commons or wastes, appendant or appurtenant to the demised premises, may be distrained for rent. 3 Comm. 11.

If a driver of cattle asks leave of the lessor to put his cattle into his ground for a night, and he gives leave, as well as the lessee; yet it is said he is not concluded from distraining them for rent. 2 Vent. 59: 2 Danv. 642.

Beasts that escape into the tenant's ground, may be distrained for rent, though they have not been *levant* and *couchant*. 1 Inst. 47. This doctrine has been objected to as too general; and several distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately, without being *levant* or *couchant*; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind, till they have been *levant* and *couchant*; nor afterwards by a landlord for rent on a lease, unless on notice, the owner of the beasts neglects to remove them: though it is said that such notice is not necessary, where the distress is by the lord of the fee for an ancient rent, or by the grantee of a rent charge.—See this subject argued at large in *Kemp v Crewes*, 2 Lutw. 1573.

If A. brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. Noy. n. 298: Vide 15 E. 3. *Avowry* 216.—See Noy. 68. and S. C. in Cro. Eliz. 549, 596.—For other cases in which the property of strangers is privileged from distress, for the sake of trade and commerce, See *Francis v. Wyatt*, 3 Burr. 1498. In that case the question was, whether a person's chariot, which stood at a common livery stable, could be distrained for rent due, from the keeper of the livery stable; and the Court after two arguments, appearing to be strongly inclined in favour of the distress, the owner of the chariot declined bringing the question to a third argument.

The goods of a Carrier are privileged, and cannot be distrained for rent, though the waggon wherein loaded, is put into the barn of a house, &c. on the road. 1 Salk. 249.

Now by Stat. 2 H. 5. c. 5, sheaves or cocks of corn, or corn loose or in the straw, or hay in any hovel stack or rick, or otherwise on the land, may be distrained for rent on demise, lease, or contract.

At Common law *corn growing* could not be distrained, because it adheres to the freehold. 1 Ro. Ab. 666. H. pl. 4: but by Stat. 11 Geo. 2. c. 19, Landlords are empowered to distrain all sorts of corn, grass, or other produce growing on the estate demised, and to cut and gather them when ripe.

Distresses for rent are to be reasonable, and not excessive; and not to be taken in the King's highway, or the common street; or in the ancient sees of the church. 51 H. 3. Stat. 4: 52 H. 3. c. 1, 2, 3, 4, 15: 9 Ed. 2. st. 1. c. 9. Except in case of an amercement in the *leet*.

All *distresses* for rent must be made on the premises, by the Common law. And by Stat. 8 An. c. 14, if any tenant fraudulently removes goods from off the premises, the landlord may in five days seize such goods wherever found, as a *distress* for the rent in arrear; unless the goods are sold for a valuable consideration before the seizure. By Stat. 11 Geo. 2. c. 19, thirty days are allowed. And, whereas at Common law, for rent due the last day of the term, the lessor could not distrain; because the term ended before the rent was due, and the lessee had the whole day to pay it; nor where the lessee held over his term, for rent incurred during the term, (See 1 Inst. 47.) now, by the Stat. 8 An. c. 14, where leases are expired, a *distress* may be taken, provided it be done within six months, and during the landlord's title and tenant's possession.

Distresses for services are to be on the land: but for an amercement in a *leet*, the *distress* may be taken any where within the hundred, as well out of the land, as on it, wherever the cattle are of him that is amerced; for the amercement charges only the person, and not the land; and for this a *distress* may be taken in the high street. 2 Danv. Abr. 644, 645. The lord cannot distrain for amercements in a court-baron, without a prescription; though he may in the *leet*: and the goods and cattle of another, may not be taken in *distress* on my ground, for an amercement, &c. set upon me in a court-leet or court-baron. 11 Rep. 44: 12 H. 7. 13. For services a *distress* cannot be taken but where the services are certain; or may be reduced to a certainty. Co. Lit. 96.

II. ALL DISTRESSES must be made by day; unless in the case of *damage feasant*; an exception allowed lest the beasts should escape before they are taken. 1 Inst. 142.

The landlord might not formerly break open a house to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door. 1 Inst. 161: Comb. 17. By Stat. 11 Geo. 2. c. 19, (See *post*.) he may by assistance of the peace-officer, break open in the day time any place, whither the goods have been fraudulently removed, and locked up to prevent a distress; oath being first made in case it be a dwelling house, of a reasonable ground to suspect that such goods are concealed therein. See 3 Comm. 11.

Where a landlord comes to distrain cattle, which he sees on the tenant's ground, if the tenant, or any other, to prevent the *distress*, drives the cattle off the land, the landlord may make fresh pursuit, and distrain them: though

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though if before the *distress*, the owner of the cattle tenders his rent, and a *distress* is taken afterwards, it is wrongful. 2 *Inst.* 107, 160.

A *distress* of cattle must be brought to the common pound, or be kept in an open place; and if they are put into a common pound, the owner is to take notice of it at his peril; but if in any other open place, notice is to be given to the owner, that he may feed them; and then if the cattle die for want of food, the tenant shall bear the loss; and the landlord may distrain again for his rent. 5 *Rep.* 90: *Co. Lit.* 47, 96. Where one impounds cattle distrained, he cannot justify the tying them in the pound: if he ties a beast, and it is strangled, he must answer it in damages. 1 *Salk.* 248. If the person distraining *damage-feasant* put the *distress* in a broken pound, and the *distress* escapes, he can have no action for the same: it is otherwise if from a good pound, without his default, when he may have action for the trespass. *Salk.* *Ibid.* By *Stats.* 53 *H.* 3. c. 4: 1 *P. & M.* c. 12, none shall drive a *distress* out of the county, on pain to be fined and amerced: and no *distress* of cattle shall be driven out of the hundred where taken to any pound, except to a pound overt in the same county, and not above three miles distant; nor shall any *distress* be impounded in several places under the penalty of 5*l.* and treble damages.

By *Stat.* 11 *Geo.* 2. c. 19 § 10, persons distraining for rent, may impound the *distress* on any convenient part of the land chargeable with the *distress*.

After a *distress* is in the pound, it is said to be *in custodia legis*, so that the owner of it hath no absolute property therein; and therefore he cannot sell or forfeit it, nor may the same be taken in execution, &c. but it must be as a pledge or means to help the party distraining to his debt or duty. *Co. Lit.* 190: *Finch L.* 135. Cattle distrained may not be used, because by law they are only as a pledge; unless it be for the owner's benefit, by milking, &c. *Cro. Jac.* 148.

When a *distress* is taken of household goods, or other dead things, they are to be impounded in a house, or other pound covert, &c. And if the *distress* is damaged, the distrainer must answer it. *Wood's Inst.* 191. And they are to be removed immediately; except corn or hay, by *Stat.* 2 *W. & M.* *sess.* 1. cap. 5. But if a landlord doth not remove goods immediately, but quits them till another day, during which time they are taken away, it is not a rescous, for want of possession. *Mod. Ca.* 215: 1 *Nel.* 672.—See *post* III.

Where goods are unlawfully distrained, the owner may replevy them, before they are impounded; but not afterwards. *Co. Lit.* 47. But the safest way is to replevy, as there are few cases, in law, where a man is allowed to be his own judge, if any.—If lands lie in several counties, a *distress* may be made in one county for the whole rent. *Co. Lit.* 154. And if a landlord comes into a house, and seizes upon some goods as a *distress*, in the name of all the goods in the house; this is a good seizure of all. 6 *Mod.* 215.

By *Stat.* 2 *W. & M.* c. 5, if any *distress* and sale be made where there is no rent due, the owner of the goods distrained shall recover double the value of the goods, and full costs. Also by the Common law, if a lord or other person shall distrain several times for his service or

rent, when none is in arrear, the tenant may have an *assise de siveint distress*, &c. *R. N. B.* 176.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for part at one time, and part at another. 2 *Lutw.* 1532. But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient *distress*, He, his executors, &c. may take a second *distress* to complete his remedy. *Cro. Eliz.* 13: *Stat.* 17 *Car.* 2. c. 7: 4 *Burr.* 590.

Distresses must be proportioned to the thing distrained for. By the *Stat. of Marlbridge*, 52 *H.* 3. c. 4, if any man takes a great or unreasonable *distress*, for rent arriere he shall be heavily amerced for the same. As if the landlord distrains two oxen for 12*d.* rent, the taking of both is an unreasonable *distress*. 2 *Inst.* 407. But if there were no other *distress* nearer the value to be found, he might reasonably have distrained one of them; but for homage, fealty, or suit and service, as also for parliamentary wages (when they used to be paid) it is said no *distress* can be excessive. *Bro. Ab. t. Assise* 291: *Prerog.* 98. For as these *distresses* cannot be sold, the owner upon making satisfaction, may have his chattels again. 3 *Comm.* 12.

The remedy for excessive *distresses* is, by a special action on the *Stat. of Marlbridge*; for an action of trespass is not maintainable upon this account, it being no injury at the Common law. 1 *Vent.* 104: *Fitzgib.* 85: 4 *Burr.* 590.—See titles *Avowry*, *Replevin*, *Rescous*, &c.

III. SEE FURTHER as to *Distress* 3 *Comm.* 6, 145; and in the several abridgments titles *Distress* and *Replevin*, and also *Gilbert on Replevins*—See also *Stats.* 2 *Wm. & M.* *st.* 1. c. 5: 8 *An.* c. 14: 4 *Geo.* 2. c. 28: 11 *Geo.* 2. c. 19.

These statutes have made great alterations in the ancient law of *distress*, particularly by empowering persons who distrain for rent of any kind, to sell the *distress* for payment of rent in arrear, if the tenant or owner fails to replevy with sufficient security, within five days after taking of the *distress*, and giving the tenant notice of the cause; in this case the constable is bound to assist, the goods are to be appraised by two sworn appraisers, and the overplus, if any, left in the constable's hands for the use of the owner. This improvement of the remedy by *distress*, was first introduced by *Stat.* 2 *W. & M.* c. 5, with respect to rents due on demise, or contract; and afterwards by *Stat.* 4 *Geo.* 2. c. 28, was extended to rents-seck, rents of assise, and chief rents. Before these two statutes, the remedy by *distress* was very imperfect; for the *distress* was merely taken *nomine pence*, to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the King and some few other instances.—See further as to *distresses* and other remedies for rent, this Dict. titles *Cessavit*, *Rent*, *Lease*, &c.

The following extracts will more fully explain the nature of *distress* by statute.

By *Stat.* 11 *Geo.* 2. c. 19, if any tenant of lands or tenements shall fraudulently carry away his goods, to prevent *distress*, the landlord may, within thirty days after, distrain them wherever they shall be found, as if they had been on the premises; but no such goods shall be distrained,

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distrained, if sold *bona fide* for valuable consideration before seizure, to any person not privy to the fraud. Tenants committing such fraud, or others assisting, shall forfeit double the value of the goods carried off, to be recovered by action of debt, &c. And where they shall not exceed 50*l.* value, the landlord may exhibit a complaint before two justices of peace, who are to examine the fact, and enquire into the value of the goods, and thereupon order the offender to pay double value, leviable by distress and sale; and, for want thereof, commit the offender to the house of correction for six months. Landlords, or their agents, may, with the assistance of a constable, seize any goods fraudulently concealed in any house, out-house, &c.

And in case of a dwelling-house, on oath first made to some justice, of reason to suspect that such goods are therein, may break open the same, and distrain them: they may also distrain for rent and cattle, or stock of their tenants, feeding in any common; or corn, grass, hops, fruits, &c. growing on the land, which they shall cut, gather, cure and lay up when ripe, in any proper place, giving notice to the tenant within a week where lodged, and dispose thereof towards the satisfaction of the rent and charges; the appraisement to be taken when cut or cured: but, if after a distress is taken, before the product be ripe and gathered, the tenant shall pay the rent, and charges of the distress, the said distress shall cease.

Persons may secure distresses lawfully taken, and sell them upon the premises in like manner as may be done off the same, by 2 *W. & M. sess. 1. c. 5.* And any persons may go to and from the premises, to view, appraise, buy, or take away the goods of the purchaser; and if a rescous be made of the distress, the persons aggrieved shall have the remedy given by the said statute.

Distresses made for rent justly due, shall not be unlawful, nor distrainers be trespassers *ab initio*, for any irregularity in the disposition thereof; but the parties grieved to have satisfaction for special damage, in an action on the case, &c. But no tenant shall recover by such action, if tender of amends, hath been made before the action brought. And in all actions of trespass, or on the case relating to the entry, distress, or sale, made by landlords for rents, the defendants may plead the general issue, and if the plaintiffs become non-suit, &c. shall recover double costs of suit.

By Stat. 27 Geo. 2. c. 20, Justices of peace, in all cases, where they are impowered to levy penalties by any act of parliament, are in their warrants of distress, to limit a time for the sale of the goods; the Constable making such distress may deduct the reasonable charges of detaining, keeping, and selling such distress, out of the money arising by the sale; and the overplus, if any, after such charges, and also the penalty or sum of money, shall be fully paid, shall be returned to the owner of the goods distrained; and the Constable, if required, shall shew the warrant to the party whose goods are distrained, and suffer a copy thereof to be taken.—This act not to alter or repeal the Stat. 7 & 8 W. 3. c. 34, and 1 Geo. 1. c. 6, relating to Distresses on Quakers for Tithes and Church Rates.

DISTRESS OF THE KING. By the Common law no Subject can distrain out of his fee or seignior; unless cattle are driven to a place out of the fee, to hinder the lord's

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distress, &c. But the King may distrain for rent-service, or fee-farm, in all the lands of the tenant wheresoever they be; not only on lands held of himself, but of others; where his tenant is in actual possession, and the land manured with his own beasts, &c. 2 *Inst.* 132: 2 *Dauv. Abr.* 643.

DISTRESS OF A TOWN. If a town be assessed to a certain sum, a distress may be taken in any part, subject to the whole duty. 2 *Dauv.* 643.

DISTRIBUTION of Intestates' Estates; See title *Executor.* V. 8.

DISTRICIONE SCACCARII, The Stat. 51 H. 3. Stat. 5, as to Distresses for the King's debt.

DISTRICT, [districus.] A territory, or place of jurisdiction; the circuit wherein a man may be compelled to appear; also the place in which one hath the power of distraining; and where we say *bors de son fee*, out of the fee, it has been used for *extra districtum suum.* Brit. c. 120.

DISTRINGAS, A writ directed to the Sheriff, or other officer commanding him to *distrain* a man for a debt to the King, &c. or for his appearance at a day affixed. There is a great diversity of this writ; which was sometimes of old called *constringas.* F. N. B. 138. There is also a *distringas* against Peers and persons intitled to privilege of parliament, under Stat. 10 Geo. 3. c. 50; by which the effects (in law called the *issues*) levied may be sold to pay the plaintiff's costs. And it has been held that this statute extends to all writs of *distringas.* 5 *Burr.* 2726.—See titles *Process;* *Parliament;* (*privilege of*). In *detinue* after judgment, the plaintiff may have a *distringas* to compel the defendant to deliver the goods, by repeated distresses of his chattels. 1 *Ro. Ab.* 737: *Rass. Entr.* 215.—See title *Execution.*

DISTRINGAS JURATORES, A writ directed to the sheriff, to distrain upon a jury to appear; and return issues on their lands, &c. for non-appearance. Where an issue in fact is joined to be tried by a jury, which is returned by the sheriff in a panel upon a *venire facias* for that purpose; thereupon there goes forth a writ of *distringas jurator*, to the sheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 *Lil. Abr.* 483. The writ of *distringas jur* ought to be delivered to the sheriff so timely, that he may warn the jury to appear four days before the writ is returnable, if the jurors live within forty miles of the place of trial; and eight days if they live farther off. *Ibid.* 484. There may be an *alias*, or *pluries distringas jur* where the jury doth not appear. See titles *Jury;* *Trial.*

DIVEST, See *Devest.*

DIVIDENDS OF BANKRUPTS, EFFECTS, See title *Bankrupt.*

DIVIDEND IN THE EXCHEQUER, Is taken for one part of an indenture. Stat. 10 Ed. 1. c. 11.

DIVIDEND OF STOCKS, A dividable proportionate share of the interest of stocks erected on public funds; as the Bank, South-Sea, and India stocks, &c. See title *Funds.*

DIVISA, Hath various significations: sometimes it is used for a device, award or decree: sometimes for device of a portion or parcel of lands, &c. by will: and sometimes it is taken for the bounds or limits of division of a parish or farm, &c. as *divisus perambularis*, to walk the bounds of a parish; in which sense it has been extended to the division between counties, and given name to towns,

towns, as to the *Devises*, a town in *Wiltshire*, situate on the confines, the *Division* of the *West Saxon* and *Mercian* kingdoms. *Leg. H. 2. cap. 9: Leg. Inq. c. 44: Leg. H. 1. c. 57. Corwel.*

DIVORCE, *divortium*; à *divertendo*.] The separation of two, *de facto* married together, made by law: it is a judgment *spiritual*; and therefore, if there be occasion, it ought to be reversed in the spiritual court. *Co. Lit. 335.* And, besides sentence of *divorce*, in the old law, the woman *divorced* was to have of her husband a writing called a *bill of divorce*, which was to this effect, *viz. I promise that hereafter I will lay no claim to thee, &c.*—See title *Baron and Feme*. III. 2: VI: and particularly XI. See also title *Marriage*.

There are many *divorces*, mentioned in our books; as *causâ precontractûs*; *causâ frigiditytis*; *causâ consanguinitatis*; *causâ affinitatis*; *causâ professionis*, &c. But the usual *divorces* are only of two kinds, i. e. à *mensa & thoro*, from bed and board; and à *vinculo matrimonii*, from the very bond of marriage. A *divorce à mensa & thoro* dissolveth not the marriage; for the cause of it is *subsequent* to the marriage, and supposes the marriage to be lawful: this *divorce* may be by reason of adultery in either of the parties, for cruelty of the husband, &c. And as it doth not dissolve the marriage, so it doth not debar the woman of her dower; or bastardize the issue, or make void any estate for the life of husband and wife, &c. *Co. Lit. 235: 3 Inst. 89: 7 Rep. 43.* The woman under separation by this *divorce*, must sue by her next friend; and she may sue her husband in her own name for alimony. *Wood's Inst. 62.*

A *divorce à vinculo matrimonii*, absolutely dissolves the marriage, and makes it void from the beginning, the causes of it being precedent to the marriage; as *precontract* with some other person, consanguinity or affinity, within the *Levitical* degrees, impotency, impuberty, &c. On this *divorce* dower is gone; and if by reason of *precontract*, consanguinity, or affinity, the children begotten between them are bastards. *Co. Lit. 335: 2 Inst. 93, 687.* But in these *divorces*, the wife, it is said, shall receive all again that she brought with her, because the nullity of the marriage arises through some impediment; and the goods of the wife were given for her advancement in marriage, which now ceaseth: but this is where the goods are not spent; and if the husband give them away during the coverture, without any collusion, it shall bind her: if she knows her goods unspent, she may bring action of detinue for them; and as for money, &c. which cannot be known, she must sue in the spiritual court. *Dyer 62: Nelf. Abr. 675.* This *divorce* enables the parties to marry again. But in the other cases, a power for so doing must be obtained by act of parliament.

Where lands were formerly given to husband and wife, and the heirs of their bodies in *frank-marriage*; if they had been afterwards *divorced*, the wife was to have her whole lands; and by *divorce* an estate-tail of baron and feme, it is said, may be extinct. *Godb. 18.* After a sentence of *divorce* is given in the spiritual court *causâ precontractûs*, the issue of that marriage shall be bastards, so long as the sentence stands unrepealed: and no proof shall be admitted at Common-law to the contrary. *Co. Lit. 235: 1 Nelf. 674.* In such case, issue of a second marriage may inherit until the sentence is repealed. 2 *Leon. 207.* If after a *divorce à mensa & thoro*, either

of the parties marry again, the other being living, such marriage is a mere nullity; and by sentence to confirm the first contract, she and her first husband become husband and wife to all intents, without any formal *divorce* from the second. 1 *Leon. 173.* Also on this *divorce*, as the marriage continues, marrying again while either party is living, hath been held to be bigamy within the Stat. 1 *Jac. 1. c. 11.*—*Cro. Car. 333: 1 Nelf. 674.*

A *divorce for adultery* was anciently à *vinculo matrimonii*; and therefore in the beginning of the reign of Queen Elizabeth, the opinion of the church of England was, that after a *divorce* for adultery, the parties might marry again; but in *Foliambe's* case, *H. 44 El.* in the star-chamber, that opinion was changed; and archbishop Bancroft, by the advice of divines, held, that adultery was only a cause of *divorce à mensa & thoro*. 3 *Salk. 138.*

Sentence of *divorce* must be given in the life of the parties, and not afterwards: but it may be repealed in the spiritual court, after the death of the parties. *Co. Lit. 35, 244: 7 Rep. 44: 5 Rep. 98.* Upon the *divorce* of a man and his wife, equity will not assist the wife in recovering dower, at the husband's death, but shall leave her to the law; neither ought the spiritual court to grant her administration, she not being such a wife as is intitled to it; nor will the Chancery decree her a distributive share. *Preced. Canc. 111, 112.*

DIURNALIS, See *Daywore*.

DOCKET, or **DOGGET**. A brief in writing on a small piece of paper or parchment, containing the effect of a greater writing. *West Symbol. par. 1. sect. 106.* And when rolls of judgments are brought into C. B. they are docketed, and entered on the docket of that term; so that upon any occasion you may soon find out a judgment, by searching these dockets, if you know the attorney's name. *Stat. 4 & 5 W. & M. c. 20.*—See title *Judgments*. Exemplification of decrees in Chancery and Commissions of Bankruptcy, are also docketed.

DOCTRINES, *illegal, asserting, or publishing*. See titles *Libel*; *Sedition*; *Treason*.

DOGS, The law takes notice of a greyhound, mastiff dog, spaniel and tumbler; for trover will lie for them. *Cro. Eliz. 125: Cro. Jac. 44.* A man hath a property in a mastiff; and where a mastiff falls on another dog, the owner of that dog cannot justify the killing the mastiff; unless there was no other way to save his dog, as that he could not take off the mastiff, &c. 1 *Saund. 84: 3 Salk. 139.* The owner of a dog is bound to muzzle him if mischievous, but not otherwise: and if a man doth keep a dog, that useth to bite cattle, &c. if after notice given to him of it, or his knowing the dog is mischievous, the creature shall do any hurt, the master shall answer for it. *Cro. Car. 254, 487: Stra. 1264.*—See titles *Action*; *Trespass*.

By Stat. 10 Geo. 3. c. 18, If any person shall steal any dog or dogs, they shall be liable to forfeit for the first offence from 30 to 20*l.* or be committed to gaol, for from twelve to six months, at the discretion of two justices—for the second offence to forfeit from 50 to 30*l.* or be imprisoned for from eighteen to twelve months, and also whipped.—A punishment perhaps not too severe for notorious dog-stealers; but which may afford a dangerous handle for oppression: and Burn, title *Dogs*, seems seriously to doubt whether the statute extends to Bitches—a question that we believe has never yet been argued in a court of law.

DOG-DRAW,

DOG

DOG-DRAW, The manifest prehension of an offender against venison in a *forest*, when he is found drawing after a deer, by the scent of a hound led in his hand: or where a person hath wounded a deer, or wild beast, by shooting at him, or otherwise, and is caught with a dog drawing after him to receive the same. *Manwood, par. 2. cap. 8* — See title *Forest*.

DOGGER, A light ship or vessel: as a *Dutch dogger*, &c. *Stat. 31 Ed. 3. cap. 1.* and *Dogger fish*, are fish brought in those ships. *Stat. ibid.*

DOGGER-MEN, Fishermen that belong to *dogger-ships*. 25 H. 8. c. 2.

DOITKIN, or *doit*. Was a base coin of small value, prohibited by the *Stat. 3 H. 5. c. 1.* We still retain the phrase, in common saying, when we would undervalue a man, *that he is not worth a doit*. See title *Coin*.

DO LAW, *facere legem*.] Is the same with to make law *Stat. 23 H. 8. c. 14.*

DOLE, *dola*] A Saxon word signifying as much as *pars* or *portio* in the *Latin*: and anciently where a meadow was divided into several shares, it was called a *dole meadow*. 4 Jac. 1. c. 11. See *Dalus*.

DOLEFISH. Seems to be the share of fish, which the fishermen, yearly employed in the *North seas*, do customarily receive for their allowance. *Stat. 35 H. 8. c. 7.*

DOLG-BOFE, *Sax*] A recompence or amends, for a scar or wound. *Sax. Diet. LL. Aluredi Reg. cap. 22.*

DOLLAR, A piece of foreign coin, passing for about 4 s. 6 d. *Lex Mercat.*

DOM BEC or **DOM BOC**, *Sax.* See *Doms-book*.

DOME, or **DOOM**, from the *Sax. dom*.] A judgment, sentence, or decree. And several words end in *dom*: as *kingdom*, *earldom*, &c. from whence they may be applied to the jurisdiction of a lord, or a king. *Mon. Angl. tom. 1. fol. 284.*

DOME-BOOK, *Liber judicialis*] A book composed under the direction of *Alfred*, for the general use of the whole kingdom, containing the local customs of the several provinces of the kingdom. This book is said to have been extant so late as the reign of *Ed. IV*; but it is now lost. It probably contained the principal maxims of the common law, the penalties for misdemeanors and the forms of judicial proceedings. Thus much at least may be collected from the injunction to observe it which is found in the laws of *Edward the Elder*, son of *Alfred*, c. 1. See also *Leg. Inac. c. 29.* and *Spelm. in verb. Domesb.* This book was compiled by *Alfred* for the use of the Court Baron, Hundred and County Court, the Court Leet and Sheriff's tourn. See 1 *Comm.* 64: 4 *Comm.* 411. See post *Domesday*.

DOMESDAY or **DOMESDAY-BOOK**: *Liber judicialis, vel censualis Angliæ*.] A most ancient record, made in the time of *William I* called the Conqueror, and now remaining in the *Exchequer* fair and legible, consisting of two volumes, a greater and a less; the greater containing a survey of all the lands in England, except the counties of *Northumberland*, *Cumberland*, *Westmoreland*, *Durham*, and part of *Lancashire*, which it is said were never surveyed; and excepting *Essex*, *Suffolk*, and *Norfolk*; which three last are comprehended in the lesser volume. There is also a third book, which differs from the others in form more than matter, made by the command of the same King. And there is a fourth book kept in the *Exchequer* which is called *Domesday*; and, though a very large volume, is only an

DOM

it of the others. Likewise a fifth book is kept in the *Remembrancer's* office in the *Exchequer*, which has the name of *Domesday*, and is the very same with the fourth before mentioned. Our ancestors had many *domes-books*. King *Alfred* had a roll which he called *Domesday*; and the *Domesday* book made by *Will. I.* referred to the time of *Edward the Confessor*, as that of King *Alfred* did to the time of *Ethelred*; See ante *Dome-book*. The fourth book of *Domesday* having many pictures, and gilt letters in the beginning, relating to the time of King *Edward the Confessor*, this led him who made notes on *Fimberbert's Register* into a mistake in p. 14, where he tells us, that *hæber Domesday factus fuit tempore regis Edwardi*.

The book of *Domesday* was begun by five justices, assigned for that purpose in each county, in the year 1081, and finished anno 1086. And the question whether lands are *antient demesne*, or not, is to be decided by the *Domesday* of *Will. I.* from whence there is no appeal: and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned to be determined by it. The addition of *day* to this *Dome* book was not meant with any allusion to the final day of judgment, as most persons have conceived; but was to strengthen and confirm it, and signifieth the judicial decisive record or book of dooming judgment and justice. *Hammond's Annot.* Camden calls this book *Gulielmi Librum Censualem*, the *Tax-Book* of King *William*; and it was further called *Magna Rolla Winton*. The dean and chapter of *York* have a register styled *Domesday*; so hath the bishop of *Worcester*; and there is an ancient roll in *Chester castle*, called *Domesday-Roll*. Blount. A transcript of the *Domesday* book of *W. I.* has been made and published, by which the access to it is rendered more familiar to our Antiquaries and Historians. See *Speml. in verb. Domesdei*, and this *Dist. title Tenures*, II. 1.

DOMES MEN. Judges, or men appointed to doom, and determine suits and controversies, hence *æg dem*, *I deem*, or judge. Vide *days men*.

DOMICELLUS. An obsolete *Latin* word, anciently given as an appellation or addition to the King's natural sons in *France*, and sometimes to the eldest sons of noblemen there; from whence we borrowed these additions: as several natural children of *John of Gaunt*, Duke of *Lancaster*, are styled *domicelli* by the charter of legitimation. 20 R. 2. But according to *Tiborn*, the *domicelli* were only the better sorts of servants in monasteries.

DOMIGERIUM, Is sometimes used to signify danger; but otherwise, and perhaps more properly, it is taken for power over another; *sub domigerio alicujus vel manu esse*. *Brañ. lib. 4. tract. 1. cap. 10*

DOMINA, A title given to honourable women, who anciently in their own right of inheritance held a barony. *Parorb. Antiq.*

DOMINICA IN RAMIS PALMARUM, *Palm Sunday*. 23 Ed. 1.

DOMINIUM, right or regal power. *Parorb. Antiq.* 498.

DOMINUS. This word prefixed to a man's name, in ancient times usually denoted him a knight, or a clergyman; and sometimes a gentleman, not a knight, especially a lord of a manor.

DOMO REPARANDA, Is a writ that lay for one against his neighbour by the fall of whose house he feared a damage and injury to his own. *Reg. Orig.* 153.

DOMUS CONVERSORUM. An ancient house built or appointed by King Hen. III. for such Jews as were converted to the Christian faith; but King Ed. III. who expelled the Jews from this kingdom, deputed the place for the custody of the rolls and records of the Chancery. See *Rolls*.

DOMUS DEI, The hospital of St. Julian in Southampton, so called. *Mun. Angl. tom. 2. 440.* A name applied to many hospitals.

DONATIO CAUSA MORTIS. A death-bed disposition of property so called, viz. when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death; or *mortis causa*. *Prec. Chm. 269: 1 P. Wms. 404. 441: 3 P. Wms. 357: 2 Comm. 514: 2 Fez. 431: Ward v. Turner.* This latter case collects all the law on the subject of donations *causamortis*; and particularly considers what shall be a sufficient delivery of different kinds of property to give effect to such donations.—There may be a *donatio causa mortis* of bonds bank notes and bills payable to bearer; but not of other promissory notes or bills of exchange, these being choses in action which do not pass by delivery. See further this Dict. titles *Legacy*; *Will*.

DONATIVE, donativum.] Is a benefice merely given and disposed of by the patron to a man, without either presentation to, or institution by, the Ordinary, or induction by his order. *F. A. B. 35.* *Donatives* are so termed, because they began only by the foundation and erection of the church. The King might of ancient time found a church or chapel, and exempt it from the jurisdiction of the Ordinary; so he may by his letters patent give licence to a common person to found such a church or chapel, and make it *donative*, not presentable; and that the incumbent or chaplain shall be deprived by the founder and his heirs, and not by the bishop; which seems to be the original of *donatives* in England. See *2 Comm. 22*; and this Dict. title *Abbayson*.

When the King founds a church, &c. *donative*, it is of course exempted from the Ordinary's jurisdiction, though no particular exemption is mentioned; and the Lord Chancellor shall visit the same: and where the King grants a licence to any common person to found a church or chapel, it may be *donative*, and exempted from the jurisdiction of the bishop, so as to be visited by the founder, &c. *Co. Litt. 134: 2 Rol. Abr. 230.* The resignation of a *donative* must be to the donor or patron, and not to the Ordinary; and *donatives* are not only free from all ordinary jurisdiction, but the patron and incumbent may charge the glebe to bind the successor: and if the clerk is disturbed, the patron may bring *quare impedit*, &c. Also the patron of a *donative* may take the profits thereof when it is vacant. *Co. Litt. 344: Cio. Jac. 63.*

If the patron of a *donative* will not nominate a clerk, there can be no lapse: but the bishop may compel such patron to nominate a clerk by ecclesiastical censures; for

though the church is exempt from the power of the Ordinary, the patron is not exempted: and the clerk must be qualified like unto other clerks of churches; no person being capable of a *donative*, unless he be a priest lawfully ordained, &c. *Tilv. 61. Stat. 14 Car. 2. cap. 4: 1 Lill. 488.*

There may be a *donative* of the King's gift with cure of souls, as the church of the Tower of London is: and if such *donative* be procured for money, it will be within the statute of simony. *Mich. 9 Car. B. R.* A parochial church may be *donative*, and exempt from the Ordinary's jurisdiction. *Godolph. 262.* The church of St. Mary le Bow in Middlesex is *donative*, and the incumbent being cited into the spiritual court, to take a licence from the bishop to preach, pretending that it was a chapel, and that the parson was a stipendiary; it was ruled in the King's Bench that it was a *donative*; and if the bishop visit, the court of B. R. will grant a prohibition. *1 Mod. 90: 1 Nelf. Abr. 676.*

If a patron of a *donative* doth once present his clerk to the Ordinary, and the clerk is admitted, instituted, and inducted, then the *donative* ceaseth; and it becomes a church presentative. *Co. Litt. 344.* But when a *donative* is created by letters patent, by which lands are united upon the parson and his successors, and he is to come in by the donation of the King, and his successors; in this case, though there may be a presentation to the *donative*, and the incumbent come in by institution and induction, yet that will not destroy the *donative*. *2 Salk. 541.* Abbotspricks being of the foundation of the King, they were in ancient time *donative*. *3 Rep. 75.* See title *Bishops*.

Donatives have two peculiar properties; one, that the presentation does not devolve to the king as in other livings when the incumbent is made a bishop. *C. Parl. 184.*—The other that a *donative* is within the statute of pluralities, if it is the *first* living; but if a *donative* is the second benefice taken without a dispensation, the first would not be void; for the words of the statute are *instituted and inducted* to any other, which are not applicable to *donatives*. *1 Woodd. 330.*—And therefore it seems if *donatives* are taken last they may be held with any other preferment.

DONIS, Statute de. The statute of *Wesim. 2. viz. 13. Ed. 1. c. 1.* called the statute *de donis conditionalibus*. This statute revives, in some sort, the ancient feudal restraints which were originally laid on alienations; by enacting, that from thenceforth the will of the donor be observed, and that the tenements so given, (to a man and the heirs of his body) should at all events go to the issue, if there were any, or if none, should revert to the donor. See *2 Comm. 12*; and this Dict. titles *Estate*; *Tail*; *Limitation*.

DONOR AND DONEE. *Donor* is he who gives lands or tenements to another in tail, &c. And the person to whom given is the *donee*.

DOOMSDAY, See *Domesday*.

DORTURE, dormitorium.] The common room or chamber, where all the *Fryars*, or religious of one convent, slept and lay all night. *Stat. 25 H. 8. c. 11.*

DOSSALE. Hangings or tapestry.—*Mat. Par.*

DOT, ASSIGNANDA, Is a writ that lay for a widow, where it was found by office, that the King's tenant was seized of lands in fee, or fee-tail at the day of his death, and

NOTE

and that he held of the King in chief, &c. In which case, the widow came into the *Chancery*, and there made oath, that she would not marry without the King's leave; whereupon she had this writ to the escheator, to assign her dower, &c. But it was usual to make the assignment of the dower in the *Chancery*, and to award a writ to the escheator, to deliver the lands assigned unto her. *Stat. 15 Ed. 4. cap. 4: Reg. Orig. 297: F. N. B. 263.* See title *Dower*.

NOTE UNDE NIHIL HABET. A writ of *dower*, that lies for the widow against the tenant who bought land of her husband in his life-time, whereof he was solely seised in fee-simple or fee tail, and of which she is dowable. *F. N. B. 147.* See the law and the form of the writ in *Booth's Real Actions* 166. &c. See further title *Dower*.

DOTIS ADMENSURATIO. *Admeasurament of dower*, where the widow holds more than her share, &c. See titles *Admeasurament*; *Dower*.

DOTKIN. See *Dotkin*.

DOUBLE PLEA. *duple placitum.* Is where a defendant alledgeth for himself two several matters, in bar of the plaintiff's action, when one of them is sufficient; which shall not be admitted: as if a man plead several things, the one not depending upon the other, the plea is accounted *double*, and will not be allowed; but if they mutually depend on each other, and the party may not have the last plea without the first, then it shall be received. *Kitch. 223.* And where a *double* plea that is wrong, is pleaded, if the plaintiff reply thereto, and take issue of one matter; if that be found against him, he cannot afterwards move in arrest of judgment; for by the replication it is allowed to be good. *18 Ed. 4. 17.*

If a man pleads two or more matters, when he is compelled to shew them, it makes not the plea *double*; so it is where two distinct things are pleaded, which require but one answer: and in case a man pleads two several matters or things, and only one is material, the other being surplusage, or but matter of inducement, and needing no answer, the plea is not *double*. *Hob. 197.* Where there are several inducements to a plea, they shall not make the plea *double*; and a *duple* plea is allowable in assizes of *assault*, &c. but not in other actions. *Jenk. Cent. 75.*

By *Stat. 4 Ann. c. 16. sect. 4.* It shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence. That is, in so many separate and distinct pleas, and where there are more pleas than one. By virtue of this statute defendant is said to plead *double*, by leave of the court.— See further title *Pleading*.

DOUBLE QUARREL. *duple querela.* Is a complaint made by any clerk, or other, to the archbishop of the province, against an inferior Ordinary, for delaying or refusing to do justice in some cause ecclesiastical; as to give sentence, institute a clerk, &c. and seems to be termed a *double quarrel*, because it is most commonly made against both the judge, and him at whose suit justice is denied or delayed: the effect whereof is, that the archbishop taking notice of the delay, directs his letters under his authentical seal to all clerks of his province, commanding them to admonish the Ordinary within a certain num-

DOWER.

ber of days to do the justice required, or otherwise to appear before him or his official, and there alledge the cause of his delay: and to signify to the Ordinary, that if he neither perform the thing enjoined, nor appear and shew cause against it, he himself, in his court of audience, will forthwith proceed to do the justice that is due. *Covent.*

DOUBLES. *Fr.* Letters patent. *Stat. 14 H. 6. c. 6.*

DOVER CASTLE. The constable of *Dover* castle shall not hold plea of any foreign county within the castle gates, except it concern the keeping of the castle; nor shall he distrain the inhabitants of the ports, to plead elsewhere or otherwise than as they ought, according to the charters, &c. *Stat. 28 Ed. 1. c. 7.* See title *Cinque Ports*.

DOW. To give or *endow*. from the *Latin* word *do*.

DOWAGER. *dotata, dotifla* A widow endowed; applied to the widows of Princes, Dukes, Earls, and other great personages.

DOWAGER. *Queen.* Is the widow of the King, and as such enjoys most of the privileges belonging to her as Queen consort. But it is not high treason to conspire her death, or violate her chastity; because the succession to the crown is not thereby endangered. But no man can marry her, without special licence from the King, on pain of forfeiting his lands and goods. *2 Inst. 18.* See *Riley's Plac. Parl. 672: 1 Comm. 223.* See title *King*.

DOWER.

DOTALIUM. The Portion which a Widow hath of the lands of her husband after his decease, for the sustentance of herself, and education of her children. *1 Inst. 30.* See title *Tenure*, III. 8.

I. Of the several Kinds of Dower.

II. 1. *What Woman shall be endowed; 2. Of what Estate.*

III. Of the Assignment and Admeasurment of Dower.

IV. What shall be deemed a Bar and Forfeiture of Dower.

V. Of the Proceedings in Dower.

I. There were formerly five kinds of *dower* in this kingdom. 1. *Dower by the Common law*; which is a third part of such lands or tenements whereof the husband was sole seised in fee-simple, or fee tail, during the coverture; and this the widow is to enjoy during her life.

2. *Dower by custom*; which is that part of the husband's estate to which the widow is intitled after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste; and this is more than one third part, for in some places she shall have *half* the land, as by the custom of *gavellkind*; and in divers manors the widow shall have the *whole* during her life, which is called her *free-bench*: but as custom may enlarge, so it may abridge *dower* to a 4th part. *Co. Litt. 33.*

3. *Dower ad optatum exstetia*; made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed; and in ancient time it was taken, that a man could not by this *dower*, endow his wife of more than a third part, though of less he might: and as the certainty of the land was openly declared by the husband, the wife after his death might enter into the land of which she was endowed without any other assignment. *Co. Litt. 34: Lit. § 39.*

DOWER II. 1.

4. *Dower ex assensu patris*, which is only a species of the *dower ad opus ecclesie*; which likewise was of certain lands named by a son who was the husband, with the consent of his father then living and always put in writing as soon as the son was married; and if a woman thus endowed or *ad opus ecclesie*, after the death of her husband, entered into the land allotted her in dower, and agreed thereto, she was concluded to claim any dower by the Common law. *Litt.* §§ 40, 41.

5. *Dower de la plus belle*; which was where the wife was endowed with the fairest part of her husband's estate.

But of all these kinds of *Dower*, the two first are now only in use.

II. 1. A Woman to be endowed must be the actual wife of the party at the time of his decease. If she be divorced *à vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dō*. *2 Inst. lib. 2. c. 39. § 4.* But a divorce *à mensa et thoro* only, doth not destroy the dower; *Co. Litt. 32*: no, not even for adultery itself by the Common law. Yet now by *Stat. Westm. 2. (13 Ed. 1. c. 34.)* if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. And in a case where *John de Camoys* had assigned his wife by deed, it was decided in parliament, that, notwithstanding the pretended purgation of the adultery in the spiritual court, the wife was not entitled to dower, *2 Inst. 435.* If however after the elopement of a wife, her husband and she demean themselves as husband and wife, it is evidence of reconciliation. *Dyer 106.* *Lady Percy's case*, where the reconciliation was specially pleaded and allowed.—It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy. *Co. Litt. 31.* But as it seems to be at present agreed, upon principles of sound sense, and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says *Staudford de Jure*, (*P. C. b. 3. c. 3.*) that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may: though *Broom* (c. 110.) gives it another turn; viz. that it is presumed the wife was privy to her husband's crime. However the *Stat. 1 Ed. 6. c. 12.* abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent *Stat. 5 & 6 Ed. 6. c. 11.* revived the severity against the widows of traitors, who are now barred of their dower; (except in the case of certain treasons relating merely to the coin; *Stat. 5 Ed. 6. c. 11: 18 Ed. 6. c. 1: 8 & 9 H. 3. c. 20: 15 & 16 Geo. 2. c. 23.*) but the widows of felons are not barred. An alien also cannot be endowed unless she be Queen consort; for no alien is capable of holding lands. *Co. Litt. 31.* See *post* at the end of this *Dow.* The wife must be above nine years old at her husband's death, otherwise she shall not be endowed. *Litt. § 36.* See *2 Comm. 130.*

The wife of a man who is banished shall have dower in his life-time; it is held otherwise, if he is professed in religion; and a jointress of a banished husband shall enjoy her jointure, in his life. *Co. Litt. 133: Perk. 5. 307.*

If a woman be of the age of nine years, at the death of her husband, she shall be endowed of whatsoever age he is; because after the death of the husband, the marriage is adjudged lawful. *Co. Litt. 53.*

The wife of a *felo de se* shall have dower. *Plow. 261 a. 262 a.* So if the husband be outlawed in trespass, or any civil action, for this works no corruption of blood or forfeiture of lands. *Bro. 82: Perk. 338: Co. Litt. 31 a.*

If a woman being a lunatick kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her who was deprived of her understanding by the act of God; so though she be of sound mind, and refused to bring an appeal of his death, when he is killed by another, yet she shall be endowed; for this is only a waiver of that privilege the law has given her to be avenged of her husband's murderer; so it seems if she refuses to visit and assist her husband in his sickness, yet she shall be endowed, for this is only undutifulness, which the law does not punish with the loss of her entire subsistence. *Perk. 364, 365.*

If a man take an alien to wife and dieth, she shall not be endowed, except the wife of the King, who shall be endowed by the law of the Crown.—And if a Jew born in England marry a Jewess also born here, the husband becomes a christian, purchases lands and dies.—The wife, (not being also a christian) shall not have dower. *1 Inst. 31 b: 32 a.*

In the notes on Mr. *Hargrave's* edition of *Co. Litt.* the latter part of the above is confirmed; as to the former there is the following remarkable note. "Anciently a woman alien was not dowable; but by special act of parliament not printed, *Rot. Parl. 8 H. 5. n. 15.* all women aliens who from thenceforth should be married to English men by licence of the King, are enabled to demand their Dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women. But this act did not extend to those married before; and therefore in *Rot. Parl. 9 H. 5. n. 9.* there is a special act of parliament to enable *Beauclerc* countess of *Shumbli* born in Portugal to demand her Dower. *Hal. MSS: See Acc. 1 Ro. Ab. 675.*"—See also *9 Vin. 210.* (8vo. ed.)

2 A Woman is now by law entitled to be endowed of all lands and tenements, of which her husband was seized in fee simple, or fee-tail general at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir. *Litt. § 36. 53.* Therefore if a man, seized in fee-simple, has a son by his first wife, and afterwards marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son, by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on A. his wife; though A. may be endowed of these lands, yet if A. dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them. *Ibid. § 53.*

But in case land be given to the husband and wife in tail, the remainder in tail to the husband, and the first wife dying without issue, he marries another wife; this second wife will be intitled to dower, after his death. *Litt. § 53: 40 Ed. 3. 4: 2 Shep. Abr. 63.* For here he hath

hath an estate in tail. The wife of a *tenant in common*, but not a *jointenant*, shall have *dower*; and she shall hold her part in common with the tenants in common. *Kitt. b.* 160.

A *feisin* in law of the husband will be as effectual as a *feisin* in deed, in order to render the wife *dowable*; for it is not in the wife's power to bring the husband's title to an actual *feisin*, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be a tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually *seised* in deed. *Co. Litt.* 31.—The *feisin* of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine,) will not entitle the wife to *dower*. *Co. Jac.* 615: 2 *Rep.* 67: *Co. Litt.* 31: for the land was merely *in transitu* and never vested in the husband, the grant and render being one continued act. But, if the land abide in him for the interval of but one single moment, it seems that the wife shall be endowed thereof. And in short a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary.

Thus, a woman shall not be endowed of a castle, built for defence of the realm. *Co. Litt.* 31, 5: 3 *Lev.* 401: Nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. *Co. Litt.* 32: 1 *Jon.* 315. Copyhold estates are also not liable to *dower*, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the *widow's free-tomb*. 4 *Rep.* 22. See title *Copyhold*. But where *Dower* is allowable, it matters not though the husband alien the lands during the coverture; for he aliens them liable to *dower*. *Co. Litt.* 32.

It is now settled that although the husband may be tenant by the curtesy of a trust estate of inheritance, (see title *Curtsey*;) the wife is not entitled to *Dower* out of such an estate. 3 *P. Wms.* 229.—The reason assigned for this is that the wife was not endowed of a use at Common Law.—And from analogy to trusts it has been determined that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. 1 *Bro. C. R.* 316.

The following further particulars as to what estate a woman shall be endowed of are worthy the attention of the Student.

If lands are exchanged by the husband for other lands, the wife may be endowed of which lands she will, as the husband was *seised* of both; though she may not be endowed of the lands given and taken in exchange. *Co. Litt.* 31.

Where the estate, which the husband hath during the marriage, is ended, there the wife shall lose her *dower*. *New. Nat. B.* 333. But of an estate-tail in lands determined, a woman shall be endowed; in like manner as a man may be tenant by the curtesy of her lands. *Co. Litt.* 31. And if a wife be endowed of her third part, and afterwards evicted by an elder title, she shall have a new writ of *dower*, and be endowed of the other lands.

2 *Danv. Abr.* 670. Though this is, where it is the immediate estate descended to the heir; and not when it is the estate of an *alienage*. 9 *Rep.* 17. The wife is *dowable* where lands are recovered against the husband by default or covin: and a woman *deceased* of her *dower* shall recover damages, viz. the value of her *dower* from her husband's death. 13 *E. 1*: 20 *H. 3*. If the husband doth not die *seised*, after demand and refusal to assign *dower* to her, she shall have damages from the time of the refusal. *Jenk. Cent.* 45. She shall be endowed of a reversion, expectant on a term of years; and of a rent reserved thereon. *Lutw.* 729. If the husband hath only an estate for life, *remainder* to another in tail, though the remainder over is to his heirs, the wife shall not be endowed. 2 *Danv.* 656. A woman shall not be endowed of the goods of her husband; nor of a castle, or capital messuages: but of all other lands and tenements she may. *Co. Litt.* 35.

A grantee of a rent in fee or tail, dies without heir, his wife shall be endowed: but not where the rent arises upon a reservation to the donor and his heirs, on a gift in tail, and the donee dies without issue; for this is a collateral limitation. *Plowd.* 156: *F. N. B.* 149. If during the coverture, the husband doth extinguish rents by release, &c. yet she shall be endowed of them; for as to her *dower* in the eye of the law, they have continuance. *Co. Litt.* 32. And where a rent is descended to the husband but he dies before any day of payment; notwithstanding the wife shall be endowed of it. 1 *H. 7.* 17. If lands are given to the husband and wife in tail, and after the death of the husband, the wife disagrees, she may recover her *dower*; for by her waiving her estate, her husband in judgment of law was sole *seised ab initio*. 3 *Rep.* 27. If lands are improved, the wife is to have one third according to the improved value. *Co. Litt.* 32. And if the ground delivered her be sowed, she shall have the corn. 2 *Inst.* 81.

Dower is an inseparable incident to an estate in tail or fee, and cannot be taken away by condition. If one *seised* in fee of lands make a gift in tail, on condition that the wife shall not have *dower*, the condition is void. 6 *Rep.* 41. If tenant in tail die without issue, so that the land reverts to the donor; or in case he covenants to stand *seised* to uses, and dies, his wife will be endowed: and a devise of land by the husband to his wife by will, is no bar of her *dower*, but a benevolence. 8 *Rep.* 34: *Yelv.* 51: *Bro. Dower.* 69. See *post.* IV.

A person grants and conveys land to D. and his heirs, on condition, to re-demite the same back, &c. which afterwards he does, and dies; here D.'s widow may nevertheless be endowed. *Ab. Cus.* 217. A. is tenant in tail of lands, the remainder to B. in tail, remainder to A. in fee; if A. bargains and sells the land to C. and his heirs, the wife of the bargainee shall have *dower*, determinable upon the death of the tenant in tail. 10 *Rep.* 96. And if a *feoffment* be made upon condition to re-*feoff*, and the *feoffee* take a wife, she may have her *dower* till re-*feoffment*, or an entry made for not doing it: and so it is of other defeasible estates. 2 *Rep.* 59: *Perk.* §. 420. If one be disseised, and after doth marry, if he die before entry, his wife shall not have *dower*: and where a person recovers land in a real action, and before his entry or execution made he dieth, the wife shall not be endowed of this land. 2 *Rep.* 56: *Perk.* 377. In these cases the husband

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was not actually seized, *sed quæ* for, as before observed, where there is a seisin in law, she shall be endowed. *Co. Litt.* 31, 32, &c. So that these cases depend on the construction of what is, and what is not a *seisin in law*. And see post. *Div.* IV. towards the end, and *Park* 379, 380.

Although copyhold lands a woman shall not be endowed, unless there be a special custom for it; yet if there be a custom to be endowed thereof, then she shall have the assistance of such laws as are made for the more speedy recovery of dower in general, being within the same mischief, and therefore shall recover damages within the statute of *Merton*. 4 *Co. 22*: *Hob* 216: 5 *Co.* 116.

Of tithes women were not dowable till 32 *H. 8. c. 7*; for before that statute tithes were not a lay fee, but now they are dowable of them. *Style's P. R.* 122: 11 *Co.* 25: *Co. Litt.* 32 a. 159 a: 1 *Roll. Abr.* 682.

Of an advowson, be it appendant or in gross, a woman shall be endowed; for this may be divided as to the fruit and profit of it, *viz.* to have the third presentation. See *Park* 343, 344: *F. N. B.* 148, 150: *Co. Litt.* 32: *Co. Jac.* 621: *Cr. Eliz.* 360: 1 *Roll. Abr.* 683: *Co. Litt.* 379: 3 *Leon.* 155: *Cr. Jac.* 691.

III. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud, to the lord's enemy. *Magn. c. 1. § 3*. This licence the lord took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided, first by the famous charter of *Henry I. A. D.* 1101, and afterwards by *Magna Charta c. 7*, that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh if she chooses to live without a husband; but shall not however marry against the consent of the lord; and further, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarentine*; a term made use of in law to signify the number of forty days, whether applied to this occasion or any other. The particular lands, to be held in dower, must be assigned, by the heir of the husband, or his guardian; *Co. Litt.* 34, 5. not only for the sake of notoriety, but also to entitle the lord of the fee, to demand his services of the heir, in respect of the lands to holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment, which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts, not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the time of quarentine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. *Co. Litt.* 34, 5. Or if the *heir* (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by a writ of *admonishment* of dower. *F. N. B.* 148: *Fin h. L.* 114: *fl. Westm.* 2, 13 *Ed.* 1. c. 7. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds, but if it be indivisible,

she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithes and the like. *Co. Litt.* 32.

The assignment of the lands is for the life of the woman; and if lands are assigned to a woman for years, in recompense of *dower*, this is no bar of *dower*; for it is not such an estate therein as she should have. 2 *Darr.* 268. 668. Also where other land is assigned to the woman, that is no part of the lands wherein she claims *dower*; that assignment will not be good or binding: And there must be certainty in what is assigned; otherwise, though it be by agreement, it may be void. 4 *Rep.* 2: 1 *Inst.* 34. If a wife accept and enter upon less land than the third of the whole, on the sheriff's assignment she is barred to demand more. *Moon* 679. But if where a wife is intitled to *dower* of the lands of her first husband; her second husband accepts of this *dower* less than her third part, after his death she may refuse the same, and have her full third part. *Fitz. Dower*, 121.

If a wife having right of *dower* in the land, accept of a lease for years thereof after the death of her husband, it suspends the *dower*; though not such acceptance of a lease before the husband's death, &c. for then the wife has only a title to have *dower*, and not an immediate right of *dower*. *Bro. Ca.* 372: *Jenk. Cent.* 15. A widow accepting of *dower* of the heir, against common right, shall hold it subject to the charges of her husband; but otherwise it is if she be endowed against common right by the sheriff. 2 *Darr.* 672. By provision of law, the wife may take a third part of the husband's lands, and hold them *discharged*. *Ibid.* If *dower* be assigned a woman on condition, or with an exception; the condition and exception are void. *Co. Eliz.* 541.

Where there are three manors, one of them may be assigned to the wife in *dower* in lieu of *dower* in all three; though it is said that a third part of every manor ought to be assigned. *Moon* 12, 47. The sheriff may assign a rent out of the land in lieu of *dower*; and her acceptance of the rent will bar *dower* out of the same land, but not of other lands. 2 *And.* 31: *Dyer* 91: 1 *Nelj. Abr.* 680.

A woman intitled to *dower* cannot enter till it be assigned to her, and set out either by the heir, tenant or sheriff, in certainty. 1 *Roll. Abr.* 681: *Dyer* 345: *Plowd.* 529: *Bro.* 16: *Co. Litt.* 34 b. 37 a. b.

None can assign *dower* but those who have a freehold, or against whom a writ of *dower* lies; therefore a tenant by statute merchant, statute staple, or *cognit*, or *lessee* for years cannot assign *dower*, for none of these have an estate large enough to answer the plaintiff's demand. *Park.* 403, 404: *Co. Litt.* 35: *Bro.* 63, 94: 1 *Roll. Abr.* 681: 6 *Co.* 57.

If a woman be dowable of land, meadow, pasture, wood, &c. and any of these be assigned in lieu of *dower* of all the rest, it is good, though it be against common right, which gives her but the third part of each, for the heir's enjoyment of the residue sufficiently accounts for her title to what she has. 1 *Roll. Abr.* 683: *Moor*, pl. 47, 66.

If lands whereof a woman hath no right to be endowed, or a rent out of such lands be assigned in lieu of her *dower*, this does not bar her demand of *dower*, for she having no manner of title to those lands, cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her *dower*

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was to be. *Park.* 407: *Co. Lit.* 34: 4 *Co.* 1: *Co. Lit.* 169: *Bro.* 3.

If the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of *admeasurement* of dower at full age by the Common law: so if too much be assigned in dower by the heir within age, or his guardian in chivalry; and the heir dies, his heir shall have such writ, to rectify the assignment; but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir; if a disseisor assigns too much, the heir of the disseisor shall have *admeasurement* by the Common law. *F. N. B.* 148, 332: *Co. Lit.* 39 a: 2 *Inst.* 367: 7 *H. 2.* 4. See *Statutes* 13 *E. 1.* c. 7 § 8.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of *admeasurement* of dower, by the Statute of *H. 2.* c. 7. before which Statute the guardian had no remedy because the writ of *admeasurement* being a real action, lay not for the guardian, who had but a chattel; also by the same Statute it is provided, that if the guardian pursue such writ feintly, or by collusion with the wife, the heir at full age shall have a writ of *admeasurement*, and may allege the feint pleading or collusion generally. 2 *Inst.* 367.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of *admeasurement* lies; so if they be of greater value, by reason of mines open at the time of the assignment, no writ of *admeasurement* lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines, which were open at the time of such assignment. *F. N. B.* 149: 2 *Inst.* 368: 5 *Co.* 12.

IV. Upon preconcerted marriages, and in estates of considerable consequence, tenancy in Dower happens very seldom: for the claim of the wife to her dower at the Common law, discharging itself so extensively, it became a great clog to alienations, and was otherwise very inconvenient to families. Wherefore since the alteration of the ancient law respecting Dower *ad optium ecclesiarum*, which hath occasioned the entire disuse of that species of Dower, jointures have been introduced in their stead, as a bar to the claim at Common law.

A widow may be barred of her Dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, (See ante II.) but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them. *Ibid.* 39. Though if she denies the detainer, and it is found against her, she loses her Dower. *Hob.* 169: 9 *Rep.* 19. By the Stat. of Gloucester, 6 *Ed.* 1. c. 7, if a dowager aliens the land assigned her for Dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her Dower, by levying a fine with her husband, or suffering a recovery of the lands during her coverture. *Pig. of Recor.* 66: 2 *Rep.* 74: *Plowd.* 514.—See title *Fine and Recovery*.

But the most usual method of barring Dower, is by jointures, as regulated by the Stat. 27 *Hen.* 8. c. 10.

A Jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in com-

mon acceptation extends also to a sole estate, limited to the wife only, is thus defined by *Coke*, 1 *Inst.* 36. "A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This description is framed from the Stat. 27 *Hen.* 8. c. 10, commonly called the Statute of *Uses*. (See title *Uses*.)—Before the making of that Statute, the greatest part of the land in England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, and profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee simple, yet the wife was not entitled to any Dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife, in case she survived her husband. At length the Statute of uses ordained, that such as had the use of lands, should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure; had not the same Statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her Dower. 4 *Rep.* 1, 2.

But in this case, these four requisites must be punctually observed.—1. The jointure must take effect immediately on the death of the husband.—2. It must be for the life of the wife herself at least, and not *pur auter vie*, or for any term of years, or other smaller estate.—3. It must be made to herself, and no other in trust for her.—4. It must be made in satisfaction of her whole Dower, and not of any particular part of it, and must be expressed to be in the deed; or it may be averred to be so. 1 *Inst.* 366: 4 *Rep.* 3: *OW.* 33.

If the jointure be made to her *after* marriage, she has her election after her husband's death as in Dower *ad optium ecclesiarum*, and may either accept it, or refuse it, and betake herself to her Dower at Common-law, for she was not capable of consenting to it during coverture.

So where a *devise* is expressed to be given in lieu and satisfaction of Dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. 1 *Inst.* 366. *in n.*

If, by any fraud, or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession; she shall then (by the provisions of the same Stat. 27 *H.* 8. c. 10,) have her Dower *pro tanto* at the Common-law.

If a woman who is under age at the time of marriage, agrees to a jointure and settlement in bar of her Dower, and of her distributive share of her husband's personal property, in case he dies intestate; she cannot afterwards waive it; but is as much bound as if she were of age at the time of the marriage. *Drury v. Drury*, (or *Buckingham B. v. Drury*) 3 *Bro. P. C.* (8vo. ed.) 492.

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There are some advantages attending tenants in dower that do not extend to jointresses; and to *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in Dower by the old Common-law, is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the King's debtor, the King cannot dischain for his debt; if contracted during the coverture. *Co. Lit.* 31 a: *P. N. B.* 150. But on the other hand, a widow may enter at once, without any formal process, on her jointure land, as she also might have done on Dower *at leg. et c.* which a jointure in many point resembles; and the resemblance was still greater, while that species of Dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of Dower. *Co. Lit.* 36. And, what is more, though Dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow; *1 Inst.* 37. Wherefore Coke very justly gives it the preference, as being more sure and safe to the widow, than even Dower *at estium ecclesie*, the most eligible species of art. 2 *Comm.* 135, &c. An additional advantage is, that a jointure is not forfeited by the adultery of the wife as Dower; and Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that the wife lives separate from him in adultery. *Silvey v. Silvey*, 3 *P. Wms.* 269, &c. and the notes to that case.

Further as to the means by which a woman may be barred of her Dower.—Where a woman releases her right to him in reversion, her Dower may be extinguished. 8 *Rep.* 151.

If a woman takes a lease for life of her husband's lands after his death, she shall have no Dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have Dower during these years, because it was her own act to suspend the fruit and effect of her Dower during that time. *Perk.* 350: *P. N. B.* 149: *M. pl.* 403.

If a recovery be had against the husband by collusion, this shall not bar the wife of Dower; as if the recovery be by confession, or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining of them; but it seems to have been a very great doubt, whether a recovery by default should not be a bar: and the better opinion being that such recovery was a bar at Common-law, therefore the *Stat. W. 2. cap. 4.* was made, which ordains that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the Dower shew his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her Dower notwithstanding such recovery by default against her husband. 2 *Inst.* 349: *Perk.* 376.

By *Stat. W. 2. cap. 4.* it appears, that if the recoveror had right, then the wife is barred; therefore if the heir of the disseisor be in by descent, and the disseisee enters upon him, and marries, and the heir of the disseisor recovers by default, or reddition, in a writ of entry, in nature of an assize, and the husband dies, his wife shall not have Dower, because he, who recovered, had right to the possession by the descent; *aliter*, if this disseisin, descent, &c. were after marriage, because the husband was seised before of a rightful estate during the coverture,

whereof his wife had title of Dower, which cannot be defeated by the disseisin, descent and recovery, which all happened during the coverture. *Perk.* 379, 380.

If the husband levy a fine with proclamation of his lands, and dies, his wife is bound to make her claim within five years after his death; otherwise she shall be barred of her Dower; for though her title of Dower was not consummate at the time of the fine levied; yet it being initiate by the marriage and seisin of the husband, the fine begins to work upon it presently after the husband's death; and if she does not claim it within five years after, she shall be barred. 2 *Co.* 93: 10 *Co.* 49, 99: 3 *Inst.* 216: *Hob.* 265: *M. pl.* 151, 879: *Dyer* 224: 13 *Co.* 20.

See further as to bar of Dower by jointure, devise, &c. this Dict. title *Jointure*.—And further as to forfeiture thereof by the crime of the Baron, *ante* 11. and this Dict. title *Forfeiture* I.

V. The Wife is, as soon as she can after the decease of her husband, to demand her Dower, lest she lose the value from the time of his death: and in action of Dower, the first process is *summons* to appear: and if the tenant or defendant do not appear, nor call an essoin, a *grand cape* lies to seize the lands, &c. By *Stat. 31 Eliz.* c. 3. every summons on the land is to be made fourteen days before the return of the writ, and proclamation made at the church door on a Sunday, or else no *grand cape* to be awarded, but an *alias* and *pluries* summons till proclamation. But on the return of the writ of summons, the attorney for the tenant or defendant may enter with the filazer that the tenant appears, and prays *view*, &c. Then a writ of view goes out, whereby the sheriff is to shew the tenant the land in question; upon the return of which writ of view, the tenant's attorney takes a declaration, and puts in a plea; the most general one is, *ne unques seiseat*, &c. *viz.* that the husband was never seised of any estate, whereof the wife can be endowed; and when issue is joined, you must proceed to trial, as in other actions; upon trial, the jury are to give damages for the mesne profits from the death of the husband (if he die seised) for which, execution shall be made out; and then you have a writ to the sheriff to give possession of a third part of the lands. The sheriff may give possession or seisin to the woman by a clod, or by grafs growing on the land, or by any beast being thereon. 40 *E.* 3: *Fitz. Dower* 48.—See *Impey's Sheriff*.

A widow may recover her Dower with a *cessat executio*, in case there be any thing objected, precedent to the title of Dower, &c. till that is determined. 1 *Nelf.* 684, 687: 1 *Salk.* 291. Judgment in Dower is to recover a third part of lands and tenements by *metes and bounds*. A wife may have her writ of dower against an heir, an alienee, a disseisor, &c. or against any one that has power to assign Dower; if the lord enters on the land for an escheat, she may bring it against him, but to the King she must sue by petition. 9 *Rep.* 10: *Plowd.* 141: *Dyer* 263: *Co. Lit.* 59. This writ was brought against eight persons seoffers of the husband after marriage, two confessed the action, and the other six pleaded to issue; here the demandant had judgment to recover the third part of two parts of the land, in eight parts to be divided: and after the issue being found for the demandant against the other six, she recovered against them the third part of the six parts of the same land as her Dower. *Dyer* 187: *Co. Lit.* 32.

At the Common-law, before the *Stat. of W. 1. c. 39*, if a woman had accepted any part of her *Dower*, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of *Dower*; for if she brought a writ of *dower unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county; which being a great mischief to the woman is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her *Dower* of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her *Dower*. 2 *Inft.* 261.

As to damages in *Dower*, they are given by the *Stat. of Merton, c. 1*; but that statute extends only to the possessory action of *dower unde nihil habet*, and not to the writ of right of *dower*, because they are intended to be given for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong done till the right be determined; also that statute extends only to lands, whereof the husband died seised; and therefore judgment for the damages was reversed, because the jury did not find that the husband died seised; for otherwise she shall have no damages; as if the husband aliens and takes back an estate for life, the wife shall recover *Dower*, but no damages; because this dying seised was only of an estate of freehold; but if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion with a third part of the rent and damages, because there he died seised as the statute speaks. *Co. Lit.* 32: *Dyer* 284. pl. 33: *Yelv.* 112: *Dr. & Stud. lib.* 2. c. 13. § 166: 2 *Inft.* 80.

Damages must be after demand of *Dower*, for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife; but a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath been always ready, and still is, to render her *Dower*; she may plead such request, and issue may be taken upon it; but the *feoffee of the hen* cannot plead *non tempus praest.* because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits, and damages against him, and if he hath not provided his indemnity and recompence against the heir, it is his own folly. *Co. Lit.* 32.

If the heir or feoffee assign *Dower*, and the wife accepteth thereof, she loses her damages, because having the *Dower*, which is the principal, she cannot sue for the damages, which are but consequential or accessory. *Co. Lit.* 33 a.

Damages are given in *Dower* from the death of the husband and to the return of the writ of enquiry, though the writ of seisin issued a year before, but was not executed. *Harb.* 19, &c. Where there are two jointenants in *Dower*, and one dies after judgment for damages, and his heir and the other jointenant bring error, the value from the time of the judgment to the affirmation, cannot be recovered against the surviving plaintiff in error only. *Id.* 50.—See 2 *Str.* 271. On a writ of *Dower*, damages cannot be awarded by 16 *Car.* 2. without speeding a writ of enquiry. *Harb.* 51.

DOWL and DEAL, A division: from the Brit. *Dal*, *diviso*, from the Sax. *dulan*, i. e. *dividere*, and from thence comes the word *dealing*. So the stones which are laid to the boundaries of lands, are called *dowle stones*, i. e. such as divide the lands. *Covent.*

DOWRY, *Don Mularia*] Was in ancient time applied to that which the wife brings her husband in marriage; otherwise called *maritagium*, or marriage goods: but these are termed more properly, goods given in marriage, and the marriage portion. *Co. Lit.* 31. This word is often confounded with *Dower*; though it hath a different meaning from it.

DOZEIN, A territory or jurisdiction, mentioned in the statute of *View and Frankpledge, Stat.* 18 *Ed.* 2.—See *Decret.*

DOZEN PEERS. Were twelve peers, assigned at the instance of the barons in the reign of K. H. III. to be privy councillors to the King, or rather conservators of the kingdom.

DRACO REGIS, The standard ensign, or military colours, borne in war by our ancient Kings, having the figure of a dragon painted on them. *Reg. Hoved. sub. ann.* 1191.

DRAGS, Seem to be floating pieces of timber so joined together, that by swimming on the water they may bear a burden or load of other things down a river. *Stat.* 6 *H.* 6. c. 15.

DRANA, A drain or water-course; sometimes written *dracca*. *MSS. antiq.*

DRAPERY, *Pannaria*.] Is used as a head in our old statute-books, extending to the making and manufacturing of all sorts of woollen cloths. See titles *Clothiers*, *Manufacturers*.

DRAW-LATCHES, Were thieves and robbers: *Lambert* in his *Firen. lib.* 1. cap. 6, calls them *thieves*, *wasfers*, and *robbersmen*; the two last words are grown out of use. They are mentioned in *Stats.* 5 *E.* 3. c. 14. and 7 *R.* 2. c. 5.

DRELGHERMEN, Fishers for oysters, &c. *Stat.* 2 *Geo.* 2. c. 19.—See titles *Fish*; *Oysters*.

DRIIT-DREIT, or DROIT-DROIT, *jus duplicatum*.] Are words signifying formerly a double right, viz. of possession, and of property or interest. *Bract. lib.* 4. cap. 27: *Co. Lit.* 266.—See 2 *Comm.* 199, and this Dict. title *Estate*.

DRENCHES, or DRENGES, *Drengi*.] Tenants in capite. *Mon. Angl. tom.* 2. fol. 598. And according to *Spelman*, they are such as at the coming of *William the Conqueror*, being put out of their estates, were afterwards restored thereunto; on their making it appear that they were owners thereof, and neither *in auxilio*, or *consilio*, against him. *Spelm.*

DRENGAGE, *Drengagium*.] The tenure by which the *drenches* or *drenges* held their lands. *Tinn.* 21 *Ed.* 3. *Ebor. & Northumbrian l. Rot.* 191.

DRIFT OF THE FOREST, *Agitatio animalium in Foresta*.] A view or examination of what cattle are in the forest, that it may be known whether it be surcharged or not; and whose the beasts are, and whether they are commonable, &c. These drifts are made at certain times in the year by the officers of the forest; when all the cattle of the forest are driven into some pound or place inclosed, for the purposes aforementioned; and to the end it may be discovered, whether any cattle of strangers be there, which

which ought not to common. *Manw. par. 2. c. 15: Stat. 32 H. 8. c. 13: 4 Inst. 309*—See title *Forest*.

DRINKLEAN, in some records *Potina Drinklean*.] A contribution of tenants, in the time of the Saxons, to wards a *potation*, or ale, provided to entertain the lord, or his steward.

DROFDENE, Among the Saxons, a grove, or woody place, where cattle were kept; and the keeper of them was called *Drofdena, Domesday*.

DROFLAND, or **DRYFLAND**, *Saxon*.] A tribute or yearly payment made by some tenants to the King, or their landlords, for driving their cattle through a manor to fairs or markets. *Cowel*.

DROIT, *Right*, Is the highest writ of all other real writs whatsoever, and hath the greatest respect, and the most assidue and final judgment; and therefore is called a *writ of right*, and in the old books *Droit. Co. Lit. 158*. There are divers of these writs used in our law, as

DROIT DE ADVOWSON.

DROIT DE DOWER.

DROIT DE GARDE.

DROIT PATENT.

DROIT RATIONABILI PARTIB.

DROIT SUR DISCLAIMER.

As to all which several writs of right, and their various uses, see *Refo*, and *Writs*; and the several titles to which these writs belong.

Also consult *Booth on Real Actions*.

DROMONES, DROMOS, DROMUNDA, Ships of great burden; Men-of-war. *Walsing. Anno 1292.—Mat. Paris. sub ann. 1191.*

DROVERS, Those that buy cattle in one place to sell in another: they are to be married men and householders, and be licensed, by *Stat. 5 Eliz. c. 12*; that part of the statute directing them to be married and householders, is now totally disregarded. See title *Cattle*.

DRUGGERIA, A place of drugs, or drug-stee's shop.

DRUNKENNESS, Is an offence for which a man may be punished in the Ecclesiastical court; as well as by justices of peace by statute.

By *Stats. 4 Jac. 1. c. 5: 21 Jac. 1. c. 7*. If any person shall be convicted of drunkenness by the view of a justice, oath of one witness, &c. he shall forfeit five shillings for the first offence, to be levied by distress and sale of his goods; and for want of a distress shall sit in the stocks six hours; and for the second offence, he is to be bound with two sureties in ten pounds each, to be of the good behaviour, or be committed.

Tipling, is a species of drunkenness. By *Stat. 1 Jac. 1. c. 9. § 2, 3: 1 C. 1. c. 4: 21 Jac. 1. c. 7. § 4*. If any inn keeper, victualler, or ale-housekeeper, shall suffer any person (except travellers, and labouring people at their dinner hour) to continue drinking or tipling in an alehouse, &c. he shall forfeit 10s. to the poor, to be recovered by distress, or the party offending to be committed till payment; and disabled to keep an alehouse for three years.

By *Stats. 4 Jac. 1. c. 5. § 4: 1 Jac. 1. c. 9: 21 Jac. 1. c. 7: 1 C. 1. c. 4*. The persons tipling shall forfeit 3s. 4d. or be set in the stocks for four hours. And an alehouse keeper tipling shall be disabled to keep an alehouse for three years. *7 Jac. 1. c. 10*.

See further titles *Churchwarden*; *Constable*.

He who is guilty of any crime, through his own voluntary drunkenness, shall be punished for it as if he had been sober. *Co. Lit. 247: 1 Harok. P. C. 3*. It has been held, that drunkenness is a sufficient cause to remove a magistrate: and the prosecution for this offence by *Stat. 4 Jac. 1. c. 5*, was to be, and still may be, before justices of peace in their sessions, by way of indictment, &c.

Equity will not relieve against a bond, &c. given by a man when drunk, unless the drunkenness is occasioned through the management or contrivance of him to whom it is given. *3 P. W. 130 in n. 1 Inst. 247: Plowd. 19*; and this Dict. titles *Bond*; *Fraud*; *Chancery*.

DRY EXCHANGE, *Cambium Siccum*.] A term invented in former times for the disguising and covering of usury; in which something was pretended to pass on both sides, whereas in truth nothing passed but on one side, in which respect it was called *dry*. *Stat. 3 H. 7. c. 5*.—See *Cowel*.

DRY RENT, A rent reserved without clause of distress. See *Rent-fee*.

DUCE TECUM, Is a writ commanding a person to appear at a certain day in the Court of Chancery, and to bring with him some writings, evidences, or other things which the court would view. *Reg. Orig.* So *subpoenas duces tecum*, are often sued out at Common-law, to compel witnesses, to produce, on trials, at *Nisi prius*, deeds, bonds, bills, notes, books, or memorandums, &c. which are in their custody or power, and which relate to the issue in question. But if they are in the possession or power of the adverse party or his attorney, it is customary to give notice to the attorney to produce them, and on proof made in open court, before the judge of *Nisi prius*, of such notice, the court generally compels the attorney, or his client to produce the same, if material. If not produced, *proot* evidence may be given of their contents. See titles *Evidence*; *Trial*.

DUCE TECUM LICET LANGUIDUS, A writ directed to the sheriff, upon a return that he cannot bring his prisoner without danger of death, he being *aisco languidus*; then the court grants a *habeas corpus* in the nature of a *duces tecum licet languidus*. *Book Entr.* But this is now out of use; and where the person's life would be endangered by removal, the law will not permit it to be done.

DUCKING STOOL. See *Castigatory*.

DUES, *ecclesiastical*, non-payment of. Various Dues to the clergy, are cognizable in the spiritual court; which makes decrees for their actual payment. *Offerings, oblations, and obventions*, not exceeding the value of 40s. may by *Stat. 7 & 8 W. 3. c. 6*, be recovered in a summary way, before two justices of peace.

DUEL, *Duellum*.] In our ancient law is a fight between persons in a doubtful case for the trial of the truth. *Flota*—See title *Battel*. But this kind of *Duel* is disused; and what we now call a *Duel* is, a fighting between two, upon some quarrel precedent: wherein, if a person is killed, both the principal and his seconds are guilty of murder, and whether the seconds fight or not. *H. P. C. 47, 51*.

If two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time a ter, by which it may be presumed the blood was cooled; and then they meet and fight a *Duel*, and one kill the other, it

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it is murder. 3 *Inft.* 52: *H. P. C.* 48: *Kel.* 56. And whenever it appears, that he who kills another in a *Duel*, or fighting on a sudden quarrel, was matter of his temper at the time, he is guilty of murder; as if after the quarrel he fall into another discourse, and talk calmly thereon; or alledge that the place where the quarrel happens is not convenient for fighting; or that his shoes are too high, it he should fight at present, &c. *Kel.* 56: 1 *Lev.* 180.

If one challenge another, who refuses to meet him, but tells him that he shall go the next day to such a place about business, and then the challenger meets him on the road, and assaults the other; if the other in this case kill him, it will be only manslaughter; for here is no acceptance of the challenge, or agreement to fight; and if the person challenged refuseth to meet the challenger, but tells him that he wears a sword, and is always ready to defend himself; if then the challenger attack him, and is killed by the other, it is neither murder nor manslaughter, if necessary in his own defence. *Kel.* 56.—See further at length title *Murder*; and as to Challenges, title *Challenge to Fight*.

DUKE, Lat. *Dux*, Fr. *Duc*, à *Ducendo*.] Signified among the ancient Romans, *ducentem exercitum*, such as led their armies; since which, they were called *duces*, and were governors of provinces, &c. In some nations, the sovereigns of the country are called by this name; as the *Duke of Savoy*, &c. In England, the title of *Duke* is the next dignity to the Prince of Wales: and the first *Duke* we had in England was Edward the Black Prince, so famed in our English histories for heroic actions; who was created *Duke of Cornwall* in the 11th year of King Ed. III. After which, there were more made in such manner as that their titles descended to their posterity. They are created with solemnity, *per cincturam gladii, capite & circuli aurei in capite impositionem*. *Cambd. Brit.* p. 166.—See title *Pier*.

DUM FUI INFRÆ ETATEM, A writ whereby an infant who had made a testament of his lands, when he came of full age, might recover those lands and tenements which were so aliened: and within age, he might enter into the land, and take it back again, and by his entry he should be remitted to his ancestor's right. 2 *Ass. Pl.* 426. If the husband and wife alien the wife's land, during the nonage of both of them, the wife at her full age after the death of the husband, shall have a writ of *non fuit infra etatem*. *M.* 14 E. 3. By this writ to the sheriff, he shall command *A.* that he render to *B.* who is of full age, two messuages and lands, &c. which *B.* demised to him, *while he was within age*, as he saith; or into which the said *A.* hath not entered, but by *C.* to whom the said *B.* the same demised; and unless, &c. *F. N. B.* 377.—See title *Infant*.

DUM NON FUI COMPOS MENTIS, Is a writ that lay where a man not of sound memory aliened any lands or tenements, against the alienee. And he shall alledge that he was not of *sound memory*, but being visited with infirmity, lost his discretion for a time, so as not to be capable of making a grant, &c. *New Nat. B.* 449. See title *Disability*; *Lunatic*; and *F. N. B.* 202.

DUN, *Down*, Which termination is now varied into *don*; it signifies a mountain or high open place; so that the names of those towns which end in *dur*, or *don*, as

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Ashdon, &c. were either built on hills, or near them in open places. *Domesday*.

DUNSETT'S, Those who dwell on hills or mountains.

DUNUM; DUNA, *Dunnarium*, A down or hill. *Chart. MSS.*

DUODENA, A jury of twelve men. *Walsing.* 256.

DUODENA MANU, Twelve witnesses to purge a criminal of an offence. See titles *Jurare duodecimā manū*; *Wager of Law*.

DUPLEX QUERELA, A process ecclesiastical. See *Double Quarrel*.

DUPLICATE. Is used for the second letters patent, granted by the Lord Chancellor, in a case wherein he had before done the same; which were therefore thought void. *Comp. Jurisd.* fol. 215. But it is more commonly a copy or transcript of any deed or writing, account, &c. or a second letter, written and sent to the same party and purpose as a former, or a copy of dispatches for fear of a miscarriage of the first, or for other reasons. See *Stat. 4 Car. 2. c. 10*.

It is also the name of the discharge, given by the quarter sessions, &c. to an insolvent debtor, who takes the benefit of an act, for relief of insolvent debtors, with respect to the imprisonment of their persons.—See title *Insolvency*.—See also title *Patent-makers*.

DUPPLICITY in pleading. This must be avoided as it begets confusion. Every plea must be simple, intire, connected and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same point. See titles *Double Plea*; *Pleading*.

DURANTE ABSENTIA, *Administration*. An administration granted when the executor is out of the realm, to continue in force until his return. See this Dist. title *Executor*.

DURANTE MINORE ETATE, *Administration*. An infant cannot act as executor until seventeen, during which minority this administration is granted. See title *Executor*.

DURFEN, A thicket of wood in a valley. *Corvel*.

DURESS, *Duress*, Constraint.] Whatever is done by a man to save either life or limb, is looked upon as done by the highest necessity and compulsion. Therefore if a man through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, these, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs in case of non compliance. 2 *Inft.* 485.—And the same is also a sufficient excuse for the commission of many misdemeanours. The constraint a man is under in these circumstances, is called in law *Duress*; of which there are two sorts, *Duress of Imprisonment*, where a man actually loses his liberty; and *Duress per minas*; (by threats) where the hardship is only threatened and impending.

If a man is under *Duress of Imprisonment*, or illegal restraint of liberty, until he seals a bond or the like, he may alledge this *Duress*, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a

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bond or deed, this is not by Duress of imprisonment, and he is not at liberty to avoid it. 2 Inst. 482. See this Dict. title *Prisoner*.

Duress per minas, is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason; *non suspicio ejuslibet vini et meticulosi hominis, sed talis qui possit cadere in virum constantem*. Bract. l. 2. c. 5.—A fear of battery, (or being beaten) though never so well grounded, is no Duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb. 2 Inst. 483.—See 1 Comm. 131, 6.

As to criminal cases—In time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. 1 Hal. P. C. 50. This however seems only or at least principally to hold as to positive crimes, so created by the laws of Society; and which therefore Society may excuse; but not as to natural offences so declared by the laws of God. Therefore though a man may be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by such means. 1 Hal. P. C. 51. But in such a case he is permitted to kill the assailant; for there the law of nature and self defence have made him his own protector. 4 Comm. 30.—See this Dictionary, titles *Baron and Feme*; *Felony*; *Murder*, &c.

Further as to civil cases.—It has been adjudged, that if a man makes a deed by Duress done to him by taking of his cattle, though there be no Duress to his person, yet this shall avoid the deed. 2 Danv. Abr. 686. If a person threaten another to make a deed to a third person, it is by Duress, and void; as if such third person had made the threatening. 2 Inst. 482; 3 Inst. 92; 4 Inst. 97. And where a man is imprisoned until he makes a bond at another place; if afterwards he doth it when at large, the bond is by Duress, and void.

If a person be arrested upon an action at the suit of another, and the cause of action is not good, if he make a bond to a stranger, it is not Duress; though if he make it to the plaintiff, it is, and being sued upon the bond, he may plead it was made by Duress, and to avoid it: also the party shall have an action for the false imprisonment itself. 1 Rep. 119; Perk. § 10; Cromp. Jur. 256; 1 Ld. Abr. 491. If the arrest is under colour of legal process, the action must be a *special action on the case*, not an action of trespass or assumpsit.

If one imprisoned make an obligation by Duress, and after he is at large, takes a defeasance upon it; this will stop him to say it was made *per Duress*. And where A. and B. by Duress to B. seal a bond or deed, it may be good as to A. that was never threatened. 3 H. 6. 16; Bro. 17; Mich. 7 Jac. 1.—See 43 E. 3. 20; 2 Danv. 686.

A man shall not avoid a deed by Duress of a stranger: for it hath been held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only. Cro. Jac. 187. Yet a son shall avoid his deed by Duress of the father: and the husband shall avoid a deed made by Duress of the wife; though a servant shall

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not avoid a deed made by Duress of his master, or the master the deed sealed by Duress of his servant. 2 Danv. 686. If a man is taken by virtue of a process issuing out of a court that hath not power to grant it; or in custody on a false charge of felony, &c. and for his enlargement and discharge gives bond, &c. this may be avoided, as taken by Duress. Cro. El. 646; 4 Inst. 97; Allen 92.

A statute merchant may be avoided by *audita querela*, because it was made by Duress, or imprisonment. A will shall be avoided by Duress or menace of imprisonment. A feoffment made by Duress is voidable; but not void. But no averment shall be taken against a deed enrolled, that it was made by Duress. 1 Rol. Abr. 862; 2 Danv. 685. A marriage had by Duress is voidable; and by Stat. 31 H. 6. c. 9, obligations, statutes, &c. obtained of women by force, to marry the persons to whom made, or otherwise, unless for a just debt, are declared void. If a person executes a deed by Duress, he cannot plead *non est factum*, because it is his deed; though he may avoid it by special pleading, and judgment *Si agit*, &c. 5 Rep. 119. Records may not regularly be said to be made by Duress, and therefore shall not be avoided by this plea or pretence. 2 Shep. Abr. 319.—See further this Dict. title *Fraud*; *Fine*, &c.

DURHAM, The bishoprick of *Durham* was dissolved, and the King to have all the lands, &c. by Stat. 7 Ed. 6. But this act was afterwards repealed, and the bishoprick newly erected, with all jurisdiction ecclesiastical and temporal annexed to the County Palatine. The justices of the County Palatine of *Durham* may levy fines of lands in the county: and writs upon proclamation, &c. are to be directed to the bishop. Stat. 5 Eliz. c. 27; 31 Eliz. c. 2. Writs to elect members of parliament in the County Palatine of *Durham* shall go to the bishop or his chancellor, and be returned by the sheriff, &c. Stat. 25 Car. 2. c. 9.—See further title *Counties-Palatine*.

As to the Courts of which three Counties, and the Royal Franchise of *Elfr*, we may here insert what was there omitted. They are a species of private courts of a limited local jurisdiction, and having at the same time an exclusive cognizance of pleas in matters both of law and equity. 4 Inst. 213, 8; Finch. R. 452. In all these, as in the Principality of *Wales* the King's ordinary writs issuing under the Great Seal out of Chancery do not run; that is they are of no force. For as originally all *jura regalia* were granted to the Lords of these Counties-Palatine, they had of course the sole administration of justice by their own judges appointed by themselves, and not by the Crown. It would therefore be incongruous for the King to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these Counties Palatine were adjudged by Stat. 27 H. 8. c. 24, it was also enacted, that all writs and process should be made in the King's name, but should be tested or witnessed in the name of the owner of the Franchise. Wherefore all writs whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which, *Cheshire* and *Lancaster*, are now united to the Crown, and the two latter (*Durham* and *Ely*) under the government of their several bishops. And the judges of assize who sit therein, sit by virtue of a special commission from the owners of the several franchises.

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and under the seal thereof, and not by the usual commissions under the Great Seal of England. 3 Comm. 78.

DURSL.EY, Signifies *blows* without wounding or bloodshed, vulgo *dry blows*. Blount.

DUSTY-FOOT, See *Court of Piepowder*.

DUTCHY COURT OF LANCASTER, See titles *Chancellor of the Duchy of Lancaster*; *Counties-Palatine*.

DUTIES of persons. Allegiance is the duty of the people, protection the duty of the magistrate; yet they are reciprocally the rights, as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people. 1 Comm. 123.

DUTY, Any thing that is known to be due by law, and thereby recoverable, is a duty before it is recovered; because the party interested in the same hath power to recover it. 1 Lill. 495.

DWELLING-HOUSE, A man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. 1 Hal. P. C. 547: 4 Comm. 224.—See titles *Burglary*; *Riot*.

DWINED, *Consumed*; from whence comes the word *dwindle*.

DYERS, By Stat. 3 & 4 E. 6. c. 2, No *dyer* may dye any cloth with orchel; or with Brazil, to make a false colour in cloth, wool, &c. on pain of 20s. By Stat. 23 Eliz. c. 9, *Dyers* are to fix a seal of lead to cloths, with the letter M. to shew that they are well mathered, &c. or forfeit 3 s. 4 d. per yard. By Stat. 23 Geo. 3. c. 15, several penalties are inflicted on *dyers*, who dye any cloths deceitfully, and not throughout with woad, Indico and mather; dying blue with logwood to forfeit 20l. *Dyers* in London are subject to the inspection of the *Dyers' Company*, who may appoint searchers; and out of their limits, justices of the peace in sessions to appoint them: opposing the searchers, incurs 10l. penalty.—See this Dict. title *Labourers*; *Manufacturers*.

DYKE-REED, rather DYKE REVE, An officer that hath the care and oversight of the *dykes* and *drains* in fenny countries; as of *Deeping fens*, &c. mentioned in Stat. 16 & 17 Car. 2. c. 11.

DYRGE or DIRGE, A mournful song over the dead; from the Teutonick *dyrke*, *laudare*, to praise and extol, whence it is a laudatory song. Cowel.

DYRENUM, A ditty or song.—*Venire cum toto ac pleno dyreno*; to sing harvest home. *Paroch. Antiq.* 320.

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EADLING, See *Aeling*.

EAHALUS, from the Sax. *Eale*, Cervisia, & *Hus*, Domus.] An ale-house: In the laws of King *Alfred* we often find this word.

EALHORDA. The privilege of asising and selling ale and beer. It is mentioned in a charter of King *Hen. II.* to the abbot of *Glastonbury*.

EALDERMAN, or *Ealdorman*. Among the Saxons was as much as *Earl* with the *Dance*. *Cumbr. Brit.* 107. Also an elder, senator, &c. *Ealdormen* or *aldermen*, are now those that are associated to the mayor or chief officer in the common council of a city or borough town. *Stat.* 24 *H. 8.* c. 13. See titles *Aldermen*; *Saxons' Ang. Sax. Gov.* 107, 161, 220, n. 257. n. and *Lord Lyt. Hist. H. II. V.* 2 215.

EARL. Sax. *Eorle*, Lat. *Comes*.] This it is said was a great title among the Saxons, and is the most ancient of the English peerage, there being no title of honour used by our present Nobility that was likewise in use by the Saxons, except this of *Earl*; which was usually applied to the First in the Royal Line. *Verfegan* deriveth this word from the Dutch *Ear*, i. e. Honour, and *Ethel*, which signifies Noble: But whencesoever it is derived, the title *Earl* was at length given to those who were associates to the King in his council and martial actions; and the method of investiture into that dignity was *per cinctum gladii*, without any formal charter of creation. *Dugdale's Warwicksh* 302. *William* the First, called the Conqueror, gave this dignity in fee to his Nobles, annexing it to this or that county or province; and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces *Caunt*. And formerly one *Earl* had divers shires under his government, and had lieutenants under him in every shire, such as are now *Barons*; as appears by divers of our old statutes. *Cowel*.

But about the reign of King *John* and ever since, our Kings have made *Earls* of counties, &c. by charter; giving them no authority over the county, nor any part of the profits arising out of it; only sometimes they have had an annual fee out of the Exchequer, &c. An *Earl*, *Comit*, was heretofore correlative with *countatus*; and anciently there was no *Earl*, but had a shire or county for his *earldom*; but of late times the number of *Earls* very much increasing, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Besides these local *Earls*; there are some personal and honorary; as *Earl-Marshal of England*; See titles *Constable*; *Count of Chivalry*; and others nominal, who derive their titles from the names of their families. *Lex Constitutionis*, p. 78. Their place is next to a Marquis, and before a Viscount: And

E A S T

as in very ancient times, those who were created *Counts* or *Earls*, were of the blood royal; our *British* monarchs to this day call them in all public writings, "Our most dear Cousin:" They also originally did, and still may use the style of *Nob.* See titles *Countess*; *Peers*; *Sheriff*.

EARNEST. Money paid in part of a larger sum, or part of the goods delivered, on any contract, &c. which being done by way of *earnest*, the property of the goods is absolutely bound by it: And the buyer may recover the goods by action, as well as the vendor may the price of them. And by the statute of frauds, *Stat.* 29 *Car.* 2. c. 3, No contract for sale of goods, to the value of 10*l.* or more, to be valid, unless such *earnest* is made or given. See title *Frauds*.

EASEMENT, *Affamentum*, from the Fr. *Aise*, *Commoditas*] Is defined to be a service or convenience, which one neighbour hath of another, by charter or prescription, without profit; as a way through his land, a sink, or such like. *Kitch.* 105. A person may prescribe to an easement in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another; a gate-way, water-course, or washing place on another's ground, may be claimed by prescription as easements. But a multitude of persons cannot prescribe; though for an easement they may plead custom. *Cro. Jac.* 170: 3 *Leon.* 254: 3 *Mod.* 294. To allege an easement by *consuetudine* only, is the best way: And things of necessity shall not be extinguished by unity of possession; but a way of *euse* may be thus extinguished. *Lit. Abr.* 496. See title *Prescription*.

EASTER. The name of a goddess which the Saxons worshipped in the month of *April*, and so called, because she was the goddess of the *East*. *Blanc.* In our church it is the feast of the *Pasche*, in commemoration of the sufferings of our Saviour.

EAST-INDIA COMPANY.

A Corporation or "UNITED COMPANY OF MERCHANTS OF ENGLAND TRADING TO THE EAST INDIES;" which name is given to them in *Stat.* 6 *Ann.* c. 17 § 13. More explicitly, according to their charter, and the adjustment of their rights by *Stat.* 9 & 10 *Will.* 3. c. 44 § 61; trading "into, and from, the *East Indies*, in the countries and parts of *Asia* and *Africa*, and in, to, and from the islands, ports, havens, cities, creeks, towns, and places of *Asia*, *Africa* and *America*, or any of them beyond the *Cape of Good Hope*, to the Straights of *Magellan*, where any trade or traffick of merchandize is or may be used or had, and to and from every of them."

EAST-INDIA COMPANY.

The laws relative to this important Company, shall be considered in the following order.

- I. *The ORIGIN, and UNION of the Old and New East India Companies.*
- II. *The STATE of the present East India Company, and the Regulations by certain Statutes, and otherwise relating thereto.*
- III. *The RIGHTS, permanent and temporary, of the present East India Company.*
- IV. *STATUTES relative to the present East India Company; particularly the Statute 33 Geo. 3. c. 52, "for settling the Government and Trade of India, and for the Appropriation of the Territorial Revenues and Profits of the Trade."*

I. THE PASSAGE by sea to the peninsula of India, and the Eastward part of the Continent of Asia, the present seats of our Asiatic trade, was not discovered till about the latter end of the 15th century; and, of the various attempts made from hence by individuals, to open a trade thither, none proved successful until Queen Elizabeth A. D. 1600, established the first incorporated Company by the name of the *London East India Company*. After a long series of disasters and losses this Company obtained from the country powers of India, at a great expence, the privilege of a limited trade in certain parts of India, and Persia; and of making small settlements or houses of trade called *Factories* for the residence of their factors and servants. In those times the charters of the crown, and the powers which they conveyed were not thought to require parliamentary sanction; nor was it till after the Restoration that the rights or authorities derived under them to the Company, were first called in question.

By the interruptions, however, of speculative adventurers, called *Interlopers*, who had begun to resist the exclusive claims of the Old Company, under their charters, on the ground of their wanting the sanction of parliamentary authority, and by occasional failures of investments of goods from abroad, and the then not unfrequent losses of ships in their passage, the commerce of the Company was often chequered with disasters and disappointments.

Notwithstanding these discouragements the Company, formed by degrees various factories and houses of trade, both in India and Persia. When by this means they had at length become more successful, various attempts were made to induce the Crown, and even Parliament itself to interpolate and revoke the charters of the Company; some on pretext that every man had an equal right to trade in the East as well as in the West Indies; while others hoped to effect it on proposals of terms of advantage in point of public finance, that they might themselves be erected into an exclusive Company.

Such was the state of things in 1693; when the Company, by an accidental failure in the payment of a small duty which had been imposed on their capital stock, (See Stat. 4 & 5 W. & M. c. 15. §§ 10, 12,) gave an opening to Government to determine their charters, rendered void by that default: and though in the same year the Crown to obviate all doubts revived their powers and exclusive privileges by a new charter, the Company

were obliged to submit to a condition, that their capacity of trading should in future be determinable on three years' notice. The legal obstacle to the erecting a new Company being thus removed, the Stat. 9 & 10 W. 3. c. 44, was passed for borrowing two millions on a loan at 8 per cent. towards carrying on the war; and as an encouragement to subscribers it was declared, that they should be incorporated by a charter from the King into a general society; with liberty for each individual member to trade to India, and the other limits of the old Company's exclusive charter; so that the value of his exports exceeded not his share of this loan or capital: and that such of the subscribers as should choose to convert their subscriptions into a joint stock, should be at liberty so to do, and be incorporated by a separate charter by the name of *The English East India Company*; with the privilege of trading with and to the amount of such joint stock. All persons but those incorporated, and such as they should license were prohibited from this trade, except the old Company; who had time given them to wind up their commercial affairs.

The act reserved a power to determine the charters both of the General Society and the New Company after September 1711, on repayment of the loan and three years' notice.

The bulk of the subscribers having agreed to trade as a separate Company, with a joint stock, the old Company, to whose prejudice the two new corporations were to be erected, found means to become members for a very large proportion of the loan of two millions. With an interest thus acquired they joined with the English Company, and by means of their superior knowledge and possessions, they obtained a decided influence in the general courts of the new Company, and thus paved the way to that union, which afterwards took place in 1702; and which A. D. 1708 was confirmed by parliament, by Stat. 6 Ann. c. 17. By the terms of this union the warehouses at home and shipping, and also all the settlements and factories of the old Company in the East-Indies, Persia and China, including the islands of Bombay and Saint Helena with their dependencies, and all their rights and privileges however derived, became vested in the United Company; except their *Body Politic* which was surrendered to the Crown.

The curious reader may wish to learn what became of the General Society, whose members were individually authorized to trade, as far as the value of their subscriptions in goods exported from hence. All that can be discovered of them is, that though they were actually incorporated by the King's charter, and were therefore legally authorized to send ships to India or China, it does not with certainty appear that any one ship was ever fitted out by them; and that the superior advantages, of being concerned in the trade to be carried on with a joint stock, were so evident that at the time of the union of the two Companies, out of the whole loan of two millions, only 7, 200 l. then remained the property of the separate traders of the General Society; and that this sum also was soon absorbed in the *United Company*, whose capital or trading stock by which their dividend of profits was to be governed, thereupon became fixed at *Two Millions*.

EAST-INDIA COMPANY. II.

II. THE FIRST ENLARGEMENT of the Company's term took place in 1708: (*Stat. 6 Ann. c. 17*;) when the United Company bargained with the Public to advance £1,000,000 *à la fin* but without any interest; (or, which operated as the same thing, at a reduced interest of 5 per cent. on the two loans conjointly,) for an extension of their term, in the exclusive trade, of fifteen years; and thus their nominal trading capital on which the dividend was made, became advanced to 3,200,000*l*.

In 1712 the Company petitioned Parliament, (on the ground that the term which remained unexpired in their trade was too short to admit their risking the expenses of regaining and recuring the *pepper trade*, which had been engrossed by the *Dutch*;) that their corporate capacity might be continued, though the debt due to them from the Public should be redeemed. In consequence of this petition the *Stat. 10 Ann. c. 28* passed for repealing all former provisions and powers of determining their trade or incorporation; but with power for the Public to redeem the debt at any time after September 1733. And thus the United Company were supposed to have obtained a perpetuity, as well in the exclusive trade as in all their chartered rights and capacities. They however submitted themselves in that respect, to the pleasure of Parliament in 1730; when the *Stat. 3 Geo. 2. c. 14.* was passed for continuing to them their exclusive trade till 1766: for which they gave the Public a premium of 200,000*l*. without any return of either principal or interest, and also agreed to a reduction of the rate of interest to 4 per cent. on the debt of 3,200,000*l*. and to accept of payment of the principal by installments of 500,000*l*.

In 1744 they contracted for and obtained, by *Stat. 17 Geo. 2. c. 17.* a further addition of fourteen years in the exclusive trade; for which they lent to the public one million at 3 per cent.—And in 1750 they agreed by *Stat. 23 Geo. 2. c. 22.* to a further reduction of the rate of interest on the former debt, to 3 per cent.

Thus grew the debt of 4,200,000*l*. from the Public to the United Company, carrying with it an annuity of 126,000*l*. This was called the 3 per cent. *East India* annuities; and are now consolidated with the 3 per cent. *Bank* annuities. See title *National Debt*.—But the Company's capital or nominal sum, by which their dividends were governed, continued as before at 3,200,000*l*; the million last lent having been raised by their bonds, and therefore not added to their former capital.

The next renewal, and the last previous to *Stat. 33 Geo. 3. c. 52*; (stated at large post IV;) was made by contract with the public by *Stat. 21 Geo. 3. c. 65. § 9*; when a further term, determinable in 1794, was granted in the exclusive trade on payment of 400,000*l*. in discharge of all claims on the Company by the Public, previous to March 1st, 1781. But it was provided that after payment of a yearly dividend of 8 per cent. to the holders of *India* stock, the surplus of all the net proceeds of their trade and revenues, should be applied, $\frac{1}{4}$ to the use of the Public, and the remaining $\frac{3}{4}$ to the use of the Company.

The debts incurred by the Company, in the wars subsisting in *India* at and after that period, prevented any such surplus from arising; and therefore no participation of revenue took place under this act.—On the contrary

the pressure of those debts, and the compulsory clauses of an act of 1784, by which the Company were obliged to keep a stock of teas always in their ware houses, sufficient for one year's consumption, rendered it necessary for them to enlarge their actual trading capital, by new subscriptions to 3,000,000*l*. for which they had the sanction of Parliament granted them by *Stat. 26 Geo. 3. c. 12*, (explained by *Stat. 31 Geo. 3. c. 11*;) and *Stat. 29 Geo. 3. c. 65*.

In 1783 the Public agreed to forego any participation of the funds of the Company under the said *Stat. 21 Geo. 3. c. 6*; until certain debts should be discharged; and by the *Relief Act* of 1784, the participation, as settled in 1781, was to be resumed as soon as the debts therein specified were paid, and the bond debt reduced to a million and a half. See *Stats. 22 Geo. 3. c. 83*; *24 Geo. 3. c. 34*.

Having said thus much relative to the rise and progress of the Company, it may not be unacceptable to state shortly the mode of what may be called its internal economy.

The books of the Company are at all times open for the admission of every description of persons, natives or foreigners, who may desire to become members, and have money to adventure. It knows no distinction of professions, religions or even sexes, and in the general courts there is the most perfect equality; every one present has the same right with another to speak his sentiments and give his advice. A difference is made only in voting, which when taken by the holding up of hands requires 500*l*. stock, and when by ballot 1000*l*. stock, for a single vote, 3000*l*. for two votes, 6000*l*. for three votes; and 10,000*l*. for four votes; which is the largest number of votes, any member is allowed to possess; 2000*l*. stock qualifies any member to become a candidate for the office of a Director or Chairman.

In the beginning of the year 1794, the number of votes was about 1700—that of *actual voters* however not much exceeding 1400.

A proprietor of stock to the amount of 1000*l*. whether man or woman, native or foreigner has a right to give a vote in the General Courts. The Directors are twenty-four in number, including the chairman and deputy chairman; who may be re-elected in turn, six each year for four years successively. (See post IV.) The meetings or courts of Directors are to be held at least once a week, but are commonly oftner, being summoned as occasion requires. Out of the body of Directors are chosen several committees, who have the peculiar inspection of certain branches of the Company's business; as the Committee of Correspondence; a Committee of Buying; a Committee of Treasury; a House Committee; a Committee of Warehouse; a Committee of Shipping; a Committee of Accounts; a Committee of Law Suits; and a Committee to prevent the growth of private trade. And under *Stat. 33 Geo. 3. c. 52*, a Committee of Secrecy. See post IV.

The bulk of the Company's *Exports* consists of camblets, cloth, and other woollens; metals, (particularly tin, lead, and copper); naval and military stores; and silver in bullion.

The Company reserved to themselves the exclusive export of cloth, woollens, copper, bullion and military stores; and also clocks, toys, and other articles ornamented with jewels.

Other

EAST-INDIA COMPANY. III.—IV.

Other articles exported from hence are chiefly purchased in *India* by *Europeans*, for their own consumption, and are carried abroad, (in what is called private trade,) by the commanders and officers of the Company's ships.—The Company may license whom they please, to trade in the *East Indies*. The officers and subordinates of their ships, being thirty in number for every ship, are allowed the benefit of it, both in export and import, according to their different ranks. This is called *private trade*; and what they pay for this permission and in lieu of freight is called *Company's duties*, and forms an article of the Company's profits. The servants abroad are also frequently permitted to remit home their fortunes in merchandize, for which they pay a freight to the Company. This latter trade is distinguished from the former by the name of *privileged trade*.

Besides this, abundance of *British* goods are sent to *India* by *illicit trade* carried on directly from *Great Britain*; and also by *clandestine trade* from various parts of *Europe*, in *British* ships under foreign colours.

See the *Stat. 33 Geo. 3. c. 52, post. IV.* in the 4, 5 and 6th divisions of the act as there arranged.

The goods *Imported* by the Company from *India*, consist chiefly of muslins, calicoes and other piece-goods, raw silk, cotton, indigo, pepper, salt-petre, opium and various sorts of drugs; and from *China*, tea, coffee, and japan and china-ware, the other articles are comparatively of a trifling value.—Sugar has occasionally been imported in small quantities but being at present (*January 1794*) subject to a heavy duty it is in effect nearly prohibited.

The whole average amount of the customs and inland duties on the *Import-trade* of *India* and *China* to *Great Britain*, may be estimated at upwards of a million *per annum*, and the sale amount thereof at nearly six millions *per annum*.

III. THE TEMPORARY RIGHTS of the Company, consist. 1st. Of the sole and exclusive trade with *India*, and other parts within the limits already described; so that none other of the King's subjects can go thither or trade there except it be by leave of the Company; or pursuant to the directions of *Stat. 33 Geo. 3. c. 52, post. IV.*—2nd. They have the administration of the government and revenues of the territories in *India*, acquired by their conquests during their term in the exclusive trade; subject nevertheless to the various checks and restrictions contained in the several statutes, which vest that administration in them.

The rights which the Company possess in *perpetuity*, are, to be a Body Corporate and Politick, with perpetual succession. See *Stats. 3 Geo. 2. c. 14: 17 Geo. 2. c. 17: 21 Geo. 3. c. 65.*—To purchase, acquire and dispose at will of lands and tenements in *Great Britain*. In their charter of 10 *H. 3.* the value in *Great Britain* was not restricted; but by *Stat. 3 Geo. 2. c. 14 § 14*, the value therein is not to exceed 10,000*l. per annum.*—By the charter of King *William*, to make settlements to any extent, within the limits of their exclusive trade; build forts and fortifications; appoint governors; erect courts of judicature; coin money; raise, train and muster forces at sea and land, repel wrongs and injuries, make reprisals on the ravagers or disturbers of their peace; and con-

tinue to trade within the same limits, with a joint stock for ever, although their exclusive right of trading shall be determined by parliament. See the three statutes immediately above cited; and as to the forces, *Stats. 27 Geo. 2. c. 9: 1 Geo. 3. c. 14: 21 Geo. 3. c. 65: 28 Geo. 3. c. 8*, explained by *Stat. 31 Geo. 3. c. 10.*

These rights, it appears, the Company hold under the immediate authority of Parliament; they embrace all those of the old chartered Company which subsisted from the year 1600 to 1708, when, as has been already observed, they became vested or absorbed with all their fortresses, settlements and factories, and other property real and personal, in the present United Company.—They are a perpetual Corporation; and although their exclusive right to the trade, and their power of administering the government and revenues of *India*, were to be determined, they would still remain an incorporated Company in perpetuity; with the exclusive property and possession of *Calcutta* and *Fort William*, *Madras* and *Fort St. George*, *Bombay*, *Bencoolen* and *St. Helena*, and various other settlements and landed estates in *India*; and also a right of trading thither, with a joint stock; together with all their repositories and other conveniences adapted to their commerce and the preservation of their merchandize, both abroad and at home.

The only privileges they can be constitutionally deprived of, are, those of trading to the exclusion of others, and of governing the countries and collecting and appropriating the revenues of *India*. See *post. IV. Stat. 33 Geo. 3. c. 52. Div. 4.*

IV. THE STATUTES most interesting, and of most consequence, besides those already enumerated and referred to, are *Stats. 13 Geo. 3. c. 63: 24 Geo. 3. sess. 2. c. 25: and 33 Geo. 3. c. 52*, of which an abstract of some length seemed here necessary.

The other statutes now in force relative to the trade and concerns of the *East-India Company*, but which it does not seem expedient to state at large, are—*Stat. 9 & 10 H. 3. c. 44. § 69*; by which persons trading to the *East-Indies*, are first to give security for causing all goods laden on their account in *India*, to be brought, without breaking bulk, to some part of *England* or *Wales*, and there to be unladen and put on land. The amount of this security is regulated by *Stat. 6 An. c. 3.—Stat. 7 Geo. 1. c. 5. §§ 32, 33*, enabling the Company to borrow money on their Common Seal.—By *Stat. 25 Geo. 2. c. 26*, which is now expired, insurance of ships trading to *India* under foreign commissions, was prohibited.—*Stat. 7 Geo. 3. c. 49. § 1*, as to making dividends; and § 3, as to ballots.—See also on the same point *Stat. 10 Geo. 3. c. 47. § 3*.—The said *Stat. 10 Geo. 3. c. 47. in § 4. Et.* declares that crimes and oppressions against His Majesty's subjects in *India* may be punished by information in the Court of *K. B.* in *England*.—*Stat. 12 Geo. 3. c. 54*, as to building new ships.—*Stat. 17 Geo. 3. c. 8*, as to the time of electing Directors.—*Stat. 21 Geo. 3. c. 70*, regulating in several particulars the power of the Supreme Court at *Fort William*; and of the Governor General and Council of *Bengal*.

By the *Stat. 13 Geo. 3. c. 63*, "for establishing certain rules and orders for the management of the Affairs of the Company, as well in *India* as in *Europe*." Considerable alterations were made in the constitution of the Company.

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It was enacted that the Court of Directors should in future be elected for four years; six members annually; but none to hold their seats longer than four years. That no person should vote at the election of the Directors, who had not possessed their stock twelve months.—This Stat. also increased the qualifications for a vote from 500*l.* to 1000*l.* (See ante II.)—The statute ordained that the Mayor's Court of *Calcutta*, should in future be confined to small mercantile causes, to which only its jurisdiction extended before the territorial acquisitions. That in lieu of this Court, a new one should be established at *Fort William*, under the title of the Supreme Court of Judicature, consisting of a Chief Justice, and three Puisne Judges; and that these judges be appointed by the Crown. That a superiority be given to the presidency of *Bengal*, over the other presidencies in *India*. That the power of nominating and removing the Governor-General and Council at *Fort William* and *Bengal*, should be vested in the Directors. [By Stat. 26 Geo. 3. c. 25, it is declared that His Majesty's approbation of the appointment of the Governor-General and Council of *Fort William*, is not necessary.] The salaries of the Judges were also fixed at 8000*l.* to the chief justice, and 6000*l.* a year to each of the other three. The appointments of the Governor-General and Council were fixed the first at 25,000*l.* and the four others at 10,000*l.* each, annually.

It has been said, we know not on what foundation, that no proportionable benefit has resulted from this act to the Company; that on the contrary, this court of justice occasioned much discontent to the natives, as well as dissatisfaction to the Company's servants. This being a political question, the discussion of it is by no means applicable to the design of this work.

By Stat. 24 Geo. 3. sess. 2. c. 25, three things were intended.—1. The establishing a power of *conireul* in this kingdom, by which the executive government in *India*, is connected with that over the rest of the empire.—2. The regulating the conduct of the Company's servants in *India*, in order to remedy the evils that had prevailed there.—3. The providing for the punishment of crimes which might reflect disgrace upon *Great Britain*.

1. Six persons are to be nominated by the King, as Commissioners for the affairs of *India*, of whom one of the Secretaries of State, and the Chancellor of the Exchequer for the time being shall be two, and the President is to have the casting vote if equally divided. (See post. Stat. 33 Geo. 3. c. 52. div. 1.) New Commissioners are to be appointed at the pleasure of the Crown.—The Members of this Board of Controul, are sworn to execute the several powers and trusts reposed in them, without favour or affection, prejudice or malice. The Court of Directors are to deliver to this Board, for their approbation or alteration, all minutes, orders, and resolutions of themselves, and of the Courts of Proprietors; and copies of all letters, orders, and instructions proposed to be sent abroad. None to be sent until after such previous communication on any pretence whatever. The Directors are to appoint the servants abroad, but power is given to the King by his Secretary of State, to recall the Governors and Members of the Councils, and all inferior Magistrates. The Council of *Bengal* are subjected to the direction of the Company at home; and in all cases, except those of immediate danger and necessity, restrained from acting without orders from *England*.

Another object of this Act is, to redress the grievances of the natives of *India*; to provide for the payment of the debts of the Nabob of *Aree*, which are a burden on his country; discriminating at the same time those which were justly incurred, from those which were forced upon him by the injustice and extortion of *British* oppressors; to ascertain the indeterminate rights and pretensions, on which so many differences arose between him and the *Rajah* of *Tanjore*; and to deliver the Zemindars, and other native landholders of *India*, from oppression; and to secure to them their possessions by permanent rules of moderation and justice.

2. A material part of this bill is directed also against the abuses said to have prevailed in the civil and military departments; enjoining a thorough revival of their establishment, together with the suppression of such places as are found to be useless, and of such expences as may be conveniently avoided. And in order to prevent any delusive show of retrenchment, or any future deviation, this reform is directed to be constantly submitted in its whole state and progress to Parliament. (See also Stat. 28 Geo. 3. c. 8. : 31 Geo. 3. c. 10.)

Cadets and writers were heretofore sent to *India* in such numbers as to remain a burden upon the Company's establishments. These are reduced to a certain complement not to be exceeded.

A system of succession by seniority is established by the act, to prevent the servants of the Company from rising, merely through interest without merit; leaving however to the Councils abroad the power of bringing forward, for reasons to be by them assigned, any persons of extraordinary merit or capacity. (See post. Stat. 33 Geo. 3. c. 52. div. 3.)

3. Security having been heretofore derived to delinquents in *India*, from the circumstance of their offences being committed within the territories of *Indian* princes; so as not to come within the cognizance of the *British* Government; this act provides against such evasions in future, by declaring the offence equally punishable, in whatever territory of *India* it is committed. The act of receiving presents, is declared to be in itself extortion, and punishable accordingly. The offences of disobeying orders, and bargaining for offices, are pronounced to be misdemeanors; and it is provided that offenders shall not compound for them with the Company; nor ever be restored to appointments in their service. Collectors and receivers are bound by oath not to receive any private gratuity over and above the legal tribute.

With a view to prevent, or more easily punish the misconduct of the Company's servants, several regulations were made by this statute for the discovery of their property on their return to *England* from *India*; but which were all repealed by Stat. 26 Geo. 3. c. 57. § 31.

The Attorney-General or Court of Directors, may exhibit an information against any person guilty of the crime of extortion, or other misdemeanors committed in the *East-Indies*, after *January* 1, 1785; which information is to be tried by Commissioners selected from both Houses of Parliament.

The election of these Commissioners is regulated by Stat. 26 Geo. 3. c. 57, which in substance directs as follows. The Lords are to ballot for twenty-six of their house, and the Commons for forty of their number; their names are again to be put into a box, to be drawn

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out by lot, in presence of three Judges, (one of the Court of *K. B.* one of *C. P.* and one of the Exchequer) and of the parties; and the defendant may *peremptorily* challenge thirteen peers and twenty commoners; and he as well as the prosecutor may challenge as many as they please *for cause shown*. The first five names of the Peers, and the first seven names of the Commoners which shall be drawn without challenging, shall be returned by the three judges to the Lord Chancellor, to insert their names, with those of the three Judges in a *special commission*, for them or any ten of them, of whom one of the Judges always to be one, to hear and determine every such information, and pronounce judgment thereon; such judgment to be enforced by the authority of the Court of *K. B.* and to be effectual and conclusive to all intents and purposes whatsoever.—This as well as the former act also, contains many other directions relative to the trial, as also relative to the dispensing justice, both in criminal and civil cases in *India*.

The above *Stat. 24 Geo. 3. c. 25*, is explained by *Stat. 28 Geo. 3. c. 8.* as to the forces, (See *ante* III. and *Stat. 31 Geo. 3. c. 10.*) the annual accounts (*ante* 2.) and the power of the Commissioners as to salaries and gratuities.

In consequence of the regulations adopted under this statute, it has been asserted, we believe with truth, that the administration of our *Indian* possessions and trade has become regular and efficient; the credit of the Company has increased; the price of *India* stock has advanced; the trade of the Company has been almost doubled; the duties paid to the Public augmented; tranquillity for many years maintained, and a necessary and politic war supported with dignity, and terminated (in 1793) with success and honour.

The *Stat. 33 Geo. 3. c. 52*, the commencement of which in *India* is appointed to take place on the 1st of February, 1794, being of the greatest importance on this subject is here presented in the form which seemed best adapted to elucidate the purposes for which it was past. As it concerns,—1. The Controul in *Great Britain*.—2. The Governments abroad.—3. Patronage and rule of promotion.—4. The general trade.—5. Limitations on the exclusive trade to and from *India*.—6. What shall at present be deemed illicit or clandestine trade.—7. Appropriations of the Company's revenue.—8. The method of suing for forfeitures and penalties, and proceeding as to seizures.—9. Regulations of general justice in *India*; and as to the Directors.—10. The statutes repealed.

1. The act provides for the continuation of the Board of Controul in all its parts; except that the person first named in the King's Commission is to be President; and instead of the Commissioners being limited to six Privy Councillors, the number is indefinite, resting in the King's pleasure; of which however the two principal Secretaries of State, and the Chancellor of the Exchequer, are to be three; and His Majesty may if he pleases add to the list two Commissioners not of the Privy Council.

The King may give 5000*l.* a year among such of the Commissioners as he pleases; which together with the salary of the Secretary and Officers, and other expenses of the Board, are to be paid by the *India* Company, and not, as formerly, by the Civil List; the whole not to exceed 16,000*l.* *per annum*.

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Oaths are prescribed for the Commissioners and their officers. The office of a Commissioner, or chief Secretary, is not to be deemed a new office to disable them from sitting in parliament. Nor is the appointment of a Commissioner not having a salary, or of a Chief Secretary to vacate a seat. Three Commissioners must be present to form a Board.

The Powers of the Board are in substance the same as under former acts of parliament. They are to superintend, direct and control all acts, operations and concerns, which relate to the civil or military government and revenues of the *British* territorial possessions in *India*, subject to the restrictions after mentioned. They and their officers are to have access to the papers and records of the Company, and to be furnished with copies or extracts of such of them as shall be required. They are also to be furnished with copies of all proceedings of General Courts, and Courts of Directors, within eight days; and with copies of all dispatches from abroad, relating to matters of government or revenue, immediately after their arrival. No orders on those subjects are to be sent by the Company to *India*, until approved by the Board, and when the Commissioners vary or expunge any part of the dispatches proposed by the Directors, they are to give their reasons; and all dispatches are to be returned to the Court of Directors in fourteen days. The Directors may state their objections to any alterations, and the Commissioners are to reconsider them; and if they interfere, with what the Directors deem matters of Commerce, the Directors may apply to the King in Council to determine betwixt them. But the Board are restricted from the appointment of any of the Company's servants. If the Directors, on being called upon to propose dispatches, on any subject relating to government or revenue, shall fail to do so within fourteen days, the Board may originate their own dispatches on that subject.

The Board are not to authorise any increase of salaries, or any allowance or gratuity to be granted to persons employed in the Company's service, except the same shall be first proposed by the Company; and their intention and reasons for such grant are to be certified to both Houses of Parliament, thirty days before the salary can commence.

The Directors are to appoint three of their Members to be a Committee of Secrecy, through whom dispatches relating to government, war, peace, or treaties, may be sent to and received from *India*. This Committee and their clerks to be sworn to secrecy.

Orders of Directors concerning the government or revenues of *India*, once approved by the Board, are not subject to revocation by the general court of proprietors.

2. The forms of government over the presidencies of *Bengal*, *Fort St. George*, and *Madras*, are continued in all their essential parts. For *Bengal* by a Governor General and three Members of Council. For each of the others, a Governor and three Members. These latter with respect to treaties with the native powers of *India*, levying war, making peace, collecting and applying revenues, levying and employing forces, or other matters of civil or military government, are to be under the control of the Government-General of *Bengal*; and are in all cases whatever to obey their orders; unless the Directors shall have sent to those settlements, any orders repugnant thereto not known to the Government-general; of which in that

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case they are to give the Government-general immediate advice.

The Court of Directors are to appoint to these several governments; namely, the Governor-General, the two other Governors, and the Members of all the Councils; and likewise the Commander in Chief of all the Forces, and the three Provincial Commanders in Chief. None of the Commanders in Chief are; *ex officio*, to be of the Council, but they are not disqualified from being so, if the Directors shall think fit to appoint them: and when they are Members of the Council, they are to have precedence of the other Counsellors. The Civil Members of Council, are to be appointed from the list of Civil Servants who have resided twelve years in the service in *India*.

The Directors may appoint to any of these offices provisionally, but without salary, till the persons appointed shall actually succeed in possession. Any vacancy of Governor-General, or Governor, when no provisional successor is on the spot, is to be filled by the senior of the Civil Counsellors, till a successor shall arrive; and the vacant seat in Council thereby occasioned, shall be temporarily supplied from among the senior Merchants, at the nomination of the acting Governor-General, or Governor, if only one Counsellor shall then remain; and on other occasions, the Governor-General and Governors, may supply vacancies in Council from the list of senior Merchants, until successors duly appointed shall arrive to take their seats. In all these cases, the salaries and allowances are to follow the acting Members while in office. If the Directors fail to appoint to vacancies in two calendar months, after notification thereof, the King may supply them, and the Directors shall not remove any person so appointed. In all other cases, the Directors have the power of recalling or dismissing any servants; and the like general power is vested in the Crown. Appointments made before the act, not to be disturbed.

The Commander in Chief of all the Forces, when at either of the subordinate settlements, is to have a seat at the Council Board, but is to have no salary in respect thereof; and if the provincial commander is a Member of that Council, he may continue to deliberate, but his voice shall be suspended as long as the other shall remain.

Provision is made for supplying the place of any Member of Council disabled from attending by illness.

The departure of any Governor, or Member of Government, or Commander in Chief, from *India*, with intent to come to *Europe*, or any written resignation delivered in by them, shall be deemed an avoidance of office, and the coming into any part of *Europe*, shall be a sufficient indication of that intent. No salary shall be payable to any officer or his agent during absence, unless employed on actual service; and if any officer, unless absent on service, never returns, the salary is to be deemed to have ceased from the day of his quitting the settlement.

The act prescribes the order and method of conducting business at the several Council Boards. Powers are given to the Governor-General, or Governor, to act contrary to the opinions of the other Members of Council, taking upon themselves the sole responsibility.

Provision is made in case of the absence of the Governor-General, and his visiting any subordinate presiden-

cy; and in case he shall be in the field without a Council, all the governments and officers shall obey his orders, and he alone shall be responsible;

All the governments are laid under restrictions to prevent war or extension of dominion in *India*, unless hostilities against the Company or their Allies shall render war unavoidable. The Members of subordinate governments, acting contrary to this act, or to the directions of the Government-General, may be suspended or dismissed by that government, and further punished. The subordinate presidencies are also required to communicate all matters of importance to the superior government with all dispatch.

The Governor-General, and other Governors, are vested with powers of apprehending persons, suspected of illicit correspondence with the enemies of the Company or of *Great Britain*. Witnesses are to be examined, and cross examined, and their evidence recorded; and the parties may either be tried in *India*, or sent home; in the latter case, the depositions of the witnesses are also to be sent home, and are to be received in evidence, subject to impeachment in respect to the competency of the witnesses.

To the acting President of the several Council Boards, is given a casting vote, in all cases of equality of voices.

3. The Directors are to appoint so many cadets and writers only, as to supply vacancies according to returns from abroad. Their ages to be from fifteen to twenty-two; unless any cadet shall have been one year in the King's service, and then his age is not to exceed twenty-five years.

All shall have promotion by seniority of service only. Three years' service qualifies a civil servant for a place of 500*l.* a year—six years' for one of 1500*l.*—nine years 3000*l.*—twelve years 4000*l.* or upwards. None to take two offices, where the joint emoluments shall exceed this rule. (See *ante Stat. 24 Geo. 3. c. 25. div. 2.*)

Nearly the same regulations are made by this statute, relative to receiving presents, disobedience of orders, and bargaining for offices, as have been already mentioned in *Stat. 24 Geo. 3. c. 25. div. 3.* All the King's subjects are made amenable to all courts of competent jurisdiction abroad, and at home, for all crimes committed by them in *India*. The Company may compound civil actions, but are absolutely restricted from compounding or remitting any judgment or sentence whatever in criminal cases.

Servants of the Company, after five years absence, cannot return with their rank, nor serve again, unless detained by sickness; or unless it be by leave of the Company, on a ballot of three parts in four of the General Court. In case of sickness, the Directors are the judges in the civil service; and in the military, the Directors and the Board of Control jointly.

4. The Company's term is extended for twenty years, from *March 1, 1794*; subject to be determined at or after that period, on three years' previous notice by Parliament, signified by the Speaker of the House of Commons; subject however as to the trade to and from *India* to the following limitations, in favour of such private merchants as may choose to trade there. In other respects, and to and from *China*, and other places beyond the *Cape of Good Hope*, the former restrictions against private traders, are continued in force; and if the exclu-

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five trade thus limited, shall be hereafter discontinued, the Company are still to retain their corporate capacity with power to trade, with a joint stock in common with other people. If however any new settlement shall be obtained from the *Chinese* government, separate from the Continent of *Asia*, an export trade thither is preserved to private merchants under certain regulations; and there is also a clause to preserve to the Southern Whalers the benefit of their carrying trade into the Pacific Ocean, by the way of *Cape Horn*, to the Northward of the Equator, limited to 180 degrees West Longitude of *London*: and ships from *Noorka-Sound*, are to be licensed to trade from thence with *Japan* and *China*; but are not to bring any goods of the produce or manufacture of those countries to *Great Britain*. See ante III.

5. All persons may export and import goods to and from *India*, in the Company's ships; except that they shall not export military stores, ammunition, masts, spars, cordage, anchors, pitch, tar, or copper; nor import *India* callicoos, dimities, muslins, or other piece-goods, made or manufactured with silk or cotton, or with silk or cotton mixed, or with other mixed materials, unless it be done by leave of the Company. If the market shall not be sufficiently supplied with excepted articles of import or export, (with an exception of military stores and copper,) the Board of Controul may open that trade also to individuals. If the Company should not export 1500 tons of copper annually, private traders may export copper, in the Company's ships, to the amount of the deficiency.

The Company are to furnish private traders, till 1796, with 3000 tons of shipping yearly, computed on the same principle as the Company's own tonnage is computed. The quantity may be increased by order of the Board of Controul, to meet the demands of the private traders; and if the Board order more than the Company approve, they may appeal from the order to the King in Council. And the Company are restricted from charging any higher freight than 5*l.* per ton outwards, and 15*l.* per ton inwards; except in time of war, or in circumstances incidental to war, or preparations for war, when they may charge an increased rate of freight, in a due proportion to the rates at which they shall take up their own shipping, but the proposed increase can only be made by the consent of the *Board of Controul*; before whom the Directors are also required, in 1794, and in every third year afterwards, to lay a statement of the affairs of shipping; and to abide by their order, touching any continuance, increase, or abatement of the rate of freight on private trade.

Private traders are required to notify to the Company's Secretary at home, and to the proper officers in *India*, at a time limited, the quantity of tonnage wanted by them for the ensuing season, with the place of destination, and the time when the goods will be ready for shipping. At home, this notice is to be given before the 31st of *August* for the ships of the ensuing season, and before the 15th of *September*, they are to deposit the sum for the tonnage, or give security to the Directors for payment of it. Before the 30th of *October*, they are to deliver a list of the sorts and quantities of the goods intended to be sent. In failure of having them ready, by the day specified in the notice, they are to forfeit their deposit or the security, and also their tonnage for that

turn. Similar rules are prescribed for shipping goods, &c. in *India*; but it is left to the governments there to fix the times, and to name the officers, to whom notices are to be given. The Company is to have the benefit of all forfeited and vacant tonnage, and if more is demanded for private trade than the quantity limited, every person is to have his due proportion; and notice is to be given him thereof seven days before the day for making the deposits. All private trade is to be registered in the Company's books, and, in default of being registered, it is to be considered as illicit trade, and punishable accordingly.

The restrictions of the law against the Company's servants, or others, from acting as factors for foreigners, or lending money to foreign Companies, or on bottomry of their ships, or assisting them with remittances by bills, are repealed. And all legal impediments to the recovery of debts, under any pretence that they were incurred illicitly, and against the letter of these abrogated laws, are removed; and all persons in *India*, not specially prohibited by the Company, or restricted by their covenants, are authorized to act as mercantile agents for any who may choose to employ them; and if there shall be a want of factors (properly qualified and authorized) the Company are to licence free merchants, with the approbation of the *Board of controul*, so that there may be always a proper supply of agents for conducting the private trade abroad. But the becoming factors is not to exempt any persons from being amenable to the general authorities of the governments in *India*; and all agents are restricted from going beyond ten miles from some principal settlement, without special leave.

As a further relief to private traders, the duty of 5*per cent.* granted by an act of *King William*, on goods imported in private trade, is, in respect to the *India* trade, repealed; and the Company's former charge of 2*per cent.* discontinued, and in lieu of these, and in satisfaction of the expences of unshipping, hoyage, cartage, warehouse-room, sorting, lotting, and selling private goods, the Company is to have 3*l.* per cent. on the gross amount of the sales of private trade, the customs thereon included. The repeal or the allowance thus substituted, is however not to extend to special engagements made between the Company, and any of their officers touching their privileges.

For the ease of manufacturers, who may import any articles of raw materials; rules, or by-laws are to be framed and established for bringing them to as early a sale as possible; and for preventing any undue preference in the sales of the same commodity amongst any of the importers, whether the goods belong to the Company or to individuals, the sales are to be open and public, by inch of candle, and the whole consignment bought in by the private importer, is to be delivered out to him, on payment only of the duties and other dues thereon. All other goods imported in private trade, are to be sold and treated as heretofore, according to the by-laws of the Company; and all goods in private trade are to pay to Government the same customs as goods imported by the Company on their own account.

And inasmuch as the allowance of 3*per cent.* and the rates of freight, will be insufficient to indemnify the Company their actual charges upon private trade, the Legislature has exempted the Company from actions for

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losses or embezzlements which a common carrier might, in ordinary cases, be liable by law to make good to the owner. But the act provides that the Company's officers, and all persons through whose means or negligence any loss shall happen, shall be liable to make it good to the owner; and it gives a further remedy to the owner, in certain cases, to recover satisfaction, by enabling him to prosecute under the written engagements or securities taken by the Company for the safe keeping of their own merchandize. All the laws prohibiting the import of goods from any other place than that of their growth, and for continuing all prohibitory laws, in respect to the consumption or wearing of foreign manufactures are continued. (See title *Navigation-Acts*).

6. All the old laws for preventing *Clandestine Trade* with *India*, and from lending to or assisting, or being concerned with Foreign Companies, or Foreign Traders, are wholly abrogated; and the following provisions are substituted in their place, observing that the penalties are made to extend only to such of his Majesty's subjects as belong to *Great Britain, Guernsey, Jersey, Alderney, Sark, Man, Faro Isles*, or to the Colonies, Islands, or Plantations in *America*, or the *West Indies*, and that all vessels and goods forfeited, may be seized by any of the Company's Officers in *India* or *China*.

Persons going unlawfully to *India*, and trafficking there, forfeit ships, vessels, goods, and merchandize, and double the value thereof: one-fourth to the informers, and three-fourths to the Company, they paying thereout the costs of prosecution.

Persons unlawfully going to *India*, shall be deemed unlawful traders, and subject to the foregoing penalties and forfeitures, and may also be prosecuted as for a crime and misdemeanor, and be liable to fine and imprisonment. One moiety of the fine goes to the King, the other to the Company, if they prosecute, or else to any other informer.

Persons unlawfully resorting to *India*, may be seized and sent home for trial; and on arrival, they are to give bail, or be committed to prison.

Persons dismissed the service, or whose licenses shall have expired, if they continue in *India*, are to be considered as illicit traders, and are made subject to penalties and forfeitures of goods, &c. as such.

Goods shipped clandestinely, or such as are restricted by the act, and goods unshipped at sea, shall be seized and forfeited, with double the value, and the Master, or other officer, knowingly permitting or suffering the same, shall forfeit all his wages to the Company; to be deducted out of the monies payable to the owners, and be disabled from again acting in the service.

Any who shall solicit for, or accept a *foreign commission* to sail to, and trade in *India*, shall forfeit 500*l.* half to the Company, and half to the prosecutor, or the whole to the Company if they shall prosecute.

All Governors and Counsellors are prohibited from trading, except for the Company; and all Collectors, Supervisors, and others employed in the Revenues of *Bengal, Bahar, and Orissa*, or their Agents, or any in trust for them, are prohibited from inland trade, except for the Company. The Judges of the Supreme Court of Judicature in *Bengal*, are absolutely prohibited from traffick; and none without the permission of the Company, shall trade in salt, beetle-nut, tobacco or rice, &c.

pain of forfeiture of the goods, and treble the value, one moiety to the Company, and the other to the prosecutor.

None shall send goods from *India* to the Continent of *Europe*, by any other channel than as allowed by the act, on pain of forfeiture of double the value: but this restriction is not to extend to matters of agency, only on the account *bonâ fide* of any foreign Company, or foreign Merchant.

7. APPROPRIATION. *First in India.* The territorial revenues are to be applied in the first place, in defraying all charges of a military nature. Secondly, In payment of the interest of the debts there already, or hereafter to be incurred. Thirdly, In payment of the civil and commercial establishments. Fourthly, In payment of not less than one million *per annum* for the Company's investments of goods to *Europe*, and remittances and investments to *China*; and the surplus, if any, is to be applied in the discharge of debts, or such other purposes as shall be directed from home. The sum allowed for investments, may from time to time be increased to the extent of the diminution made in the annual amount of the interest of debts, which shall be paid in *India*, or transferred home; for which transfer, provision is made to an extent of 500,000*l.* a year, by Bills of Exchange to be drawn upon the Company; and if the creditors shall not subscribe to that amount, other persons may subscribe, and the money advanced by them for bills is to be applied in discharge of such debts, and this rule is to be continued till the *India* debt shall be reduced to two millions. The Company may increase these transfers home, but the Governments abroad are restricted from exceeding the above amount without their orders. (See *Stat. 34 Geo. 3. c. —*)

Secondly at home. The net produce of the Company's funds at home, after payment of current charges, are thus appropriated. First, In payment of a 10 *per cent.* annual dividend, on the present, or any increased amount of the capital stock of the Company. Secondly, Of 500,000*l.* *per annum* to be set apart on the first of *March*, and the first of *September*, half yearly; and applied in the discharge of the before-mentioned Bills of Exchange, for the aforesaid reduction of the *India* debt. Thirdly, Of a like annual sum of 500,000*l.* to the Exchequer, to be applied by Parliament for the use of the Public, and to be paid on the first of *January*, and the first of *July*, half-yearly, by equal instalments. And, lastly, The surplus may be applied in the more speedy reduction of the *India* debt, till reduced to two millions; or in discharging debts at home, so as not to diminish the bond debt below 1,500,000*l.* Subject to these appropriations, and after the debt in *India* is reduced to two millions, and the bond debt at home to 1,500,000*l.* one-sixth part of the ultimate surplus is to be applied to an increase of dividend of the capital stock, and the remaining five-sixths, is to be made a guarantee fund, or collateral security for the Company's capital stock, and their dividend of 10 *per cent.* until such fund, by the monies paid by the Company, and the interest thereof, shall have amounted to twelve millions; and after that time, the said five-sixths of the surplus is to belong to the Public in full right. These five-sixths are to be paid into the Bank, and laid out in the purchase of redeemable annuities, in the names of the Commissioners for the reduction of the national debt, who are also to receive the dividends, and lay them out.

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out in like manner, until twelve millions have been invested. That being accomplished, the annual dividends of the stock purchased therewith, are, in the first place, to make good any defalcation in the Company's revenues, to pay the 10 *per cent.* dividend, and subject thereto, those dividends are to belong to the Public. If on the Company's exclusive trade being determined, their own assets shall prove insufficient to make good their debts, and also their capital stock rated at 250 *per cent.* the excess of such guarantee-fund is to make good the deficiency, as far as it will extend; and in the event of the Company discontinuing their trade altogether, the excess is to belong to the Public. But if the Company shall continue to trade with a joint stock, then the overplus, and the annual dividends thereof, are to remain as a like guarantee for a dividend of 10 *per cent.* and for the capital rated at 200 *l. per cent.* as long as the Company shall trade with a joint stock; but subject to the making good any such deficiencies, the said fund is to be deemed the property of the Public.

If the bond debt at home, or the debts abroad, after being reduced to the sums before limited, shall be again increased, the former appropriation is to be revived until those debts shall be again diminished to their respective standards before limited.

Any deficiency in the funds to make good the 500,000 *l.* to the exchequer in any year, is to be made good in the excesses of subsequent years; unless it happens in time of war or by circumstances incidental to war; in which case the deficiencies are not to be carried forward as a debt on the annual funds of the Company, nor to be brought forward as a debt to be paid by the Company, unless only in the event of their assets, on the conclusion of the exclusive trade affording more than sufficient to make good the capital stock rated at 200 *l. per cent.*; but any excess of such assets beyond that amount, is liable to make good the deficiency of any such payments to the Public; no interest is to be computed in the mean time on such deficiency.

The securities given by the cashiers of the Bank, are to extend to the monies they may receive under this act, and the treasury is to direct the allowances for management; and if the Company make default in any payments, directed by the act, they may be sued, and shall pay 15 *l. per cent.* damages, with costs of suit.

The statute directs the manner in which receipts shall be given; and a power is lodged in the treasury, to give the Company further time for payment in cases of exigency. And it is declared that neither the claims of the Public, nor of the Company, to the territories in India, shall be prejudiced by the statute, beyond the prolongation of the term in the exclusive trade. The statute also contains a clause of mutual acquittal of all out-standing demands between the Crown and the Company, to the 24th day of December 1792.

The statute recognizes the rights of the Company to a sum of 467,896 *l. 7 s. 4 d.* in money and 9,750 *l.* East India stock; (which sums constitute the separate fund of the Company, established under the act of 1781;) and it is observed, that it will be more for the general interest of the Company to continue that money employed in trade, computing an interest upon it and to make it a fund for a permanent increase to their dividend of 10 *per cent.*

than to draw it from their trading capital for any sudden distribution. And it then authorizes and limits the Company to make a dividend from this separate fund, and the interest thereon, after the rate of 10 *per cent. per annum* during their further term in the exclusive trade; and at the end of the term, it gives them a power of disposing of the remainder of this fund as they shall think fit.

The Company are not to grant any pensions or new salaries beyond 200 *l. per annum*, to any one person, without the consent of the Board of Control; and they are to lay before Parliament annually, a list of all their establishments abroad and at home, in which all pensions and new salaries are to be particularly noticed; and also complete accounts of all their affairs, receipts and outgoings of the preceding year, with estimates for the following year.

8. The statute gives a right of suing by action, bill or information, in any of the courts of *Westminster*, (in which case the venue is to be laid in *London* or *Middlesex*;) or in the supreme court of judicature in *Bengal*, or the Mayor's court at *Madras* or *Bombay*; and in such suits the legality of seizures of persons, ships, or goods, is made cognizable. In cases of misdemeanors, the offenders are punishable by fine and imprisonment, and if abroad, they may be sent home, as part of the punishment; and a *capias*, for arrelling the accused party, is given in the first instance, which may be compounded for by bail.

For securing to the crown the duties for goods unlawfully trafficked with, in the cases of forfeiture of goods, the Attorney General may prosecute the offenders, or their partners, by bills in a court of Equity, waving penalties, and the defendants shall make full discovery of their illicit traffick upon oath, and shall be decreed to pay all the duties thereupon to Government, and 30 *l. per cent.* on the value of the goods to the Company, and shall be relieved against all other forfeitures. The Company may, in like manner proceed against offenders by bill in equity, and if they fail they shall pay costs. Defendants are to pay costs to the Crown and to the Company, when the decree shall be against them. Other usual regulations are made as to informers, pleading, &c.

9. The jurisdiction of the Supreme Court of Judicature at *Fort William*, in causes of Admiralty, is made to extend to the High seas at large; whereby a defect in *Stat. 13 Geo. 3. c. 63*, for constituting that court, is cured.

For increasing the number of magistrates in *Bengal*, *Madras*, and *Bombay*, the supreme court of judicature in *Bengal* is to issue commissions of the peace, in pursuance of orders issued in council for that purpose; and any of the justices, so appointed, may by order in council, sit also in the courts of oyer and terminer, taking the oaths of justices in *England*, (excepting the oath prescribed by the act of the 18 *Geo. 2.* relating to qualification by estate). The proceedings and judgments of justices may be removed to the court of oyer and terminer by *certiorari*, but cannot be set aside for want of form but on the merits only. The justices may also associate with the judges in causes appealed, when called upon so to do.

The Governments abroad may appoint coroners to take inquests upon the bodies of persons coming to an untimely end, and appoint fees to be paid for that duty.

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The justices of the peace may appoint scavengers, and raise money by assessments for cleansing, watching and repairing the streets of *Calcutta*, *Madras*, and *Bombay*; they may also licence houses for retailing spirituous liquors, and fix the limits of those towns; and none are to retail spirits but such as they shall so licence, under the penalties of the laws of *Great Britain*.

A special oath is prescribed to be taken in future by the Directors of the Company, prohibitory of their acting as Directors when concerned in buying from, or selling to, the Company any goods; and prohibitory of their being concerned in any shipping employed by the Company, or accepting any present for any appointment of office, or of being concerned in any private trade contrary to the act.

10. The Acts or parts of Acts repealed, are as follows: *Stat. 9 & 10 W. 3. c. 24. § 81.*—The whole of the temporary *Stat. 5 Geo. 1. c. 21*: and so much of the several statutes as continued it in force.—*Stat. 7 Geo. 1. c. 21. § 1. to § 9.*—The whole of *Stat. 9 Geo. 1. c. 26.*—*Stat. 3 Geo. 2. c. 14. § 9.*—*Stat. 17 Geo. 2. c. 17. § 11.*—*Stat. 10 Geo. 3. c. 47. § 1 & 2.*—*Stat. 13 Geo. 3. c. 63. § 23. to 29. and § 32. to § 35.*—*Stat. 21 Geo. 3. c. 65. § 29.*—*Stat. 24 Geo. 3. c. 25. § 3. 13. 9 and 31.*—the whole of *Stat. 26 Geo. 3. c. 16.*—and *Stat. 26 Geo. 3. c. 57. § 32, 33.*

The repeal is not to extend to offences committed before the commencement of the act, nor is it to affect the powers of the former Board of Controul, until a new one shall be appointed; nor to affect the powers given to the board by *Stats. 28 Geo. 3. c. 8: 31 Geo. 3. c. 10*, concerning the forces in *India*.

EASTINTUS, Sax. *East-Tyne*.] An Easterly coast or country; also the *East street*, *East side* of a river, &c. *Leg. h. Ed. 1.*

EASTLAND COMPANY. This Company subsisted under a charter granted by Queen *Elizabeth* in 1579, for regulating the commerce into the *East country*; a name anciently given, and still continued by mercantile people, to the ports of the Baltic sea, more particularly those of *Prussia* and *Livonia*: They were by this charter to enjoy the sole trade, through the Sound, into *Norway*, *Sweden*, *Poland*, *Lithuania*, (excepting *Narva* which was within the charter of the *Russia Company*), *Prussia* and also *Pomerania*, from the river *Odel*, Eastward, *Danzick*, *Elbing* and *Koningberg*; also to *Copenhagen* and *Elfsborg*, and to *Finland*, *Gotland*, *Bornholm* and *Oland*. This charter was confirmed by another from *Charles I.* in 1629.

By the *Stat. 25 Car. 2. c. 7*, the following provisions were made for laying open a very considerable part of this trade: It was declared lawful for any native or foreigner at all times to have free liberty to trade into and from *Sweden*, *Denmark* and *Norway*, notwithstanding the charter to the *Holland Merchants* or any other charter.—And further that every person being a subject of this realm might be admitted into the fellowship of merchants of *Eastland* on paying 40 s. and no more. § 5, 6.—Which latter provision made the trade to the other parts within the limits of the charter easily accessible.

EAT INDE SINE DIE. Words used on the acquittal, &c. of a defendant that he may go without day, i. e. be dismissed. See title *Judgment*.

EAVES-DROPPERS. Persons that listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mis-

chievous tales, are a common nuisance, and presentable at the court-leet: or are indictable at the sessions, and punishable by fine, and finding sureties for good behaviour. *Kitch. of Courts. 20: 4 Comm. 169.* See title *Good Behaviour*.

EBDOMADARIUS. An *ebdomadary* or officer appointed weekly in cathedral churches, to supervise the regular performance of divine service, and prescribe the particular duties of each person attending in the choir, as to reading, singing, praying, &c. To which purpose the *ebdomadary* at the beginning of his week drew in form a bill or writing of the respective persons and their several offices, called *tabula*; whereupon the persons there entered were filed *in tabulati*: This is manifested in the statutes of the *Cathedral Church of St. Paul*, digested by *Dr. Ralph Baldock*, Dean of *St. Paul's*, anno 1295, MSS.

EBEREMORTH, EBEREMORS, EBEREMURDER. Sax.] Bare, or downright murder. *Leg. H. 1. c. 12.* See title *Abermurder*.

ECCLESIA. Lat.] The place where God is served, commonly called a church: But in *law proceedings*, according to *Fitzherbert*, this word intends a parsonage; for so he expresses it in a question, whether a benefice was *ecclesia five capella*, &c. *F. N. B. 32: 2 Inst. 363.*

ECCLESIAE SCULPTURA. The image or sculpture of a church in ancient times, which was often cut out or cast in plate or other metal, and preserved as a religious treasure or relique; and to perpetuate the memory of some famous churches. *Mon. Ang. Tom. 3. p. 309.*

ECCLESIASTICAL. Denotes something belonging to, or set apart for the church; as distinguished from *civil* or *secular*, with regard to the world.

ECCLESIASTICAL CORPORATIONS. Are where the members that compose it are *spiritual persons*. They were erected for the furtherance of religion, and perpetuating the rights of the church. See title *Corporation*.

ECCLESIASTICAL COURTS. See title *Courts Ecclesiastical*.

ECCLESIASTICAL JURISDICTION. By *Stat. 37 H. 8. c. 17*, The doctors of the civil law, although they be laymen, &c. may exercise *ecclesiastical jurisdiction*.

ECCLESIASTICAL LAWS. See titles *Canon Law*; *Courts Ecclesiastical*.

ECCLESIASTICAL PERSONS OR ECCLESIASTICKS. *Ecclesiastici*.] Churchmen, persons whose functions consist in performing the service, and keeping up the discipline of the church. See title *Clergy*.

EDESTIA, From *Edis*, used in some old charters for buildings.

EDIA, Aid or Help: Thus *Du Fresne* interprets it; but *Cowel* says it signifies *Ease*.

EDICT, *Edictum*.] An ordinance or command; a statute, *Lat. Law. Dist.*

EEL-FARES. A fry or brood of eels *Stat. 25 H. 8.*

EFFORCIALITER, Forcibly; as applied to military force.—*Mat. Paris. Anno 1213.*

EFFRACTORES, *Lat.*] Breakers applied to burglars, that break open houses to steal.

EFTERS. Sax.] Ways, walks or hedges. *Blount.*

EFFUSIO SANGUINIS. The mulct, fine, or penalty imposed by the old *English* laws for the shedding of blood; which the King granted to many lords of manors: And his privilege, among others, was granted to the abbot of *Glastonbury*. *Cartular. MSS.*

EGYPTIANS.

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EGYPTIANS. *Egyptiani.* Commonly called *Gypsies*.—These are a strange kind of common-wealth among themselves, of wandering impostors and jugglers who made their first appearance in *Germany*, about the beginning of the sixteenth century, and have since spread themselves all over *Europe* and *Asia*. They were originally called *Zinganees* by the *Turks*, from their captain *Zinganeus*, who, when *Sultan Selim* conquered *Egypt*, about the year 1517, refused to submit to the *Turkish* yoke, and retired into the deserts, where they lived by rapine and plunder, and frequently came down into the plains of *Egypt*, committing great outrages in the towns upon the *Nile*, under the dominion of the *Turks*. But being at length subdued, and banished from *Egypt*, they dispersed themselves in small parties, into every country in the known world; and as they were natives of *Egypt*, a country where the occult sciences, or black art, as it was called, was supposed to arrive to great perfection, and which in that credulous age, was in great vogue with persons of all religions and persuasions, they found the people wherever they came, very easily imposed on. *Mod. Univ. Hist. Vol. 43. p. 271.*

In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering, that they became troublesome and even formidable to most of the States of *Europe*. Hence they were expelled from *France* in the year 1560, and from *Spain* in 1591. And the government in *England*, took the alarm much earlier, for in 1530, they are described by *Stat. 22 Hen. 8. c. 10.* as "outlandish people, calling themselves *Egyptians*, using no craft or feat of merchandize, who have come into this realm, and gone from shire to shire, and place to place in great company, and used great subtil, and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men, and women fortunes; and so many times by craft and subtilty have deceived the people of their money, and have also committed many heinous felonies and robberies." Wherefore they are directed to avoid [depart] the realm, and not to return, under pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for any felonies which they might have committed, they shall not be entitled to a jury *de medietate lingue*. And afterwards it was enacted by *Stats. 1 & 2 P. & M. c. 4: 5 Eliz. c. 20.* that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l.* And if the *Egyptians* themselves remain one month in this kingdom; or if any person being 14 years old, whether a natural born subject or stranger, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him, or herself like them, shall remain in the same one month, at one or several times; it is felony, without benefit of clergy. And *Sir Matthew Hale* informs us, that at one *Suffolk* assizes, no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into execution. *4 Comm. 165, 6.* Now by *Stat. 23 Geo. 3. c. 51.* the said act of 5 *Eliz. c. 20.* is repealed. And the *Stat. 17 Geo. 2. c. 5.* (See title *Vagrants*) regards them only under the denomination of rogues and vagabonds.

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EIA, from Sax. *Eig.*] An island. *Mat. Paris Anno 883.* See *Ey.*

EJECTA. A woman ravished or deflowered; or cast forth from the virtuous. *Ejectus*, a whoremonger. *Blount.*

EJECTIONE CUSTODIÆ. *Ejectment de Gard.*] Is a writ which lieth against him that calleth out the guardian from any land during the minority of the heir. *Reg. Orig. 162: F. N. B. 139.* There are two other writs not unlike this; the one termed *ravishment de gard*, and the other *droit de gard*. See title *Guardian*.

EJECTIONE FIRMÆ; OR EJECTMENT.

AN ACTION AT LAW by which a person ousted or removed from the possession of an estate for years, may recover that possession: and which action is now used as the general mode of trying disputed titles to lands and tenements.—See 3 *Comm. 199.* from whence the subsequent matter is extracted with addition from other sources.

A writ of *Ejectione firmæ*, or action of trespass in *Ejectment*, lieth where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term, *F. N. B. 220.* In this case he shall have his writ of *ejection* or *Ejectment*; to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired and ejecting him. And by this writ the plaintiff shall recover back his term or the remainder of it, with damages.

Since the disuse of real actions, this mixt proceeding is become the common method of trying the title to lands or tenements. It is therefore necessary to delineate it's history, the manner of it's process, and the principles whereon it is grounded.

The writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor or by a grantor of the reversion, (who might at any time by a common recovery have destroyed the term,) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. *F. N. B. 145.* If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed, by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ, nor prayed by the declaration; (which are calculated for damages merely, and are silent as to any restitution;) viz. a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of *Edward IV.* though it hath been said to have first begun under *Hen. VII.* because it probably was then first applied to it's present principal use, that of trying the title of the land. *Bro. Ab: F. N. B. 220.*

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The better to apprehend the contrivance, whereby this end is effected, it is to be recollected that the remedy by ejectment is, in it's original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance*, to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. 1 *Ch. Rep.* 4p. 39.

When therefore a person, who hath a right of entry into lands, determines to acquire that possession, which is wrongfully with-held by the present tenant, he makes (as by law he may) a formal entry on the premises, and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon a-fresh and ousts him; or till some other person (either by accident or by agreement before-hand) comes upon the land, and turns him out, or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant; or his *casual ejector*, which-ever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the Court will not suffer the tenant to lose his possession without an opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must in case of any defence, make out four points before the court; *viz.* Title, Lease, Entry, and Ouster. First, he must shew a good title in his lessor, which brings the matter of right entirely before the Court; then, that the lessor, being seised or possessed by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee, or plaintiff did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted, or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall in consequence, have a writ of possession, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the Court, in order to shew the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, (save only as to the notice to the tenant,) whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new, and

more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented by the Lord Chief Justice Rolle. *Styl. Pract. Reg.* 108. (edit. 1657).

This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action; as by *John Rogers* to *Richard Smith*, which plaintiff ought to be some real person, and not merely an ideal fictitious one who hath no existence, as is frequently though unwarrantably practised. 6 *Mod.* 309. It is also stated that *Smith* the lessee entered; and that the defendant *William Stiles*, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, *Stiles*, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands. *e. g.* *George Saunders*, informing him of the action brought by *Smith*, and transmitting him a copy of the declaration; withal assuring him that he, *Stiles*, the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant, *Saunders*, will inevitably be turned out of possession. On receipt of this caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of *Stiles*, he is supposed to have no right at all; and upon judgment being had against *Stiles* the casual ejector, *Saunders*, the real tenant, will be turned out of possession by the sheriff.

But, if the Tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; *viz.* the lease of *Rogers* the lessor, the entry of *Smith* the plaintiff, and his ouster by *Saunders* himself, now made the defendant, instead of *Stiles*: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be non-suited for want of evidence; but by such stipulated confession of lease, entry and ouster, the trial will now stand upon the merits of the title only.

This done the declaration is altered by inserting the name of *George Saunders* (the tenant) instead of *William Stiles*; and the cause goes down to trial under the name of *Smith* (the plaintiff) on the demise of *Rogers*, (the lessor) against *Saunders*, the now defendant. And herein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for *Smith*, the nominal plaintiff, who by this trial has proved the right of *Rogers* his supposed lessor.

Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by *Stat. 11 Geo. 2. c. 19*, on pain of forfeiting three years' rent, to give notice to their landlords, when they

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they are served with any declaration in ejectment: and any landlord may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appears to it, or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right which indeed the landlord had, long before the provision of this statute. (*Syll. Pract. Reg.* 108, 111, 266: *7 Mod.* 70: *Salk.* 257: *Burr.* 1291:) in like manner as (previous to the statute of 1728, c. 13) if in a real action the tenant of the freehold made default, the remainder-man, or reversioner had a right to come in and defend the possession, lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. *Brass. Lib.* 5. c. 10. § 14.

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the *Stat. 11 Geo. 2: 1 Term Rep.* 647.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. *Str.* 914.—Notwithstanding *1 Salk.* 250, no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession or received rent, and not a mere stranger. *Comb.* 209.

He who claims title, shall be joined as a defendant though the plaintiff opposes it. *1 Salk.* 256. And therefore even the wife of the lessor 257.

The court permitted an *heir*, who had never been in possession, to come in and defend the ejectment. The father under whom he claimed, died just after having first obtained a similar rule. *4 Term Rep.* 122. So a mortgagee. *Comberb.* 399. As to a *cestui que trust*, see *3 Term Rep.* 783: *4 Term Rep.* 122.

But if the new defendants whether land-lord, or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff *Smith* must indeed be there non-suited, for want of proving those requisites: but judgment will in the end be entered against the casual ejector *Stiles*; for the condition on which *Saunders* (the tenant) or his land-lord, was admitted a defendant, was, that he should appear, and therefore the plaintiff is put again in the same position as if he never had appeared at all; the judgment of which (we have seen) would have been the same, if the plaintiff would have been entered for the plaintiff, and the defendant, by virtue of a writ for that purpose, would have turned out the tenant *Saunders* and delivered possession to *Smith* the plaintiff. The same process therefore as would have been had, provided no conditional rule had ever been made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) merely nominal, as 11. In order therefore to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go

by default. In this case the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sue for any antecedent profits, the defendant may make a new defence. *4 Burr.* 668.

Such is the modern way, of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principles as the ancient writs of assize, calculated to try the mere *possessionary* title to an estate, and hath succeeded to those real actions, as being infinitely more convenient for attaining the ends of justice; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicanery, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges) are judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession; invented, under the controul and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side: *4 Burr.* 668. See also *3 Burr.* 1294, 6.

But a writ of ejectment is not an adequate means to try the title of all estates, for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditaments. *Bristol.* 129: *Cro. Car.* 492: *Str.* 54. Except for tithes in the hands of lay appropriators, by the express purview of *Stat. 32 Hen. 8. c. 7*; which doctrine hath since been extended by analogy to tithes in the hands of the clergy. *Cro. Car.* 301: *2 Ld. Raym.* 789. Nor will it lie in such cases, where the entry of him that hath right is taken away by descent, discontinuance, twenty years *dispossession*, or otherwise.

More particularly, for what things ejectment will lie. Ejectment ought to be brought for a thing that is certain; and if it be of a manor; the manor of *A.* with the appurtenances; if of a rectory, the rectory of *B. Co.* And so many messuages, cottages, acres of arable land, meadow, &c. with the appurtenances in the parish of, &c. For land, must be distinguished, how much of one sort, and how much of another, &c. *Cro. Eliz.* 339: *3 Leon.* 13. Ejectment lies of a church, as of an house called the parish church of, &c. And a church is a messuage, by which name it may be recovered; and the declaration is to be served on the parson who performs divine service. *11 Rep.* 25: *1 Salk.* 256.

It lies *de uno messuagio sine burgagio*; but not *de uno messuagio sine tenemento*, unless it have a *vicar* *A. Co.* to make it good, because of the uncertainty of the word *tenement*. *1 Sid.* 295. But for a messuage and tenement hath been allowed. *1 Term Rep.* 11. So indeed for a messuage or tenement. *3 Wils.* 23: *3 Mod.* 328: *1 Sid.* 295. It will lie for a moiety, or third part of a manor or messuage, &c. And for a chamber or room of a house well set forth. *11 Rep.* 53, 59: *3 Leon.* 210. It lieth *de domo*, which hath convenient certainty for the sheriff to deliver possession, &c. *Cro. Jac.* 654. It lies of a cottage

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or curtilage; of a coal-mine, &c. but not of a common, piscary, &c. *Cro. Jac.* 150. For underwood it lies, though a *præcipe* doth not. 2 *Roll. Rep.* 482, 483. But for *use clause*, or *una peca terre*, &c. without certainty of the acres, and their nature, it doth not lie. 11 *Rep.* 53: 4 *Mod.* 1. It lieth of a close, containing three acres of pasture, &c. Also of so many acres of land covered with water; though not *de aqua cursu*. *Cro. Jac.* 435: 1 *Broml.* 242. It lies for a *prebendal stall*, after collation to it. 1 *Wils.* 14.

Ejectment lies by the owner of the soil for land which is part of the King's Highway, or of an acre of land described only by the name of land, though there be a wall and porch and part of a house built on it. 1 *Burr.* 133.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded; but in this action the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe*; because since the establishment of that real action, many things have been added and improved by art, and acquired new appellations that are perfectly understood now by the law, which are not found in the ancient law-books; and as men began to contract by new names which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts. See 2 *Ld. Raym.* 1470: 2 *Stra.* 908: 1 *Burr.* 629. —And in general ejectment does not lie without shewing the quantity and quality of the land, and how many acres of arable, meadow and pasture, &c. 11 *Co.* 55: 1 *Salk.* 254: 4 *Mod.* 97.

An Ejectment is a *possessory* remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some exceptions allowed by the statute; twenty years' adverse possession, is a positive title to the defendant; it is not a bar to the action or remedy for the plaintiff only, but takes away his right of possession. 1 *Burr.* 119. Every plaintiff must shew a right of possession, as well as of property, and therefore the defendant needs not plead the statute, as in the case of actions. *Ibid.*

A judgment in ejectment is the recovery of the possession; (not of the *seisin* or freehold;) without prejudice to the right, as it may afterwards appear between the parties. He who enters under it in truth and substance, can only be possessed according to right, *prout ten possidet*. If the lessor have a freehold, he is in as a freeholder: if he has a chattel interest he is in as a termor; and in respect of the freehold, his possession endures according to right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits. 1 *Burr.* 114.

This action of ejectment is rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by *Stat.* 4 *Geo.* 2. c. 28; which enacts that every landlord, who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is

due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or on the same upon some notorious part of the premises which will be valid, without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

The true construction upon this act is, to take off the landlord the inconvenience of his continuing always liable to an uncertainty of possession; (from it's remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity;) and to limit and to confine the tenant to six calendar months after execution granted, for his doing this; or else that the landlord shall from thenceforth hold the demised premises discharged from the lease. 1 *Burr.* 619. As to the provision of *Stat.* 11 *Geo.* 2. c. 19. § 16, in cases of tenants at rack-rent being one year in arrear and deserting the premises, see this Dict. title *Rent*. — Two Justices of peace may in this case put the landlord in possession.

Where an ejectment is brought against a tenant, for the purpose of turning him out of his farm, &c. and the tenant actually holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where no certain term is mentioned, are held to be tenancies from year to year, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, six months, and it must in all such cases, expire at that part of the year, when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant; before the end of which time the landlord cannot maintain an ejectment; unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant; in which case no notice is necessary. And the same law will apply to the executor of such a tenant. 3 *Wils.* 25. See 1 *Term Rep.* 160: 4 *Term Rep.* 361. But after the expiration of a lease for a certain term, the tenant continuing in possession is deemed a trespassor; and therefore an ejectment which is an action of trespass may be brought against him without any notice to quit.

Form of process relating to ejectments. Where there is a tenant in possession, in order to proceed against him, prepare a declaration, the copy of which, upon stamp, you serve the tenant with; if there be more than one tenant, each must be served with a copy, but if the man is not at home, his wife will do (provided she be served on the premises, and so sworn to); this is necessary both in town and country causes. At the time of service, in all cases it is requisite to read over or explain the notice at the foot of the declaration to the person served. — *Imper. K. B.* which see at length.

The tenant's son, daughter, or servant, he being out of the way, must not be served, unless it appear to the court, that such declaration and notice came to his hands, in which case it has been held a good delivery; but if the tenant purposely keep out of the way to avoid being served, the court on affidavit will grant a rule to shew cause why that should not be deemed good service.

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In case the tenant, &c., be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands before the time of showing cause; or the court will make the rule absolute. *Str. 30 Gr. 3.* In this case to ground such a motion you must shew endeavours to serve him at several times, &c.

The declaration must be served before the assign-day of every term, either in town or country, and the notice must be made to appear in the next term after delivery; but the delivery on a Sunday, or on the assign-day of that term wherein the defendant is to appear, will not do.

If the premises be in *London* or *Middlesex*, the notice must be made to appear the first day of the next term after service; for if made generally, the tenant in possession has the whole term to appear in; but if the tenements lie in any other county, the notice must be to appear as of the next term generally.

Ejectment must be brought in the county where the lands lie, and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrues, otherwise the plaintiff will be non-suited; and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. *1 Sid. 8: 2 New Ab. 171.*

If the title of the lessor of the plaintiff accrue in *Easter* vacation, yet the plaintiff may deliver his ejectment as of *Easter* term, and shall recover thereon, because he makes up his issue, or takes judgment as of the next term; otherwise the act of the law which supposes the bill filed as of the first day of *Easter* term, before a title accrued to the plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a lease made in term time, could not complain till term was over. *2 Vent. 174:* It must be brought within twenty years, by *Stat. 21 Jac. 1. c. 16: 1 Sid. 432.* See *ante*, and title *Limitation of Actions*.

It was formerly held that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the demise mere matter of form, nor does it exist, and on application, the demise was ordered to be amended; but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment; *4 Burr. 2447.* Therefore as the demise may be altered, there can be no doubt but that other parts less material may also be amended; the action being invented under the control of the court, for the advancement of justice, and merely to try the right in question. *1 Burr. 665.* The term may be amended without consent from five to ten years. *Str. 1272, 1211.*—A verdict cures a defect in setting out the title, though it cannot cure a defective title. *2 Burr. 1159.* See title *Amendment*.

It is necessary to prove the defendant or his tenant in possession of the premises: for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession; and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *1 Wils. 220.*

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. *4 Burr. 2224.*

In real actions, where the freehold is recovered the demandant has execution, by the writ of *habere facias possessionem*; in ejectment, therefore, it is but just, that a similar remedy shall be permitted to the plaintiff, who, as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by virtue of a writ of *habere facias possessionem*, directing the sheriff to give actual possession to the plaintiff, of the land recovered.

This writ may be sued out though the lessor of the plaintiff be dead, if tested the last day of the preceding term, *4 Barr. 1970.* The legal relation to the day of the test is proper to be supported in maintenance of a writ of possession on a judgment in ejectment. *Ibid.*

In ejectment, where there are divers defendants, and the freeholds are several, no defendant may defend for more than is in his own possession; and the plaintiff may take judgment against his ejector for what remains. *2 Vent. 355: 2 Rob. 524, 531.*

If there be two defendants in ejectment, and one of them appears and confesses lease, entry, and ouster, but the other does not appear, in that case the plaintiff may enter a *non-pros.* or *retraxit* against him, and go to trial, and have judgment against the other defendant. *1 Lord Raym. 717, 718.* Also if an ejectment be brought against two persons, and after issue joined, one dies, and a *verdict* is awarded as to the two defendants, and a verdict against two; here, upon suggestion of the death of one of them upon the roll, judgment shall be given for the plaintiff against the other for the whole: for it is said this action is grounded upon torts, which are several in their nature, and one may be found guilty and the other acquitted. *Ibid.*

Where one brings ejectment of land in two parishes, and the whole lies in one, he shall recover: also if a person brings ejectment of one acre in *B.* and part of it lies in *A.* he shall recover for such part as lies in *B.* And if one having title to a part only of lands, bringeth an ejectment for the whole, he shall recover his part of the lands. *Plowd. 429: Cro. Car. 13.*

A plaintiff shall recover only according to the right which he hath at the time of bringing his action: and one who hath title to the land in question, may on motion be made a defendant in the action with the tenant in possession, to defend his title. *1 Nels. Abr. 694: 1 Lill. 497, &c.* As the possession of the land is primarily in question, and to be recovered, that concerns the tenant; and the title of the land, which is tried collaterally, that concerns some other, who may be admitted to be a defendant with the tenant: but none other is to be admitted a defendant, but he that hath been in possession, or receives the rents, &c.

If the plaintiff can prove his title accrued before the time of the demise, and that the defendant hath been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert his title. *Bull. Ni. Pri. 83.*

As the plaintiff in ejectment is a mere nominal person, and a trustee for the lessor; if he release the action, the court may set aside the release, and he shall be committed for a contempt; so likewise if he release an action brought in his name for the mesne profits. *1 Salk. 260: Strm. 247.* If a man is made plaintiff in ejectment without his knowledge, and the defendant appearing, the plaintiff thereupon becomes nonsuit, after which execution is sued out against him; if it appears by his

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oath that he was made plaintiff without his knowledge or order, he shall be discharged. 34 Car. B. R. 5 An. 1 Lil 500.

If there be a verdict and judgment against the plaintiff, he may bring another action of trespass and ejectment for the land, it being only to recover the possession, &c. wherein judgment is not final, and it is not like a writ of right, &c. where the title alone is tried. *Wood's Inst.* 547 In 23 Car. B. R.

The reason of an ejectment being never final is not laid down in the general books on this subject, but in the notes to *Eunomus* vol. 4. p. 189, it is thus ingeniously stated—The reason why it is not or cannot be final seems to be this.—That it is impossible from the structure of the record in this action, to plead a former, in bar of another, ejectment brought.—Because 1. The plaintiff and defendant are nominal and exist in most cases on record only; and consequently may be changed in a new action. But the identity both of plaintiff and defendant must be averred in pleading a former action in bar.—2. The term demised may be laid many different ways. An ejectment however, though in its nature not final at law, is capable of being made so in equity: and the Court of Chancery will on proper grounds grant a perpetual injunction, and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question See 2 *Eq. Ab.* 171. c. 1. 243. c. 11. 222. c. 1: 1 *Bro. P. C.* 266, 671: 2 *Str.* 404.

FORM of the DECLARATION in EJECTMENT, by Original, against the Casual Ejector, who gives Notice thereupon to the Tenant in Possession.

Michaelmas, the 29th of King George the Third.

BEARS { **WILLIAM STILES**, late of Newbury, to wit. } the said county, Gentleman, was attached, to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers Esq. demised to the said Richard Smith, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard and against the peace of the lord the King, &c. And whereupon the said Richard by Robert Martin his attorney, complains, that whereas the said John Rogers, on the 1st day of October in the twenty-ninth year of the reign of the lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was possessed thereof; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said 1st. day of October in the said 29th year with force and arms, that is to say, with swords, staves and knives entered into the said tenement, with the appurtenances, in the possession of the said Richard, which the said John Rogers demised to the said Richard in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other

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wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the King. Whereby the said Richard saith, that he is injured and damaged to the value of 20l. And thereupon he brings suit, &c.

Martin, for the plaintiff, } Pledget of } John Doe,
Peters, for the defendant, } Prosecution, } Richard Roe.

Mr. George Saunders,

I am informed that you are in possession of, or claim, title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action, as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term in his Majesty's court of King's Bench whereforever he shall then be in England, by some attorney of that court, and then and there by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend

[Date]

William Stiles

The form of the declaration by bill does not differ very materially; and the above is inserted by way of elucidation, chiefly to such tenants, &c. as may peruse this article.

For further matter relating to Ejectment see *Bull. N. Pr.*:—and Gilbert's *Ejectments* by Runnington.

EJECTUM, *Ejectus maris, quod è mari ejicitur*: Jet, Jetson, Wreck, &c. See title *Wreck*.

EIGNE, *Fr. aîné*.] Eldest or first born; as bastard eigne, and mulier puisne are words used in our law for the elder a bastard, and the younger lawful born See title *Bastard*.

EINECIA, from the *Fr. aîné*, i. e. primogenitus] Eldership. Statute of Ireland, 14 Hen. 3. See *Ejney*.

FIRE, or **EYRE**, *Fr. eire, vie, iter*, as a grand eire, that is, *magnus itineribus*.] Is the court of justices itinerant; and justices in eyre are those whom *Bracton* in many places calls *justiciarios itinerantes*. These justices, in ancient time, were sent with a general commission into divers counties to hear such causes as were termed *pleas of the crown*: and this was done for the ease of the people, who must else have been hurried to the King's Bench, if the cause were too high for the county court: it is said they were sent but once in every seven years. *Bract. lib* 3 c. 11. *Horn's Mirror*, lib. 2. The eye of the forest is the justice-feat; which, by an ancient custom was held every three years by the justices of the forest, journeying up and down for that purpose. *Bract. lib* 3. *trac.* 2. c. 1 & 2: *Brit.* c. 2: *Crompt. Jurisd.* 156: *Mannw. par.* 1. p. 121.—See title *Justices in Eyre*.

ELECTION, *electio*.] In law, is when a man is left to his own free will, to take or do one thing or another, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the election: as if a person make a lease, rendering rent, or a garment, &c. the lessee shall have the election, as being the first agent, by the payment of the one, or delivery of the other. *Co. Lit.* 144. And if A. covenant to pay B. a pound of pepper or sugar, before Easter; it is at the election of A. at all times before Easter, which

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which of them he will pay: but if he pays it not before the said term, then afterwards it is at the election of *B.* to demand and have which he pleaseth. *Dyer* 18: 5 *Rep.* 59: 11, 12, 51.

If I give to you one of my horses in my stable, there you shall have the election; for you shall be the first agent, by taking or seizure of one of them. *Co. Lit.* 145. If things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before: but it is otherwise when to be performed at once. *Ibid.* When nothing passes to the feoffee or grantee before election to have the one thing or the other, the election ought to be made in the life of the parties; and the heir or executor cannot make the election: but where an estate or interest passes immediately to the feoffee, donee, &c. there election may be made by them, or their heirs or executors. 2 *Rep.* 36, 37. And where one and the same thing passeth to the donee or grantee, and such donee or grantee hath election in what manner he will take it, there the interest passeth immediately, and the party, his heirs, &c. may make election when they will. *Co. Litt.* 145: 2 *Danv.* Abr. 761.

Where the election creates the interest, nothing passes till election; and if no election can be made, no interest will arise. *Hob.* 174. If the election is given to several persons, there the first election made by any of the persons shall stand: as if a man leases two acres to *A.* for life, remainder of one acre to *B.* and of the other acre to *C.* Now *B.* or *C.* may elect which of the acres he will have, and the first election by one binds the other. *Co. Lit.* 145: 2 *Rep.* 36. If a man leases two acres for life, the remainder of one in fee to the same person; and after licences the lessee to cut trees in one acre, this is an election that he shall have the fee in the other acre. 2 *Danv.* 762. A real election concerning lands is descendible; and election of a tenant in tail may prejudice his issue. He in remainder may make an election, after the death of tenant for life; but if the tenant for life do make election, the remainder-man is concluded. *Moor, Ca.* 247, 832.

A person grants a manor, except one close called *N.* and there are two closes called by that name, one containing nine acres, and the other but three acres; the grantee shall not in this case choose which of the said closes he will have, but the grantor shall have election which close shall pass. 1 *Leon.* 268. But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 *Leon.* 30. If a man hath three daughters, and he covenants with another, that he shall have one of them to dispose of in marriage; it is at the covenantor's election which of his daughters the coveantee shall have, and after request she is to be delivered to him. *Moor* 72: 2 *Danv.* 762. Where there are three coparceners of lands, upon partition the eldest sister shall have the election: though if she herself make the partition, she loseth it, and shall take last of all. *Ca. Lit.* 166. See title *Partition*.

In consideration that a person had sold another certain goods, he promised to deliver him the value in such pipes of wine as he should choose: the plaintiff must make his election before he brings his action. *Style* 49. An election which of two things shall be done, ought not to be made merely by bringing an action; but before, that the de-

fendant may know which he is to do, and it is said he is not bound to tender either before the plaintiff hath made his choice which will be accepted. 1 *Mod.* 217: 1 *Nell.* Abr. 697.

A condition of a bond is, that the obligor shall pay 30*l.* or twenty kine, at the obligee's election, within such a time; the obligee at his peril is to make his election within the time limited. 1 *Leon.* 69. Though in debt upon bond to pay 10*l.* on such a day, or four cows, at the then election of the obligee, it was adjudged, that it was not enough for the defendant to plead that he was always ready, &c. if the obligee had made his election; for he ought to tender both at the day, by reason the word *then* relates to the day of payment. *Moor* 246: 1 *Nell.* 694, 695.

If a man hath an election to do one of two things, and he cannot by any default of a stranger, or of himself; or the obligee, or by the act of God, do the one; he must at his peril do the other. 1 *Lil.* Abr. 506.

Where the law allows a man two actions to recover his right, it is at his election to bring which he pleaseth: and when a man's act may work two ways, both arising out of his interest, he hath election given him to use it either way. *Dyer* 20: 2 *Rob. Abr.* 787. Action of trespass upon the case, or action of trespass *vi et armis*, may be brought against one that rescues a prisoner, at the election of the party damaged by the rescous. And an action on the case, or an assise lies against him that surcharges a common, at the election of him that is injured thereby. 1 *Lil.* 504, 505. Also for a rent-charge out of lands, there may be a writ of annuity or distress, at the election of the grantee: but after the death of the grantor, if the heir be not charged, the election to bring annuity ceaseth. *Dyer* 344.

A man was indicted of felony for entering an house and taking away money, and found guilty, and burnt in the hand; after which the person who lost the money brought an action of trespass against the other for breaking his house, and taking away his money; and it was held that the action would lie; for though it was at his election at first, either to prefer an indictment or bring an action, yet by the indictment he had made no election, because that was not the prosecution of the party, but of the Crown. *Style* 347.

If a bargain and sale be made of lands, which is enrolled, and at the same time the bargainor levies a fine thereof to the bargaineer, he hath his election to take by one or the other. 4 *Rep.* 72. A wife hath her election which to take, of a jointure made after marriage, or her dower, on the death of the husband, and not before. *Dyer* 358. When a lessor hath election to charge the lessee, or his assignee, *pro rent*; if he accepts the rent of the assignee, he hath determined his election. 3 *Rep.* 24.

If a person hath election to pay or perform one of two things at a day, and he do neither of them at that day, his election is gone: and where a grant is made of two acres of land, the one for life, the other in fee, or in tail, and before any election the feoffee makes a feoffment of both; in this case the election will be gone, and the feoffor may enter upon which he will for the forfeiture. 2 *Rep.* 37. If money on a mortgage be to be paid to a man, his heirs, or executors, the mortgagor hath election to pay it to either: and if in a feoffment it be to pay to the feoffee, his heirs or assigns, and he enfeoff another,

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the feoffor may pay the money to the first or second feoffee, *3 C. Co. Lit. 210.*

In some cases, where one hath cause of suit, he may sue one person or another at his election; for there is an election of persons, as well as of things. *Dyer 204, 207.* A man by deed binds himself and his heirs to pay money, and dies; the obligee may chuse to sue the heir, or the executors, although both of them have assets. *Popb. 151.* One may have election, when he hath recovered a debt, to have his execution by *elegit, fieri facias*, or *capias ad satisfaciendum*; but where he takes an *elegit*, and hath no fruit of it, he may resort to another writ, though the election be entered on record. *Hob. 57: Dyer 60, 369.*

There is no election against the King in his grants, *3 Leon. 30.* And an act becoming void, will determine an election. *Hob. 152.* As to election with respect to one action or another, See 1 *Com. Dig.* title *Action.* And this Dict. titles *Condition; Agreement.*

ELECTION OF A CLERK OF STATUTES-MERCHANT. A writ that lies for the choice of a clerk assigned to take bonds called *statutes-merchant*; and is granted out of the Chancery, upon suggestion that the clerk formerly assigned is gone to dwell at another place, or is under some impediment to attend the duty of his office, or hath not lands sufficient to answer his transgressions, if he should act amiss, &c. *F. N. B. 164.*

ELECTION OF ECCLESIASTICAL PERSONS. There is to be a free election for the dignities of the church. *Stat. 9 Ed. 2. c. 14.* And none shall disturb any person from making free election, on pain of great forfeiture. If any persons that have a voice in elections, take any reward for an election in any church, college, school, &c. the election shall be void. and if any of such societies resign their places to others for reward, they incur a forfeiture of double the sum, and the party giving it, and the party taking it, is incapable of such place. *Stat. 31 Eliz. c. 6.* See further titles *Bishops; Deans.*

ELECTION OF MEMBERS OF PARLIAMENT. See title *Parliament.*

ELECTION OF A VERDEROR OF THE FOREST, *electio viderorum foreste.* A writ which lies for the choice of a verdor, where any of the verdorers of the forest are dead, or removed from their offices, &c. It is directed to the sheriff; and, as appears by the ancient writs of this kind, the verdor is to be elected by the freeholders of the county, in the same manner as coroners. *New Nat Br 366.*

ELEEMOSYNA, Alms; *dare in puram & perpetuam elemosynam*, to give in pure and perpetual alms, or *mark-almoigne*; as lands were commonly given in ancient times to religious uses. *Cowel.*—See titles *Frank-almoigne; Lease.*

ELEEMOSYNÆ, The possessions belonging to the churches. *Blount.*

ELEEMOSYNA REGIS, or *elemosyna regis.* A penny which King *Æthelred* ordered to be paid for every plough in England, towards the support of the poor: it was called *Elemosyna Regis*, because it was at first appointed by the King. *Leg. Æthelred, cap. 1.*

ELEEMOSYNARIA, The place in a religious house, where the common alms were repositied, and thence by the almoner distributed to the poor.

ELEEMOSYNARIUS, The almoner or peculiar officer who received the *elemosynary* rents and gifts, and in

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due method distributed them to pious and charitable uses. There was such a chief officer in all the religious houses and the greatest of our English bishops had anciently their almoners, as now the King hath. *Lindwood's Provincial, lib. 1. tit. 12.*—See title *Almoner.*

ELEEMOSYNARY CORPORATIONS, Corporations Bodies appointed over hospitals, &c. constituted for the perpetual distribution of the free alms, or bounty of the founder of them. See title *Corporation.*

ELEGIT, from the words in the writ, *elegit sibi liberari*, because the plaintiff hath chosen this writ of execution. See 3 *Comm. 418.* A writ of execution, founded on the *Stat. W. 2. 13. E. 1. c. 18*; that lies for him who hath recovered debt or damages, or, upon a recognizance in any court against one not able in his goods to satisfy the same; directed to the sheriff, commanding him to make delivery of a moiety of the party's land, and all his goods, beasts of the plough excepted: And the creditor shall hold the said moiety of the land so delivered unto him, until his whole debt and damages are paid and satisfied; and during that term he is tenant by *elegit*. *Reg. Orig. 299. Co. Lit. 289.*

Upon an *elegit*, the sheriff is to deliver one half of all houses, lands, meadows and pastures, rents, reversions, and hereditaments wherein the defendant had any sole estate in fee, or for life, into whose hands soever the same do afterwards come; but not of a right only to land, an annuity, copyhold lands, &c. *Dyer 206: 7 Rep 49: Plowd. 224.* And by it, the plaintiff, &c. elects omnia bona & caltalla of the defendant, *preter boves & asinos & caruca sua*; and also a moiety of all the lands which the defendant had at the time of the judgment recovered—but it ought to be sued within a year and a day after the judgment. *F. N. B. 267.*

But though by this statute, the lands of the debtor are made liable, as well as his personal estate, yet the creditor takes out an *elegit*, and it appears to the sheriff, that there are goods and chattels sufficient to satisfy the debt, he ought not to extend the lands. *2 Inst. 395.* But an *elegit* executed upon goods only, is not a *fieri facias*, for a *fieri facias* is executed by sale by the sheriff; but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. *1 Sid. 184: 1 Lew. 92: 1 Keb. 105, 261, 465, 556, 692.*

Upon this writ the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court, out of which the *elegit* issued: and when the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff, by metes and bounds. *Cro. Car. 319.*

All writs of execution may be good, though not returned, except an *elegit*, but that must be returned, because an inquisition is to be taken upon it, and that the court may judge of the sufficiency thereof. *4 Rep 65, 74.* It has been ruled, that if more than a moiety of the lands is delivered on an *elegit* by the sheriff, the same is void for the whole. *Sid. 91: 2 Salk. 563.* And the sheriff cannot sell any thing, but what is found in the inquisition.

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tion; and therefore if he sell a term for years, &c. misrecited in the inquisition, as to the commencement thereof, this sale is void. 4 Rep. 74.

In debt upon bonds, the defendant before the trial conveyed his lands to another, &c. but he himself took the profits; notwithstanding this conveyance, a moiety of his lands was extended by an *elegit*. 1207 294: 3 Rep. 78. If two persons have each of them a judgment against one debtor and he who hath the first judgment, brings an *elegit*, and hath the moiety of the lands delivered to him in execution; and then the other judgment creditor, sues out another *elegit*, he shall have only a moiety of that moiety, which was not extended by the first judgment. Cro. Eliz. 483.

When lands are once taken in execution on an *elegit*, and the writ is returned and filed, the plaintiff shall have no other execution. 1 Lev. 92. And if the defendant hath lands in more counties than one, and the plaintiff awards an *elegit* to one county, and extends the lands upon the *elegit*, and afterwards files the writ, he cannot, after that, sue out an *elegit* into the other counties: but he may immediately after entry of the judgment upon the judgment-roll, award as many *elegits*, into as many counties as he thinks fit, and execute all, or any of them, at his pleasure. 1 Lil. Abr. 509: Cro. Jac. 246.

A man had lands in execution, upon an *elegit*, and afterwards moved for a new *elegit*, upon proof that the defendant had other lands, not known to the creditor, at the time when the execution was sued out; and it was adjudged, that if he had accepted of the first by the delivery of the sheriff, he could not afterwards have a new *elegit*; but when the sheriff returns the writ, he may waive it, and then have a new extent. Cro. Eliz. 310: 1 Nels. Abr. 699. See *qu*.

If the defendant dies in prison, so that there is no execution with satisfaction, the plaintiff shall have an *elegit* afterwards. 5 Rep. 86. And if all the lands extended on an *elegit* be evicted by a better title, the plaintiff may take out a new execution. 4 Rep. 66. Where one having land by *elegit*, is wholly evicted out of it, he may have a further execution, either against the defendant's lands or goods, as he might have had at first; save only, he must bring a *fiere facias* against the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, so that the plaintiff may take his full execution by holding it over; there he cannot have any new execution, by the Stat. 32 H. 8. c. 5. 2 Shep. Abr. 115.

Where an *elegit* is sued upon a judgment, the levying of goods thereon for part only, is no impediment, but the plaintiff may bring another *elegit* *pro residuo*, and take the lands. 1 Lev. 92. On a writ returned upon an *elegit*, there may be brought a *captias ad satisfaciendum*, or *fiere facias*. 1 Leon. 176. And an *elegit* may be sued after a *fiere facias* returned *nulla bona*, or where part is levied by it; and after a *captias ad satisfaciendum* returned *non est inventus*. Hob. 57.

A person in execution was suffered to escape, and then he died; the land which he had at the time of the judgment may be extended, by *elegit*, upon a *fiere facias* brought against his heir, as tenant. Dyer 271.

A man may have an assize of the land which he hath in execution by *elegit*, if he be desorced thereof. Stat. Westm. 2. c. 18. And if tenant by *elegit* alien the land in fee,

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&c. he who hath right shall have against him and the assize, an assize of novel disseisin. Ibid. At a trial at bar in C. B. the court delivered for law, that where lands are actually extended, and delivered upon an *elegit*, a fine levied on those lands, and non-claim, will bar the interest of the tenant by writ. 1 Mod. 217.

If tenant by *elegit*, be put out of possession before he hath received satisfaction for his debt, by the heir at law, &c. he may bring action of trespass, or re-enter and hold over till satisfied: but after satisfaction received, the defendant may enter on the waste by *elegit*. 4 Rep. 28, 67. Tenants by *elegit*, farmers, merchants, &c. are not punishable for waste by action of waste: but the party, against whom execution is sued, is to have a writ of *venire facias ad computandum*, &c. and then the waste shall be recovered in the debt: though it is said there is an old writ of waste in the Register, for him in reversion against tenant by *elegit*, committing waste on lands which he hath in execution. 6 Rep. 37: New Nat. Br. 130. On tenant by *elegit*'s accounting, if the money recovered by the plaintiff is levied out of the lands, the defendant shall recover his land; and if more be received by waste, &c. he shall have damages. *Terms de Ley*—See this Dict. titles *Estates*; *Extent*; *Execution*.

ELF-ARROWS, Were *flint-stones* sharpened on each side in shape of arrow-heads, made use of in war by the ancient Britons; of which several have been found in England, and greater plenty in Scotland, where it is said the common people imagine they drop from the clouds; or are made by the *elves* or fairies.

ELISORS. *Elisors*] In cases of challenge to the sheriff and coroners for partiality, &c. the *venue* to summon a jury shall be directed to two clerks of the Court, or two persons of the county named by the Court and sworn. And these two who are called *Elisors* shall indifferently name or choose the jury, and their return is final; no challenge being allowed to their array. *Forrest, de Laud. leg.* 1. 25: Co. Lit. 158.

ELKE, A kind of yew to make bows of. Stat. 32 H. 8. cap. 9.

ELOINE, from the Fr. *éloigner*] To remove or send a great way off: in this sense it is used where it is said that if such as are within age be *eloined*, so that they cannot come to sue personally, their next friends shall be admitted to sue for them. Stat. 13 Ed. 1. cap. 15.

ELONGATA, Is a return of the sheriff in *raplovin*, that cattle are not to be found, or are removed, so that he cannot make deliverance, &c. 2 Lil. Abr. 454, 455.

ELOPEMENT, from the Belg. *h'e matrimonium* & *loopen*, *carere*; or more probably from the Sax. *Gelooran*, to depart; the Saxon *r* being easily perverted from its shape into a *p*. *Blount*] Is where a married woman of her own accord, goes away and departs from her husband, and lives with an adulterer. See titles *Adultery*, *Baron and Feme*.

ELY, A royal franchise or county palatine. See title *Counties Palatine*.

EMBARGO, A prohibition upon shipping, not to go out of any port, on a war breaking out, &c.

EMBASSADOR, See *Ambassador*.

EMBLEMENTS, from the Fr. *emblare* & *le bled*, corn sprung or put up above ground] The profits of sown land: but the word is sometimes used more largely, for any produce that arise naturally from the ground, as

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grass, fruit, &c. In some cases he who sowed the corn shall have the *emblemments*; and in others not: a lessee at will sows the land, he shall have the *emblemments*; though if the lessee determines the will himself, he shall not have them, but the lessor. 5 Rep. 116. If lessee at will sows the land with grain, or other thing yielding annual profit, and the lessor enters before severance; yet the lessee shall have it: but where the lessee plants young fruit-trees, or other trees, or sows the land with acorns, &c. he shall not have these: and if such tenant by good husbandry make the grass to grow in greater abundance; or sow the land with hay seed, by which means it is increased, if the lessor enters on the lessee, the lessee shall not have it, because grass is the natural profit of the soil. Co. Lit. 55, 56.

Where tenant for life sows the land, and dies, his executors shall have the *emblemments*, and not the lessor or him in reversion, by reason of the uncertainty of the estate. Co. Lit. 463. And if a tenant for life plants hops, and dies before severance, he in reversion shall not have them, but the executors of tenant for life. Cro. Car. 515. If tenant for years, (if he so long live) sow the ground, and die before severance, the executor of the lessee shall have the corn: and where lessee for life leases for years, if the lessee for years sow the land, and after lessee for life dies before severance, the executor of lessee for years shall have the *emblemments*. 2 Danv. Abr. 765.

So it is also if a man be tenant for the life of another, and *cessus que vie*, (he on whose life the land is held,) dies after the corn sown, the tenant *per autem vic* shall have the *emblemments*. The same is also the rule if a life-estate be determined by the act of law. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land; and afterwards they are divorced *a vinculo matrimonii*, the husband shall in this case have the *emblemments*; for the sentence of divorce is the act of the law. 5 Rep. 116. But if an estate for life be determined by the tenant's own act, (as by forfeiture for waste committed, or if a tenant during widowhood, thinks proper to marry;) in these and similar cases, as in that of a tenant at will determining his own tenure, the tenants shall not be entitled to take the *emblemments*. 1 Inst. 55.

If tenant for years sows ground, and before his corn is severed, the term which is certain expires; the lessor or he in reversion shall have the *emblemments*; but he must first enter on the lands. 1 Lil. Abr. 511. A lessee for life or years sows the land, and after surrenders, &c. before severance, the lessor shall have the corn. 2 Danv. 764. If there be lessee for years upon condition that if he commit waste, &c. his estate shall cease; if he sows the ground with corn, and after doth waste, the lessor shall have the corn. Co. Lit. 55. And where a lord enters on his tenant for a forfeiture, he shall have the corn on the ground. 4 Rep. 21.

Though if a feme copyholder for her widowhood sows the land, and before severance takes husband, so that her estate is determined, the lord shall have the *emblemments*; yet if such a feme copyholder *durante viduitate*, leases for one year according to custom, and the lessee sows the land, and afterwards the copyholder takes husband, the lessee shall have the corn. 2 Danv. 764. If a husband holds lands for life, in right of his wife, and sow the land and after she dies before severance, he shall have the corn.

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ments. Dyer 316; 2 Inst. Abr. 701. And where the wife hath an estate for years, life, or in fee, and the husband sows the land, and dies, his executors shall have the corn. 1 Nels. 701. But if the husband and wife are joint tenants, though the husband sow the land with corn, and dies before severance, the wife and not his executors shall have the corn, he being the surviving jointenant. Co. Lit. 199.

When a widow is endowed with lands sown, she shall have the *emblemments*, and not the heir. 2 Inst. 81. And a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she die before severance. 2 Inst. 80, 81. And by the particular provisions of Stat. 28 H. 8 c. 11, if a Parson sows his glebe, and dies, his executors shall have the corn: and such parson may by will dispose thereof. 1 Rol. Abr. 655.

If tenant by statute-merchant sows the land, and before severance a casual profit happens, by which he is satisfied, yet he shall have the corn. Co. Lit. 55. Lands sown are delivered in execution upon an extent, the person to whom delivered shall have the corn on the ground. 2 Leon. 54. And judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment, but it was affirmed; and adjudged that the recoveror shall have the corn. 2 Bulst. 213.

If a disseisor sows the land, and afterwards cuts the corn, but before it is carried away, the disseisee enters, the disseisee shall have the corn. Dyer 31. 11 Rep. 52. A person seised in fee of land dies, having a daughter, and his wife *provenient enfeint* with a son; the daughter enters and sows the land, and before severance of the corn, the son is born; in this case the daughter shall have the corn, her estate being lawful, and defeated by the act of God; and it is for the public good that the land should be sown. Co. Lit. 55.

A man seised in fee simple sows land, and then devises the land by will, and dies before severance; the devisee shall have the corn; and not the devisors executors. Wincb 52. Cro. Eliz. 61. If a person devises his lands sown, and says nothing of the corn, the corn shall go with the land to the devisee: and when a man seised of land, in fee or in tail, sows it, and dies without will, it goes to the executor, and not the heir. 10 El. 4. 1 b: 21 H. 6. 30 a: 37 H. 6. 35 b. A devisee for life dies, he in remainder shall have the *emblemments* with the land. Hob. 132.

Tenant in fee sows the land, and devises it to A. for life, remainder to B. for life, and dies; A. dies before severance, B. in remainder shall have the corn, and not the executor of the first tenant for life. Cro. Eliz. 61, 464. Where there is a right to *emblemments*, ingress, egress and regress are allowed by law, to enter, cut and carry them away, when the estate is determined, &c. 1 Inst. 56.

EMBLERS DE GENTZ, Fr.] A stealing from the people: The word occurs in our old rolls of Parliament. Whereas divers murders, *emblers de gentz*, and robberies are committed, &c. Rel. Parl. 21 Ed. 3. n. 62.

EMBRACEOR, Fr. *embrasour*.] He that when a matter is in trial between party and party comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt.

doubt of the matter. *Stat. 19 H. 7. cap. 13.* But lawyers, attorneys, &c. may speak in the case for their clients, and not be embracers; also the plaintiff may labour the jurors to appear in his own cause; but a stranger must not do it: for the bare writing a letter to a person, or parcel request for a juror to appear; not by the party himself, hath been held within the statutes against embracery and maintenance. *Co. Lit. 369: Hob. 294: 1 Saund. 391.* If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an embracer. And a juror may be guilty of embracery, where he by indirect practices gets himself sworn on the sides, to serve on one side. *1 Lil. 513.* There are divers statutes relating to this offence and maintenance. See further title *Maintenance*, and *post*, *Embracery*.—See also titles *Jury*; *Décies tantum*.

EMBRACERY. An attempt to influence a Jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing, (the Embraceor) is by fine and imprisonment; and for the Juror so embraced, if it be by taking money, the punishment is, (by various *Stats. of Ed. III. viz. 5 E. 3. c. 10: 34 E. 3. c. 8: 38 E. 3. c. 12.*) perpetual infamy, imprisonment for a year, and forfeiture of ten-fold value. *4 Comm. 140: See 1 Hawk. P. C. c. 85;* and the preceding title.

EMBRING DAYS, from *embers*, *cineris*, so called either because our ancestors, when they fasted, sat in ashes, or strewed them on their heads.] Those days which the ancient Fathers called *Quatuor Tempora jejuni*, and of great antiquity in the church: they are observed on *Wednesday, Friday* and *Saturday* next after *Quadragesima Sunday*, (or the first *Sunday in Lent*) after *Whitsunday, Holyrood-day* in *September*, and *St. Lucy's day* about the middle of *December*. These days are mentioned by *Britten, c. 53*, and other writers; and particularly in the *Stat. 2 & 3 Ed. 6. c. 19.* Our almanacks call them the *Ember Weeks*.

EMBROIDERY. By *Stat. 22 Geo. 2. c. 36.* No foreign embroidery, or gold or silver brocade, shall be imported, upon pain of being forfeited and burnt, and penalty of 100*l.* for each piece. No person shall sell or expose to sale any foreign embroidery, gold or silver thread, lace, fringe, brocade, or make up the same into any garment, upon pain of having it forfeited and burnt, and penalty of 100*l.* All such embroidery, &c. found, may be seized and burnt, and the mercer, &c. in whose custody it was found, shall forfeit 100*l.*—See title *Munufactures, Navigation &c.*

EMENDALS, *emenda*.] An old word still made use of in the accounts of the Society of the *Inns Temple*; where so much in *emendals* at the foot of an account, on the balance thereof, signifies so much money in the bank or stock of the houses, for reparation of losses or other emergent occasions: *quod in restaurationem damni tribuitur. Spelm.*

EMENDARE, *Emendam solvere*.] To make amends for any crime or trespass committed. *Leg. Ekw. Confess. c. 35.* Hence a capital crime, not to be attoned by fine, was said to be *inmendabile*. *Leg. Canut. p. 2.*

EMENDATIO, Hath been used for the power of amending and correcting abuses, according to stated rules and measures; as *emendatio panni*, the power of looking to the assize of cloth, that it be of just measure; *emendatio panis & cervisie*, the assizing of bread and beer, &c.

privile granted to lords of manors, and executed by their officers appointed in the court-leet, &c. *Paroch. Antiq. 196.*

EMPANEL, See *Impanel*.

EMPEROR, *imperator*.] The highest ruler of large kingdoms and territories; a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. And this title is not only given to the *Emperor of Germany*, as *Emperor of the Romans*; it was formerly belonging to the *Kings of England*, as is by a charter of *King Edgar*.

NBREVER, *Fr.*] To write down in short. *Brit. 56.*

ENCAUSTUM, See *Incaustum*.

ENCHESON, A French word used in our law books and statutes, signifying the occasion, cause or reason wherefore any thing is done. *Stat. 5 Ed. 3. c. 3.*

ENDEAVOUR. Where one who has the use of his reason endeavours to commit felony, &c. he shall be punished by our laws, but not to that degree as if he had actually committed it: as if a man assault another on the highway, in order to a robbery, but takes nothing from him, this is not punished as felony, because the felony was not accomplished; though as a misdemeanor, it is liable to fine and imprisonment. *3 Inst. 63, 69, 161: 11 Rep. 98.* And in this case, by *Stat. 7 Geo. 2. c. 21*, the offender shall be transported. See titles *Intendment*; *Robbery*.

ENDOWMENT, The bestowing or assuring of *dower* on a woman. It is sometimes used metaphorically for the settling a provision upon a parson, or building of a church or chapel; and the severing a sufficient portion of tithes, &c. for a vicar, towards his perpetual maintenance, when the benefice is appropriated. See *Stats. 15 R. 2. c. 6: 4 H. 4. c. 12.*

ENEMY, *inimicus*.] Is properly an alien or foreigner, who in a public capacity, and in an hostile manner, invades any kingdom or country; and whether such persons come hither by themselves, or in company with English traitors, they cannot be punished as traitors, but shall be dealt with by martial law. *H. P. C. 10, 15.* But the subjects of a foreign prince coming into *England*, and living under the protection of the King, if they take up arms, &c. against the government, they may be punished as traitors, not as alien enemies. If a prisoner be rescued by enemies, the gaoler is not guilty of an escape; as he would have been if subjects had made the rescue, when he might have a legal remedy against them. See *Hawk. P. C.* and titles *Alien*; *Escape*; and as to adhering to and succouring the King's enemies, see title *Treason*.

ENFRANCHISE, *Fr. enfranchi*.] To make free, or incorporate a man into any society, &c. It is also used where one is made a free denizen, which is a kind of incorporation in the *Commonwealth*.

ENFRANCHISEMENT, *Fr. from franchise, i. e. libertas*.] Is when a person is incorporated into any society or body politick; and it signifies the act of incorporating. He that by charter is made a denizen, or freeman of *England*, is said to be *enfranchised*, and let into the general liberties of the subjects of the kingdom: and he who is made a citizen of *London*, or other city, or free burgess of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is in the common sense of the word a person *enfranchised*. And when a man is *enfranchised* into the freedom of any city or bo-

rough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only against the corporation, lose and forfeit the same. 11 Rep. 91. See title *Corporation*. A villein was said to be *enfranchised*, when he was made free by his lord, and rendered capable of the benefits belonging to freemen.

ENGLECCERY, or **ENGLESCHIRE**, *Englecceria*.] An old word signifying the being an *Englismen*. When *Canutus* the Dane came to be King of England, he at the request of the Nobility sent back his army into Denmark, but kept some Danes behind to be a guard to his person; and he made a law for the preservation of his Danes (who were often privately made away with by the *Engliss*) that if an *Englismen* killed a Dane, he should be tried for the murder; or if he escaped, the town or hundred where the fact was done, was to be amerced *sixty-six marks* to the King: so that after this law, whenever a murder was committed, it was necessary to prove the party slain to be an *Englismen*, that the town might be exempted from the amercement; which proof was called *Engleccery*, or *Engleschire*. And whereas if a person were privately slain, he was in ancient time accounted *Francigena*, which word comprehended every alien, especially the Danes: it was therefore ordained, that where any person was murdered, he should be adjudged *Francigena*, unless *Engleccery* were proved, and that it was made manifest he was an *Englismen*. The manner of proving the person killed to be an *Englismen*, was by two witnesses who knew the father and mother, before the Coroner, &c. *Bract. lib. 3. tract. 2. cap. 15*: *Fleta, lib. 1. cap. 30*: 7 Rep. 16. This *Engleccery*, by reason of the great abuses and trouble that afterwards were perceived to grow by it, was utterly taken away by Stat. 14 Ed. 3. ft. 1. c. 4.—See 4 Comm. 195: and this Dict. title *Murder*.

ENGLISH. Pleas, records, bonds, and proceedings in courts of justice, to be in *English*. Stat. 4 Geo. 2. c. 26. And see Stat. 5 Geo. 2. c. 27: 6 Geo. 2. c. 14: and this Dict. titles *Pleading*; *Process*, &c.

ENGLISHMEN, The names of, to be certified into the *Chancery* who are abroad in *Holland* and *Flanders*, &c. and to pay such impositions as *aliens* do. Stat. 14 & 15 H. 8. c. 4.

ENGRAVERS, That shall invent, design and engrave prints, to have the sole right of printing them for fourteen years, which shall be engraved with the names of the proprietors; and others copying, and selling such prints, though by varying, &c. without their consent, shall forfeit 5*l.* for every print, and also the plates and sheets, &c. Stat. 8 Geo. 2. c. 13.—See title *Literary Property*.

ENGROSSER, See *Ingrosser*; *Forestaller*.

TO ENHANCE. To raise the price of goods or merchandise. See title *Forestaller*.

ENPLEET, Anciently used for *implead*.—They may *enpleat* and be *enpleeted* in all courts. *Mon. Ang. tom. 2. fo. 412*.

ENQUIRY, Writ of; See title *Writ*.

ENSEINT, or **ENSEINT**, The being with child. *Law Fr. Dict.*

ENSIENTURE, or *Ensieny*, Of any woman condemned for a crime, is no ground to stay judgment; but it may be afterwards alleged against execution. 2 Hale's *Hist. P. C.* 413.

ENTAIL. See title *Tail*.

ENTERPLEADER, See *Interpleader*.

ENTIERTIE, from the French *entierité*, *entiereté*.] Is a contradistinction in our books to moiety, denoting the whole: and a bond, damages, &c. are said to be *entire*, when they cannot be divided or apportioned.

ENTIRE TENANCY, Contrary to *several tenancy*, and signifying a sole possession in one man; whereas the other is a joint or common possession in two or more. *Brook*.

ENTRY, Fr. *entrée*, i. e. *ingressus*, *introitus*.] Signifies the taking possession of lands or tenements, where a man hath title of *entry*: and it is also used for a *writ of possession*. This *entry* into lands, is where any man enters into or takes possession of any lands, &c. in his proper person; and is an actual *entry* when made by a man's self, or by attorney by warrant from him that hath the right; or it is an *entry in law*, for a *continual claim* is an *entry* implied by law, and has the same force with it. *Litt. § 419*. There is a *right of entry*, when the party claiming may for his remedy either enter into the land, or have an action to recover it: and a *title of entry*, where one hath lawful *entry* given him in the lands, which another hath, but has no action to recover till he hath entered. *Plowd. 558*: 10 Rep. 48: *Finch's Law* 105.

ENTRY, may be defined to be an extrajudicial and summary remedy, against certain species of injury by ouster, used by the legal owner, when another person who hath no right, hath previously taken possession of lands or tenements. In this case, the party entitled may make a formal but peaceable *entry* thereon, declaring that thereby he takes possession; which notorious act of ownership, is equivalent to a feudal investiture by the lord: or he may enter on any part of it in the same county, declaring it to be in the name of the whole. *Litt. § 417*. But if it lies in different counties, he must make different *entries*; for the notoriety of such *entry* or claim to the *paries* or freeholders of *Westmorland*, is not any notoriety to the *paries* or freeholders of *Suffex*. Also if there be *two* disseisors, the party disseised must make his *entry* on *both*; or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, *entry* must be made on *both*. *Co. Litt. 252*. For as their *seisin* is distinct, so also must be the act which deveys that *seisin*. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities: which claim is in force for only a year and a day. *Litt. § 422*. And this claim, if it be repeated once in the space of every year and day, (which is called *continual claim*) has the same effect with, and in all respects amounts to, a legal *entry*. *Ibid. § 419, 23*.—See this Dict. title *Claim*. Such an *entry* gives a man *seisin*; or puts into immediate possession, him that hath right of *entry* on the estate; and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. *Co. Litt. 15*.

This remedy by *entry* takes place in three only of the five species of ouster, *vis. Abatement, Intrusion, and Disseisin*; for, as in these the original *entry* of the wrongdoer was unlawful, they may therefore be remedied by the mere *entry* of him who hath right. But, upon a *Discontinuance*, or *Deforcement*, the owner of the estate cannot enter, but is driven to his action: for herein the original *entry* being lawful, and thereby an apparent right of possession being gained, the law will not suffice that

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that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit such tenant to have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui præterijt*. 1 Inst. 57, 237, 8.—See title *Disseisin*.

On the other hand, in case of *Abatement*, *Intrusion*, or *Disseisin*, where entries are generally lawful, this right of entry may be *toll'd*, that is, *taken away*, by descent. Descents which take away entries, are when any one, seized by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. *Lit.* § 385; 413.

In general therefore, no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases, there is no neglect or *laches* in the claimant, and therefore no descent shall bar, or take away his entry. *Co. Lit.* 246. And this title of taking away entries by descent, is still further narrowed by *Stat.* 32 Hen. 8. c. 33; which enacts, that if any person disseises or turns another out of possession, no descent to the *heir* of the disseisor shall take away the entry of him that has right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute, on feudal reasons, does not extend to any *feoffee* or *donee* of the disseisor, mediate or immediate. *Ibid.* 256.

By the statute of limitations, 21 Jac. 1. c. 16, it is enacted, that no entry shall be made by any man upon lands, unless within 20 years after his right shall accrue. And by *Stat.* 4 & 5 Ann. c. 16, no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect. See further title *Claim*.

This remedy by entry must be pursued, according to *Stat.* 5 Ric. 2. §. 1. c. 8, in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession *forcibly*, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor in *statu quo*; the criminal injury or public wrong, by breach of the King's peace, is punished by fine to the King. See this Dict. title *Forcible Entry*.

THE WRIT OF ENTRY is a possessory remedy which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered, or continues possession. *Finch. L.* 261. The writ is directed to the Sheriff, requiring him to, "Command the tenant of the land, that he render [in Latin, *præste quod reddat*] to the demandant the land in question, which he claims to be

his right and inheritance; and into which, as he saith, the said tenant had not entry, but by (or after) a *disseisin*, *intrusion*, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to shew wherefore he hath not done it." This is the original process, the *præcipe*, upon which all the rest of the suit is grounded; wherein it appears, that the tenant is required, either to deliver seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact, of having entered by or under such means as are suggested, or a justification of his entry, by reason of title in himself, or in those under whom he makes claim; wheresupon the possession of the land is awarded to him who produces the clearest right to possess it.

The *Writs of entry* are of divers kinds, distinguished into four degrees, according to which the writs are varied. The first degree is a writ of entry *sur disseisin*, that lieth for the disseisee, against a disseisor, upon a disseisin done by himself; and this is called a writ of entry in the nature of an *assise*.

Second, a writ of entry *sur disseisin in le per*, against the heir by descent, who is said to be in the *per*, as he comes in by his ancestor; and so it is if a disseisor make a feoffment in fee, gift in tail, &c. the feoffee and donee are in the *per* by the disseisor.

Third, A writ of entry *sur disseisin in le per & cui*, where the feoffee of a disseisor maketh a feoffment over to another; when the disseisee shall have this writ of entry *sur disseisin*, &c. of the lands in which such other had no right of entry, but by the feoffee of the disseisor, to whom the disseisor demised the same, who unjustly and without judgment disseised the demandant. 1 Inst. 238.

These three degrees thus state the original wrong, and the title of the tenant, who claims under such wrong. If more than two degrees, (that is two alienations or descents) were past, there lay no writ of entry at the Common-law. For, as it was provided for the quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his writ of entry to gain possession; so, after more than two descents, or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his writ of right, a long and final remedy, to punish his neglect in not sooner putting in his claim while the degrees subsisted; and for the ending of suits, and quieting of all controversies. 2 Inst. 153. But by the *Stat. of Marlbridge* 52 Hen. 3. c. 30, it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly,

Fourthly, A new writ has been framed, called a writ of entry in the *post*, which only alledge the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant; stating it in this manner; that the tenant had not entry, unless *after*, or subsequent to, the ouster, or injury done by the original disposessor; and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs, it is, (the writ

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of entry *sa. disseisin in the post.*) that the form of our common recoveries of landed estates is usually grounded. See title *Fine and Recovery*.

This remedial instrument, of writ of entry, is applicable to all the cases of ouster, except that of *Discontinuance* of tenant in tail, and some peculiar species of *Deformements*. Such is that of the deforcement of dower by not assigning any dower to the widow within the time limited by the law; for which she has her remedy by writ of *dower, unde nihil habet*. *F. N. B.* 147.—See title *Dower*.

But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the Laws of England, being plainly and clearly chalked out in that collection of legal forms, the *Registrum omnium Breuium*, or Register of such writs as are issuable out of the King's Courts; upon which *Kutzbereit's Natura Breuium* is a comment; which see; and the several appropriate titles in this Dict.

In the times of our Saxon ancestors, the right of possession seems to have been recoverable only by writ of entry. *Gill. Ten.* 42. This writ was then usually brought in the County Court; and the proceedings in these actions were not then so tedious, (when the Courts were held, and process issued from, and was returnable there in, at the end of every three weeks) as they became after the Conquest, when all causes were drawn into the King's Courts, and process issued only from Term to Term. Hence a new remedy was invented in many cases to do justice to the people, and to determine the possession in the proper counties by the King's Judges; this was the remedy by *Assise*; as to which, See title *Assise* in this Dict. and fully on this subject 3 *Comm.* 174, 184. *

Having said thus much in general on the titles *Entry*, and *Writs of Entry*, subjects now in some measure rather unusual than obsolete, the following observations, extracts, &c. may be of use to the enquiring Student: should any of them seem a repetition of what has already been said, it will be generally found they state the point more at large, or on different authorities.

A *Writ of Entry in the per and cui*, shall be maintained against none, but where the tenant is in by purchase or descent; for if the alienation or descent be put out of the degree upon which no writ may be made in the *per* and *cui*, then it shall be made in the *post*. *Terms de Ley*.

There are five things which put the writ of entry out of the degrees, viz. *intrusion*; *disseisin* upon *disseisin*; *succession* where the disseisor was a person of religion, and his successor enters; *judgment*, when a person hath had judgment to recover against the disseisor; and *escheat*, on the disseisor's dying without heir, or committing felony, &c. on which the lord enters, &c. In all these cases, the disseisee or his heir, shall not have a writ of entry within the degrees of the *per*, but in the *post*; because they are not in by descent, or purchase. *Terms de Ley*.

Degrees as to entries are of two sorts, either by *act* in law, as in case of a descent; or by *act* of the party by lawful conveyance. But no estate gained by wrong doth make a degree; so that *abatement*, *intrusion*, &c. work not a degree; nor doth every change by lawful title, as an estate of tenant by the curtesy, by judgment, &c. or of

any others that come in the *post*; though a tenancy in dower by assignment of the heir doth work a degree, because she is in, by her husband; but an assignment of dower by a disseisor, doth not, by reason she is in the *post*. *Co. Lit.* 239.

Though *Entry on lands* is taken away by descent on *disseisins*, or *discontinuance*, &c. yet a descent shall not take away the entry of lessee for seven years, nor of tenant by *elegit*, &c. who have but a chattel, and so freehold; otherwise it is of any estate for life, or any higher estate. *Co. Lit.* 249.

If a disseisor leases for years, and dies seised of the reversion, the entry of the disseisee is taken away, because he died seised of the fee and freehold; but if he had leased for life, &c. the entry of the disseisee would not be taken away. *Co. Lit.* 239. Where the disseisor of an infant dies seised, and after the infant comes of age, and the heir of the disseisor dies before entry; though he died not seised of an actual seisin, but a seisin in law; yet his dying seised takes away the entry of the disseisee. *Ibid.* If a disseisor makes a feoffment upon condition, and the feoffee dies seised, and the feoffor enters upon the heir for the breach of the condition, the disseisee may enter upon him; for by the entry of the disseisor, the descent is utterly defeated. *Lit. f. d.* 409.

The title of entry in a feoffor, &c. that hath but a condition, cannot be taken away by any descent, because he has no remedy by action to recover the land; so that if a descent should take away his entry, it would bar him of his right for ever: and the condition remains, and cannot be develted and put out of possession, as the lands, &c. *Co. Lit.* 240. If a man recovers lands, and after a stranger to the recovery dies seised, this shall not take away the entry of the recoveror; as it was but a title. 2 *Dunv. Abr.* 561. But where a person recovers against another, and enters and sues execution, and after the recoverer disseises him, and dies seised; this descent shall take away the entry of the recoveror, for the recovery was executed. *Ibid.*

If after recovery against tenant for life, he dies, and he in remainder enters before execution, and dies seised, the entry of the recoveror is not taken away. *Co. Lit.* 238. The entry of the tenant for life, shall be good for him in remainder; and if tenant for life make a feoffment in fee, and a stranger enters for the forfeiture in the name of the reversioner; this will be good to vest the reversion in him. *L. r.* 128; 9 *Rep.* 106. If an infant under age, makes a deed of feoffment, and after his full age the feoffee dies seised; or a lessee for life aliens the land, and the alienee dies seised thereof, or a devise be of lands upon condition, and the heir of the disseisor enters and dies seised: in these cases the entry is gone, and the parties shall be put to their action. *Lit.* 96; 9 *H.* 6; 25.

If there be tenant for life, remainder to the right heir of J. S. and the tenant for life is disseised; a descent is cast, and after J. S. dies, and tenant for life also dies: by this, the entry of the heir of J. S. is not taken away, for his remainder was in *custodia legis*. 1 *Rep.* 134. Where an infant has cause of entry, and the descent happens while he is within age, it will not bar him of his entry: he that hath the right of entry, must be of age, within the four seas, of sound memory; and if it be a woman, she must be sole; and if the party be under age, beyond the seas,

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seas, *non compescurus*, in prison, or a feme covert, at the time of the descent, it shall not bar. *Lit.* 147, 408: 21 H. 6. 17.

The whole time from a disseisin is considerable; as where *seine* covert is disseised, and her husband dieth, and she takes another husband, and then a descent is cast; or if one *ultra mare* be disseised, and he return into *England*, and then go beyond sea again, and there is a descent; here the descent will bar the entry, because of the *intersum*. 9 H. 7. 24: *Dyer* 143: 32 H. 8. c. 33.

A woman tenant in tail took husband, who made a feoffment in fee, and died, and the wife without entry made a lease for years; and it was held, that the freehold was not reduced by the lease, without an entry made, 1 *Leon.* ca. 165. The entry of a disseisee, when he duly makes it, shall avoid all the mesne charges by the disseisor upon the land: but right of entry may be lost divers ways; as by acceptance of rent, by him who hath it, and the like. 1 *Anderson* 133: *Noy Rep.* 7. If a man is disseised of land whereunto a common is appendant, the disseisee cannot use the common till he enters on the land to which the common is appendant; for if the disseisee might use it, so might the disseisor, which would be a double charge on the common yet if a person be disseised of a manor, to which an advowson is appendant, he may present to the advowson before entry on the manor. *Co. Lit.* 122.

A disseisee enters into the land, and continues therein with the disseisor, and manures it with him, claiming nothing of his first estate; or if the disseisee enters, and takes the profit, as lessee, &c. of the disseisor; it is said these will be an entry that will reduce the first estate. 2 *Danv.* 790. If the disseisee commands a stranger to put in the cattle of such stranger in the land to feed there; this is an entry in law on the land. *Co. Lit.* 245.

Where entry may be made into land, or any thing, it shall not be in the party before entry, if entry cannot be made, but only *claim*, then it shall be in him by *claim*; and when neither *entry*, nor *claim* can be made, it shall be in him by *act of law*. 1 *Plowd.* 133. In case the possession of land is in no man, but the freehold in law is in the heir that enters, his general entry into one part reduces all into his actual possession but if an entry is to divest an estate, a general entry into parcel, is good only for that part. *Co. Lit.* 15. Where an entry is in any part, it must be in the name of all. If I enfeoff a person of an acre of ground upon condition, and of another acre on condition, and both conditions are broken, here entry into one in name of both acres is not good to reduce both but if a man make a feoffment of divers parcels upon condition that is broken, there entry into part in name of all the rest is sufficient. *Co. Lit.* 252: 9 H. 7. 25.

A man hath right to enter into lands in divers villages in one county, if he enter upon part of it in one village in the name of all in that county; by this he shall have possession of the whole. *Co. Lit.* 252: *Dyer* 227, 337. If a man disseise me of one acre at one time, and another acre at another time in the same county; my entry into one of them in the name of both is good: though it will not be good, if the disseisin be by two several persons, or if the acres lie in several counties; in which case there ought to be several entries and additions. *Co. Lit.* 252.

If he who hath right of entry into a freehold, enters into part of it, it shall be adjudged an entry into all pos-

seised by one tenant; but if there be several tenants possessed of the freehold, there must be several entries on the several tenants. 1 *Lit. Abr.* 515, 516. Special entry into a house with which lands are occupied, claiming the whole, is a good entry as to the whole house and lands. *Ibid.* If a husband enters to the use of his wife; or a man enters to the use of an infant, or any other, where the entry is lawful; this settles the possession before agreement of the parties: though it is otherwise where a person enters to the use of one whose entry is not lawful; for this vests nothing in him till agreement, and then he shall be a disseisor. 2 *Danv.* 787. If two jointenants are disseised, and the disseisor aliens, and one jointenant enters upon the alienee to the use of both; this settles the freehold in both of them *Ibid.* 788. But if one coparcener, &c. enters especially claiming the whole land, she gains the part of her companion by abatement; and it shall not settle any possession in the other. *Co. Lit.* 243.

The heir is to enter into lands descended to him, to entitle him to the profits. *Co. Lit.* 214. If a younger son enters on lands in fee, where the eldest son dies leaving issue; though many descents are cast in his line, yet the heirs of the eldest son may make an entry on the lands; but if the youngest son convey away the lands in fee, and the feoffee dies seised, they may not enter; nor may they enter where the younger son disseises the eldest, and dies seised. *Co. Lit.* 237, 244: *Lit. fect.* 397.

A tenant in tail hath issue two sons, and the eldest dies, leaving his wife *perpetuum ensent* of a son, and the younger brother enters, and then the wife of the eldest is delivered of a son, he may enter upon the younger brother. 2 *Danv.* 557. See title *Descent*.

An estate of freehold will not cease, without entry or claim: also a remainder of an estate of freehold cannot cease without entry, &c. no more than estate of freehold in possession. *Co. Eliz.* 360. A right of entry preserves a contingent remainder. 2 *Lea.* 35. And a grantee of a reversion, may enter for a condition broken. *Plowd.* 1/6.

A lessee must enter into lands demised to him; and though the lessor dies before the lessee enters, yet he may enter and if the lessee dies before entry, his executors or administrators may enter. The lessee may assign his term before entry, having *interests termini*; but he may not take a release to enlarge his estate; or bring trespass, &c. till actual entry. Though if there be words *bargain and sell* in a lease, &c. for consideration of money, the lessee or bargainee is in possession on executing the deed, to make a release, &c. *Lit.* 59, 454: *Co. Lit.* 46, 57, 270.

Where a lessor enters on his lessee for years, the rent is suspended. 1 *Leon.* 110. But without entry and expulsion, the lessee is not discharged of his rent to the lessor; unless it be where the lessor is attainted of treason, &c. then the rent is to be paid to the King, who is in possession without entry. *Sid.* 399: 1 *Nelf. Abr.* 706.

There is no need of entry to avoid an estate in case of a limitation, because thereby the estate is determined without entry or claim; and the law casts it upon the party to whom it is limited. If A. devises lands to B. and his heirs, and dies, it is in the devisee immediately; but till entry he cannot bring a possessory action: and where a possession vests without entry, a reversion will vest without claim. 2 *Mol. Rep.* 7, 8. A bare entry on another, without an expulsion, makes only a seisin; so that

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that the law will adjudge him in possession who bath the right. 3 Salk. 135.

Where a person is in a house with goods, &c. the house may be entered when the doors are open, to make execution. Cro. Eliz. 759. But it must be averred that the goods were in the house. Lutw. 1428, 1434. And a man cannot enter into a house, the doors being open to demand a debt, unless he aver that the debtor is within the house at the same time. Cro. El. 6, 8. So entry may be made on a tenant where rent is in arrear, to take a distress, &c. See titles Execution; Rent; Demand.

In order to regain possession of lands by entry, &c. the manner of entry is thus. If it be a house, and the door is open, you go into it, and say these words.—*I do here enter, and take possession of this house.* But if the door be shut, then set your foot on the groundsel, or against the door, and say the before words: and if it be land, then go upon the land, and say, *I here enter and take possession of this land, &c.* If another do it for you, he must say, *I do here enter, &c. to the use of A. B.* And it is necessary to make it before witnesses, and that a memorandum be made of it. Litt. 385; Co. Lit. 237, 238.

Where an ejectment will lie, the confession of lease, entry, and ouster is sufficient in all cases, except in the case of a fine with proclamations, in which case it is necessary to prove an actual entry; and the lessor of the plaintiff directing one to deliver a declaration to the tenant in possession will not amount to such an entry. See title Ejectment.

ENTRY AD COMMUNEM LEGEM. Is the writ of entry which lies where tenant for term of life, or for term of another's life, or by the curtesy, &c. aliens and dies, he in the reversion shall then have this writ against whomsoever is in possession of the land. New Nat. Br. 461.

ENTRY AD TERMINUM QUI PRETERIIT. A writ of entry anciently brought against tenant for years, who held over his term, and thereby kept out the lessor; See New Nat. Brev. 447, 8. But an ejectment is now the common mode of proceeding; and by Stat. 4 Geo. 2 c. 28, tenants for term of years, &c. holding over after demand made, are subject to double rent. See titles Rent; Ejectment; Tenant.

ENTRY IN CASU CONSIMILI. Is a writ that lies for him in reversion by Stat. W. 2 c. 24, against tenant for life, or tenant by the curtesy, who aliens in fee, &c. See Casu Consimili.

ENTRY IN CASU PROVISIO. Where a tenant in dower aliens in fee, or for term of life, or of another's life; then he in the reversion shall have this writ, provided by the Stat. of Glouc. 6 Ed. 1. cap. 7; by which statute it is enacted, "that if a woman alien her dower in fee, or for life, the next heir, &c. shall recover by writ of entry."—See title Dower. And the writ may be brought against the tenant of the freehold of the land, on such alienation, during the life of the tenant in dower, &c. New Nat. Br. 456.

The above four writs of entry may all be brought either in the *per*, or in the *cur* or *post*.

ENTRY SINE ASSENSU CAPITULI. A writ of entry that lay where a bishop, abbot, &c. aliened lands or tene-ments of the church, without the assent of the Chapter or Convent. F. N. B. 195.

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ENURE. In law, to take place or be available; it is as much as *efficiatur*: as for example; a release made to tenant for life, shall *enure*, and be of force and effect to him in the reversion. Litt.

HODORBRICE, from the Sax. *codor*, a hedge, and *brice*, *ruptura*.] Hedge-breaking: in which sense it is mentioned in the laws of King Alfred cap. 45.

EORLE. Sax. for *earl*, &c. though made use of by the Danes for barons. See Earl.

EPIPHANY. Expences or gifts. Blount.

EPIPHANY. The day when the star appeared to the wise men at Christ's Nativity, generally called *Twelfth Day*.

EPISCOPALIA. Synodals, or other customary payments from the clergy to their bishop or diocesan; which were formerly collected by the rural deans, and by them transmitted to the bishop.—Mon. Ang. tom 3 pag 61. These customary payments have been otherwise called *onus episcopale*; and were remitted by special privilege to free churches and chapels of the King's foundation, which were exempt from episcopal jurisdiction. Ken. Gloss.

EPISCOPUS PUERORUM. It was a custom in former times, that some lay person about a certain feast should plait his hair, and put on the garments of a bishop, and in them exercise episcopal jurisdiction, and do several ludicrous actions, for which reason he was called *bishop of the boys*: and this custom obtained here long after several constitutions were made to abolish it. Mon. Ang. tom. 3 pag. 169.

EQUALITY. The law delights in equality; so that when a charge is made upon one, the law ought to bear it, he shall have relief against the law. Rep 25. And where a man leaves a power to his wife to give an estate among three daughters, in such case, as she shall think fit it has been held that the law is equally; unless good reason be given to the contrary. Cane. 256. See title Equity.

In equity it is *quasi*, *quasi* *equitas*. See Francis's Maxims, fol. 10. EQUUS AURATUS. A knight, or a knightly; because anciently none but knights were allowed to gild their armour with gold, but in modern times used by the heralds than lawyers, for *equus* is not a word in our law for knight, but *milites* and formerly *Chevaliers*. 4 Inst. 5.

EQUITY.

(See generally in the CHANCERY.)

ÆQUITAS; *quasi*, *æquitas*.] Is defined to be a correction, or qualification of the law, generally made in that part wherein it faileth, or is too severe. In other words "the correction of that wherein the law, by reason of its universality, is deficient." 1 Comm. 62. It likewise signifies the extension of the words of the law to cases unexpressed, yet having the same reason; so that where one thing is enacted by statute, all other things are enacted that are of the like degree: for example; the statute of Glouc. gives action of waste against him that holds lands for life or years; and by the equity thereof, a man shall have action of waste against a tenant that holds but for one year, or half-year, which is without the words of the act, but within the meaning of it; and the words that enact the one, by equity enact the other. Term's de Ley.

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So that *Equity* is of two kinds; the one doth abridge and take from the letter of the law; and the other enlarge and add thereto. *Æquitas est perfecta quædam ratio, quæ scriptum interpretatur et emendat. Co. Lit. 24.* And statutes may be construed according to equity; especially where they give remedy for wrong, or are for expedition of justice, &c. *Co. Lit. 24, 54, 76: 2 Inst. 106, 107. &c.*

A Court of Equity cannot now be created by the King, but the same must be done by Act of Parliament.

The distinction between *Law* and *Equity*, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country than *England* at any time.—With us the *Aula regia* which was anciently the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a Court of Equity, as distinguished from a Court of Law, did not subsist in the original plan of partition. For though equity is mentioned by *Bracton* l. 2. c. 7. pl. 23, as a thing contrasted to strict law, yet neither in that writer, nor in *Glanvill* or *Pleta*, nor yet in *Britton*, (composed under the auspices and in the name of *Edward I.* and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the King's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the King in person assisted by his privy council; (from whence also arose the jurisdiction of the court of Requests, which was virtually abolished by *Stat. 16 Car. 1. c. 10*;) and they were wont to refer the matter either to the Chancellor and a select committee, or by degrees to the Chancellor only, who mitigated the severity, or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *Aula regia*, but also after its dissolution, in the reign of King *Edward I.* and perhaps during its continuance, in that of *Henry II.* *Ll. Ed. c. 2: Lamb. Arch. 59.*

When, about the end of the reign of King *Edward III.* uses of land were introduced, and though totally discountenanced by the courts of Common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the Chancery as a court of equity began to be established. *Specim. Gloss. 106: 1 Lev. 242; John Walsbam*, who was bishop of *Salisbury* and Chancellor to King *Richard I.* (by a strained interpretation of the statute of *Westm. 2. [13 E. 1. c. 24]*, enabling the clerks in chancery to form new writs according to the special circumstances of each case,) devised the writ of *subpœna*, returnable in the court of Chancery only, to make the feeſee to ſes accountable to his *ceteris que ſeſe*: which proceſs was afterwards extended to other matters wholly determinable at the Common law, upon fictitious ſuggeſtions; for which therefore the Chancellor himſelf is by *Stat. 17 Rich. 2. c. 6*, directed to give damages to the party unjuſtly aggrieved. But as the Clergy, had long attempted to turn their eccleſiaſtical courts into courts of equity, by entertain-

ing ſuits *pro laſſione fidei*, as a ſpiritual offence againſt conſcience, in caſe of non-payment of debts or any breach of civil contracts; till checked by the Conſtitutions of *Clarendon* (10 Hen. 2. c. 15); therefore probably the eccleſiaſtical chancellorſ, who then held the ſeal, were remiſs in abridging their own new acquired juřiſdiction; eſpecially as the ſpiritual courts continued to graſp at the ſame authority as before, till finally prohibited by the unanimous concurrence of all the judges; however, it appears from the Parliament rolls, that in the reigns of *Henry IV.* and *V.* the Commons were repeatedly urgent to have the writ of *ſubpœna* entirely ſuppreſſed, as being a novelty deviſed againſt the form of the Common law. But though the ſtatute 4 Hen. 4. c. 23, was paſſed, whereby judgments at law are declared irrevocable, unleſs by attainr or writ of error, yet in *Edward IV.*'s time, the proceſs by bill and *ſubpœna* was become the daily praſtice of the Court, though it's juřiſdiction was not then nearly ſo extenſive as at preſent. *Rot. Parl. 14 Ed. 4. no. 33.*

In the time of Lord Chancellor *Elleſmere*, (*A. D.* 1616) aroſe that notable diſpute between the Courts of law and equity, ſet on foot by Sir *Edward Coke*, then Chief Juſtice of the court of King's Bench; whether a Court of equity could give relief after or againſt a judgment at the Common law. This conteſt was ſo warmly carried on, that indiſtinctments were preferred againſt the ſuitors, the ſolicitors, the counſel and even a Maſter in chancery, for having incurred a *præmunire* by queſtioning in a Court of equity a judgment in the court of King's Bench, obtained by groſs fraud and impoſition. This matter being brought before the King, was by him referred to his learned counſel for their advice and opinion; who reported ſo ſtrongly in favour of the courts of equity, that his majesty gave judgment on their behalf. *Whitlock of Parl. 2, 390: 1 Ch. Rep. Append. 11.*

Lord *Bacon* who ſucceeded Lord *Elleſmere*, reduced the praſtice of the court into a more regular ſyſtem; his ſucceſſors in the reign of *Charles I.* did little to improve upon his plan; till the appointment of Sir *Hentage Finch* in 1673, who became afterwards earl of *Nottingham*. He was a perſon of the greateſt abilities and moſt uncorrupted integrity; a thorough maſter and zealous defender of the laws and conſtitution of his country; and endowed with a pervading genius that enabled him to diſcover and to purſue the true ſpirit of juſtice, notwithſtanding the embarraſſments raiſed by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redreſs which had poſſeſſed the courts of Equity. The reaſon and neceſſities of mankind, ariſing from the great change in property by the extension of trade and the abolition of military tenures, co-operated in eſtabliſhing his plan, and enabling him in the courſe of nine years to build a ſyſtem of juřiſprudence and juřiſdiction, upon wide and national foundations which have alſo been extended, and improved by many great men, who have ſince preſided in chancery. See 3 *Comm* 50—56.

The ſame juřiſdiction is exerciſed, and the ſame ſyſtem of redreſs purſued, in the Equity-Court of the Exchequer; with a diſtinction however as to ſome few matters, peculiar to each tribunal, and in which the other cannot interfere.

Upon the abolition of the court of Wards, the care, which the Crown was bound to take as guardian of its *Infant Tenants*, was totally extinguished in every feudal view; but devolved to the King in his court of Chancery, together with the general protection of all other infants in the kingdom. *F. N. B.* 47.—When therefore a fatherless child has no other guardian, the Court of Chancery has a right to appoint one, and from all proceedings relative thereto, an appeal lies to the House of Lords. The Court of Exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice. *Cro. Jac.* 641: 2 *Lev.* 163: *T. Jun.* 90. But when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indifferently will take care of the property of the infant.

As to *Idiot* and *Lunatic*, the king himself used formerly to commit the custody of them to proper Committees, in every particular case; but now, to avoid solicitation and the very shadow of undue partiality, a warrant is issued by the King under his royal sign manual to the Chancellor, to perform this office for him. and if he acts improperly in granting such custodies, the complaint must be made to the King himself in council. *3 P. Wms.* 108. See *Rog. B.* 267. But the previous proceedings on the commission, to enquire whether or no the party be an idiot or a lunatic, are on the law-side of the Court of Chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

The king, as *parens patriæ*, has the general superintendence of all *Charities*, which he exercises by the Chancellor. And, therefore, when necessary, the Attorney General, at the relation of some informant, (who is usually called the *relator*) files *ex officio* an information in the court of Chancery to have the charity properly established.

By *Stat.* 43 *Eliz.* c. 4, authority is given to the lord Chancellor, and to the Chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to enquire into any abuses of charitable donations, and rectify the same by decree, which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of Chancery because the commission is there returned, it is not a proceeding at Common-law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleads, upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the Chancellor's decree to the House of Peers, notwithstanding any loose opinions to the contrary. *Duke's Char. Uses* 62, 128. 2 *Vern.* 248.

By the several statutes relating to *Bankrupts*, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions

thereby directed to be issued, from which the bankrupts give no appeal.

The jurisdiction of the Court of Chancery does not however extend to *some cases of common law*, and he had in the Exchequer. His jurisdiction can be brought in Chancery, for such matters, which are given to the King by the Statute, respecting distributions of the King, as direct any act to be done by him, or under any decree disposing of or affecting his property, and even in cases where he is a royal witness, which titles must be determined in the Court of Exchequer, as a court of revenue; which alone has power over the King's treasure, and the officers employed in its management, unless where it properly belongs to the duchy court of Lancaster.

In all other matters, what is said of the court of Equity in the Court of Chancery will be equally applicable to the other courts of Equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers.—See *3 Comm.* 426—429.

The learned Commentator then enters into a brief but comprehensive view of the general nature of Equity, to shew that in our courts it is not contrary to, but consistent with, law; a position which perhaps will be best understood by further explanation of the jurisdiction exercised by courts of equity, either as *affixant* to, *concurrent with*, or *exclusive of* the jurisdiction of the courts of Common-law, which is here done in an abridgment from *Loublanque's Treatise of Equity* pp. 10. &c. in n.

EQUITY is assistant to the jurisdiction of the Courts of law, 1st. By removing legal impediments to the fair decision of a question depending in courts of law. 2dly. By compelling a discovery which may enable them to decide. 3dly. By perpetuating testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. It may also be said to be assistant, by rendering the judgments of courts of law effective, as by providing for the safety of property in dispute pending a litigation; and by counteracting fraudulent judgments, &c.; and by putting a bound to vexatious and oppressive litigation.—It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition, and power. It claims an exclusive jurisdiction, in all matters of trust, and confidence; and wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. See *Mifson's Treatise on the Pleadings in Chancery*.

To pursue this division of the jurisdiction of Courts of Equity with that minuteness which is necessary to a particular acquaintance with its powers, would lead to an investigation too extensive. Some short notice shall be taken of the general objection that is urged against the claims of Courts of Equity to a concurrence of jurisdiction in those cases with Courts of law. This concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case, without enabling him to draw the ne-

cessary

cessary evidence from the examination of the defendant, justice could never be attained at law in these cases where the principal facts to be proved by one party are confined to the knowledge of the other party. In such cases, therefore, it becomes necessary for the party, in want of such evidence, to resort to the extraordinary powers of a Court of Equity, which will compel the necessary discovery; and the court, having acquired cognizance of the suit, for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition and dower, though discovery be not necessary to the plaintiff's case.

The case (and, it seems, the only case) in which fraud cannot be relieved against in equity, concurrently with courts of law, though discovery be sought, is the case of fraud, in obtaining a will; which, since the case of *Kerrick v. Dransby*, 3 *Brown's Parl. Cas.* 358, is constantly referred to a court of law in the shape of an issue, *deussavit vel non*. That courts of equity have a concurrence of jurisdiction with courts of law, in all other matters of fraud; See *White v. Hillyer*, *Pr. Ch.* 14; *Hungerford v. Enle*, 2 *Vern.* 251; *Cole v. Woodliff*, 2 *Pr. Wms.* 156; *Stout v. Baillie*, 4 *P. Wms.* 220; 2 *Comyn's Digest*, titles *Chancery*; *Prud.*

The jurisdiction exercised by Courts of Equity in matters of account, is, in many cases, bounded by the discovery: as where a suit is instituted for an account of waste of timber, without praying an injunction, the plaintiff cannot have a decree for relief. *Jesus College v. Bloom*, 3 *Atk.* 262; *Piers v. Piers*, 1 *Vez.* 521. But where the bill seeks an account of ore dug, the court will decree it, (*Bishop of Winchester v. Knight*, 1 *P. Wms.* 406;) because the working of a mine is a kind of trade. *Story v. Lord Windsor*, 2 *Atk.* 630. Yet, even in that case, the plaintiff must shew a possession. *Sayer v. Pierce*, 1 *Vez.* 232. Neither will Equity, in all cases, decree an account of mesne profits; for where a man has title to the possession of lands, and makes an entry, whereby he becomes entitled to damages at law for the time that possession was detained from him, he shall not after his entry, turn that action at law into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances. *Tily v. Bridges*, *Pr. Ch.* 252; *Owen v. Arice*, 1 *Ch. Rep.* 17. The particular circumstances excepted by the *Lord Keeper*, in laying down this rule, extend to all those cases, which involve an equity, which the plaintiff cannot make available at law. *Cowdrey v. Hall*, 2 *Ch. Rep.* 134; *Duke of Bolton v. Deane*, *Pr. Ch.* 5, 6; *Dorres v. Fortescue*, 3 *Atk.* 129, 30; *Townsend v. Alder*, 3 *Atk.* 336; *Norton v. Precker*, 1 *Atk.* 524; See also *Curtis v. Curtis*, *Rolls*, 2 *Bro. C. R.* 622.

The jurisdiction exercised by our courts of equity, in most cases of accident, presents a very striking instance of their anxiety to prevent innovation on the jurisdiction of courts of law: their interference being generally founded on some circumstance, which prevents the party being relievable at law; as where a bond or other instrument or security, is lost; equity will interfere, by compelling a discovery from the defendant; and will relieve upon such discovery; but the plaintiff is not entitled to any relief, upon a mere suggestion that the bond, instrument, or security, is lost; but is required, for the purpose of relief, to annex to his bill, an affidavit to

such effect: 3 *Atk.* 17; *Misford's Treatise* 112. And, as a further security against innovation, it must appear that the loss of the deed or instrument obstructs the plaintiff in seeking relief at law: for the loss of a deed is not always a ground to come into a Court of Equity for relief; if there was no more in the case, although he is entitled to have a discovery of that, whether lost or not, courts of law, admit evidence of the loss of a deed; proving the existence of it and its contents, just as a Court of Equity does. There are two grounds to come into equity for relief, annexing an affidavit to the bill. First, where the deed is destroyed or concealed by the defendant, and whenever that is the case, the plaintiff is intitled to have relief in this court, upon the reason in *Lord Hunston's case*. *Hab. 209*. Another is, where the plaintiff cannot recover at law, without making profert of the deed in pleading at law. *Whitfield v. Fauget*, 1 *Vez.* 392; 2 *Atk.* 61.

The judgment of the Court of King's Bench in *Reed v. Brookman*, (3 *Tim. R.p.* 151,) seems to have relieved the obligee from the necessity of coming into equity, upon the mere circumstance of the bond or instrument being lost; by allowing him to state such circumstances in his declaration, as a reason for not making profert of it; but, upon this case being cited in Chancery as furnishing an objection to the plaintiff's suit in equity, he being relievable at law, Lord *Thurlow* observed, that the Court of King's Bench having determined to give relief in a case formerly relievable only in equity was not a reason for excluding the ancient, peculiar, and at least concurrent jurisdiction of courts of equity. *Atkinson v. Leonard*, 3 *Bro. C. R.* 218. This concurrence of jurisdiction as to this kind of accident, may therefore be considered to extend to all cases, in which the deed, or instrument has been destroyed, or is concealed by the defendant, or has been lost by the plaintiff; though of the contents of such instrument the plaintiff has other evidence, of which he might avail himself at law. But where the relief sought in equity is upon the loss of a bill of exchange, or promissory note, the plaintiff must, by his bill, offer to give security, as an indemnity to the defendant, against any demand being made upon him in respect of such lost bill or note. *Wainley v. Child*, 1 *Vez.* 341.

To establish the origin of any branch of legal or equitable jurisdiction is always difficult, and seldom necessary, provided the exercise of such jurisdiction is sanctioned by the dictates of reason, and found to be conducive to the ends of substantial justice; and such will appear to be the nature and tendency of the jurisdiction exercised by our courts of equity, in cases of *Partition*, upon a reference to the difficulties which obstructed the mode of proceeding at Common-law: and though many of those difficulties are removed by *Stat. 8 & 9 W. 3. c. 31*; yet still, if the parties are in any degree complicated, it is extremely difficult to proceed at law, or where the tenants in possession are seized of particular estates only; for the persons entitled in remainder cannot be bound by the judgment, in a writ of partition. *Misford's Treatise* p. 110. Neither can a feme covert be bound by partition by writ. *Co. Litt.* 166 a. which, it should seem, she may be by decree and commission in equity. *Martyn v. Parnman*, 1 *Ch. Rep.* 125: On these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable

EQUITY.

equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be sufficient to allege seisin, yet, in equity the plaintiff must shew his title. *Cartwright v. Pulney*, 2 *Ark.* 380. And if the defendant contest the legal title, the court will dismiss the bill. *Bishop of Ely v. Kenrick*, *Burgh.* 322. but see *Satter v. Gerrard*, *Ambler* 236. And as a further mean to prevent innovation and vexatious suits, courts of equity will never allow costs on bills of partition; courts of law allowing none on the proceeding by writ. *Mercalf v. Beckwith*, 2 *P. Wms.* 376.—*Misford's Treatise* 111. And this rule prevails, notwithstanding the unequal interests of the parties. *Parker v. Gerard*, *Ambler* 236.—see on this subject of Partition in Equity also 1 *Infl.* 169 l. and the notes there; which are very ingeniously combated, we may say refuted, by Mr. *Foubert*; who sums up the result in the foregoing paragraph.

The jurisdiction of our courts of equity, in matters of *Dower*, for the purpose of assisting the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned, whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy. *Wallis v. Everard*, 3 *Ch. R.* 87. It seems now, however to be settled, that the widow labours under so many disadvantages at law, from the embarrassments of such terms, &c. that she is fully entitled to every assistance that a Court of Equity can give her, not only in paving the way for her, to establish her right at law, but also by giving complete relief when the right is ascertained. *Guns v. Carter*, 2 *Brown C. R.* 634; and *Lucas v. Calcraft*, there cited. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice, *Williams v. Lambie*, 3 *Bro. Ch. Rep.* 264. And though the widow should die before she had established her right to dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable.

With respect to the exclusive jurisdiction exercised by our courts of equity, in matters of *trust*, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this work, however, a variety of instances appear, from which the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which at present it may be sufficient to refer. See particularly titles *Chancery*; *Fraud*; *Trust*, &c. &c.

The essential difference (says *Blackstone*) between Law and Equity principally consists in the different modes of administering justice in each, in the mode of *proof*, the mode of *trial*, and the mode of *relief*. Upon these, and upon two other accidental grounds of jurisdiction, *viz.* the true construction of *promises for money lent* and the form and effect of a *trust or secret use*, hath been principally erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the system of the courts of Common-law.

As to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same, in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. 1 *Chan. C.* 57. As incident to accounts, they take a concurrent cognizance of the administration of personal assets. 2 *P. Wms.* 145; Consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. 2 *Chan. C.* 152. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto. 1 *Eq. C. Ab.* 367; of all dealings in partnership, 2 *Vern.* 277; and many other mercantile transactions; and so of bailiffs, receivers, factors and agents. *Ibid.* 638.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of *fraud*. 2 *Chan. C.* 46; all matters in the private knowledge of the party, which though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking an advantage of a judgment, obtained by suppressing the truth. 3 *P. Wms.* 148; *Year book*, 22 *Ed.* IV. 37. p. 21. See title *Discovery*.

The mode of *trial*, is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in *England*, the witnesses are abroad, or shortly to leave the kingdom; or if the witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend. See title *Depositions*.

With respect to the mode of *relief*. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a Court of Equity in a great variety of cases. To instance in executory agreements. A Court of Equity will compel them to be carried into strict execution, unless where it is improper or impossible; instead of giving damages for their non-performance. *Eq. Ca. Ab.* 16. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. 3 *P. Wms.* 215. So, of waste, and other similar injuries, a Court of Equity takes a concurrent cognizance, in order to prevent them by *injunction*. 1 *Ch. Rep.* 14; 2 *Ch. C.* 32. Over questions that may be tried at law, in a great multiplicity of actions, a Court of Equity assumes a jurisdiction, to prevent the expence and vexation of endless litigation and suits. 1 *Vern.* 308: *Pic. Ch.* 261; 1 *P. Wms.* 672; *Str.* 404. In various kinds

kinds of fraud it assumes a concurrent jurisdiction, not only for the sake of a discovery but of a more extensive and specific relief. 2 *P. Wms.* 156; as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. 1 *Vern.* 32; 1 *P. Wms.* 239; 1 *Vern.* 237; 2 *Vern.* 84. and thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a Court of Equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout. 1 *Eq. Ca. Ab.* 337.

As to the construction of securities for money lent; when courts of Equity held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *boni fide* advanced with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the Court; or he may, when out of possession, be barred, by length of time, by analogy to the statute of limitations. See also titles *Bond*; *Mortgage*; *Penalty*.

The form of a *Trust*, or second use, gives the courts of Equity an exclusive jurisdiction, as to the subject matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed; 2 *P. Wms.* 645, 668, 9. And, by a regular positive system established in the courts of Equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of Common-law. See 3 *Comm.* 436—440.

EQUITY OF REDEMPTION, *en mortgages*. If where money is due on a mortgage, the mortgagee is desirous to bar the equity of redemption, he may oblige the mortgagor either to pay the money or to be foreclosed of his equity; which is done by proceedings in the court of Chancery. But the Chancery cannot shorten the time of payment of the mortgage money, where it is limited by express covenant; though it may lengthen it: and then upon non payment, the practice is to foreclose the equity of redemption of the mortgagor. 2 *Vent.* 364.

To foreclose the Equity, a bill in Chancery is exhibited; to which an answer is put in, and a decree being obtained, a Master in Chancery is to certify what is due for principal, interest and costs, which is to be paid at a time prescribed by the decree, whereupon the premises are to be reconveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to be foreclosed from all equity of redemption, and to convey the premises absolutely to the mortgagee.

A fine or non-claim will bar equity of redemption: but in a common mortgage, a covenant to restrain it shall not be regarded in Chancery. 2 *Vent.* 365. If the condition of a mortgage is, that the mortgagor only should redeem during life, or that he and the heirs of his body shall do it; yet the general heir shall have the equity of redemption, for if the principal and interest be offered, the land is free. 1 *Vern.* 30, 190. And it is held, though a bond be con-

ditioned, that if the money be not paid at such a time, then for a further sum the mortgagee shall have the land absolutely, as a purchaser, &c. in such case a man may also redeem. *Ibid.* 488.—See at large this Dict. title *Mortgage*.

EQUIVALENT, Commissioners are appointed by statute to examine and state the debts due to Scotland on the Union by way of equivalent; and provision is made for payment of the same by a yearly annuity, &c. *Stat.* 5 *Geo.* 1. c. 25. See title *Scotland*.

EQUUS COOPERTUS, A horse equipped with saddle and furniture. *Ing.* 16 E. 1.

ERIACH. By the *Irish* Brehon law, in case of murder, the brehon or judge compounded between the murderer and the friends of the deceased who prosecuted, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompence, which was called an *eria* b. 4 *Comm.* 313.

ERMINE OR ERMINAGE STREET, See *Walling Street*.

ERMINS, From the Fr. *ermine*.] A fur of great value, much used in robes of state. See title *Custom*.

ERN, The names of places ending in *Ern*, are said to imply a melancholy situation; from the Sax. *Ern*, i. e. *Locus Sæcetus*.

ERNES, The loose scattered ears of corn, that are left on the ground, after the binding or cocking of it. It is derived from the old *Teutonic Ernde*, Harvest; *Ernen*, to cut or mow corn: hence to *ern* is in some places to glean. *Kant's Gloss.*

ERRANT, *Itin. errant*.] Is applied to justices of the circuit, and bailiffs at large, &c. See *Eyre*.

ERRATICUM. A wail, or stray; an erring or wandering beast. *Cust. l. Norm. d. D.* 1080.

ERROR. Fr. *Erreur*.]

Signifies something wrong in pleading or process, &c. whereupon a writ is brought for remedy thereof, called a *Writ of Error*; in *Latin*, *de errore corrigends*.

A Writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same, according to law. *Jenk. Rep.* 25; 2 *Ld.* 40; *Yelv.* 202; *Haidw.* 340. But yet if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. *Co. Lit.* 288 b. See *Post. Div.* II. V. There is also a writ of error to reverse a fine, and which must be prosecuted within twenty years by *Stat.* 10 & 11 *H.* 3. c. 14. See titles *Fine* and *Recovery*.

A Writ of error to some superior Court of Appeal is the principal method of redress for erroneous judgments in the King's Courts of record, having power to hold plea of debt or trespass above 40s.—It lies for some supposed mistake in the proceedings of such Court; for, to amend errors in a case court, not of record, a writ of *false judgment* lies. *Fines L.* 484. The writ of error only lies upon matter of law, arising on the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attain or a new trial, to correct the mistakes of the former verdict. See 3 *Lit. P. C.* 8vo. ed. 515.

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Formerly suitors were much perplexed by writs of error brought upon very slight and trivial grounds; as mis-spellings and other mistakes of the clerks, all which are now effectually helped by the statutes of amendment and jeofails; and particularly by *Stat. 5 Geo. 1. c. 13*, it is enacted, that all writs of error wherein there shall be any variance from the original record, or other defect, may be amended by the Court, and made agreeable to the record, and where any verdict hath been given in any action, suit, &c. in any of the Courts at *Westminster* or other court of record, the judgment thereon shall not be stayed or reversed for any defect or fault in form or substance in any bill, writ, &c. or for variance in any such writs from the declaration and other proceedings; but this statute not to extend, to any appeal of felony or process, on indictment information and appeal. Such writ of error to be brought and prosecuted with effect within twenty years; by *Stat. 10 & 11 W. 3. c. 14*.—*Stat. 16 & 17 C. 2. c. 8*, enacts that in all actions, real, personal or mixed, the death of either party between verdict and judgment shall not be alledged for error.—By *Stat. 25 Geo. 3. c. 80*, imposing a stamp-duty on warrants of attorney, it is provided that no action shall be staid, nor any judgment, sentence, &c. reversed by reason of omission or defect in the entering, or filing of record, the memorandum or minute directed. By these and other statutes all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained but for some material mistake assigned. See titles *Amendment*; *Judgment*.

If a writ of error be brought to reverse any judgment of an inferior Court of record where the damages are less than 10*l*.; or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error must (except in some peculiar cases) find substantial bail, to prevent delays by frivolous pretences of appeal; and for securing payment of costs and damages. See title *Costs*. And as to bail in such cases, see *Stat. 3 & 4 C. 1. c. 8*; 13 C. 2. *ft. 2. c. 2*; 16 & 17 C. 2. *c. 8*; 19 Geo. 3. *c. 70*.

A writ of error lies from the inferior courts of record in *England* into the King's Bench, and not into the Common Pleas. *Finch L. 480*; *D. 250*. And before *Stat. 23 Geo. 3. c. 28*, it lay from the King's Bench in *T. Land* to the King's Bench in *England*. It likewise may be brought from the Common Pleas at *Westm. etc.* to the King's Bench, and then from the King's Bench the cause is removable to the House of Lords. From proceedings on the law side of the Exchequer, a writ of error lies into the Court of Exchequer Chamber, before the Lord Chancellor, Lord Treasurer, and the Judges of K. B. and C. P. and from thence it lies to the House of Peers. From proceedings in K. B. in debt, detinue, covenant, account, case, distressment or treasuries originally begun there by bill (except where the King is a party) it lies to the Exchequer Chamber, before the Justices of C. P. and Barons of the Exchequer; and from thence also to the House of Lords, *Stat. 27 Eliz. c. 8*.—But where the proceedings in K. B. do not first commence therein by bill, but by original writ sued out of Chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies without any intermediate stage of appeal directly to the House of Lords, the dernier resort for the ultimate decision of every civil action. 1 *Ro. Rep. 264*; 1 *Sid. 424*; 1 *Saund. 346*; *Carth. 180*;

Comb. 295.—Each Court of Appeal in their respective stages may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. See 3 *Comm. 406—411*.

In criminal cases also, judgments may be reversed by writ of error; which lies from all inferior criminal jurisdictions to the Court of K. B. and from K. B. to the House of Peers: It may be brought for notorious mistakes in the judgment or other parts of the record; as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors such as any irregularity, omission, or want of form in the process of outlawry or proclamations; the want of a proper addition to the defendant's name, according to the statute (see title *Abatement*); for not properly naming the sheriff, or other officer of the court, or not duly describing where his county court was held: for laying an offence committed in the time of the late King, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advantage of national justice. See titles *Outlawry*; *Indictment*, &c.

These writs of error to reverse judgments in cases of misdemeanors, are not to be allowed of course, but on sufficient probable cause shewn to the Attorney General, and then they are understood to be grantable of common right, *et ex debito j. fustice*. But writs of error to reverse attainders in capital cases are allowed only *ex gratia*; and not without express warrant under the King's sign manual, or at least by the consent of the Attorney General. 1 *Vern. 170, 5*. Those therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the State; but they may be brought by his heir or executor after his death. But the easier and more effectual way, is to reverse such attainder by Act of Parliament. See titles *Attainder*; *Judgment*.

Having said thus much generally, we may now proceed particularly to enquire,

- I. 1. *By whom, against whom; and 2. at what time, the Writ may be brought.*
- II. 1. *In what Cases it will lie; and 2. how it is to be brought.*
- III. *In what Court it is to be brought.*
- IV. *How the error is to be assigned; and what may be assigned for Error.* See a title II. 1.
- V. *What Defence may be made by a Defendant in Error.*
- VI. *Of the Judgment to be given on a Writ of Error.*

I. 1. Any person damaged by error in record, or that may be supposed to be injured by it, may bring a writ of error to reverse it, whether he be party or no; but principal and bail cannot join in a writ of error. And where there are several defendants, if one of them reverse the errors, he may be summoned and reversed, and the others may reverse the judgment. 6 *Rep. 26*; *Hob. 72*.

Judgment against two, one brought a writ of error, and held it should be quashed with costs; that it could not be amended, and that if the other party would not join, the defendant

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defendant who chose to bring a writ of *error*, must proceed by summons and severance. *Hardw.* 135, 136.

No person can reverse a thing for *error*, unless the *error* be to his prejudice. 5 *Rep.* 38. One in remainder may have writ of *error* upon judgment given against tenant in tail: But he in reversion or remainder shall not have writ of *error*, in the life-time of tenant for life, on judgment given against such tenant, because they cannot be parties grieved in his time. 2 *Nelf. Abr.* 712.

No person can bring a writ of *error* to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 *Roll. Abr.* 747: *Dyer* 90.

So a writ of *error* does not lie against any but him, who is party or privy to the first judgment, his heirs, executors, or administrators. 1 *Roll. Abr.* 747: *Dyer* 90.

And therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land, and not against the tenant; and on such writ the judgment may be reversed; but there must go a *fiere facias* against all the tenants. 1 *Roll. Abr.* 749: 1 *Roll. K. b.* 302.

Upon this rule, that none shall have a writ of *error* to reverse a judgment, but he who is privy to, or hath some prejudice thereby, it hath been resolved, that if one hath lands on the part of his mother, and loseth them by erroneous judgment, and dies, the heir of the part or the mother shall have the writ of *error*. 1 *Leon.* 261: 2 *Sid.* 50. See *Owen*, 68: *Glab.* 377.

So the younger son, when intitled to the land by the custom of *Borough English*, shall bring the writ of *error*, and not the heir at Common law: for this remedy descends with the land. *Owen*, 68: 1 *Leon.* 261: 4 *Leon.* 5.

So if there be an erroneous judgment, in the case of tenant in tail female, the issue female, and not the son, shall bring a writ of *error*. *Dyer* 90: 1 *Leon.* 261: 1 *Roll. Abr.* 747.

So if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and *J. S.* brings a writ of *error* as a cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate tail, which determined by her death without issue; and it doeth not appear, that the remainder in fee was in the daughter as right heir, wherefore *J. S.* shall not reverse the fine, *quia de non apparentibus & non existentibus eadem est ratio*, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. *Dyer* 89: *Cro. Eliz.* 469: 3 *Lat.* 36.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity. 1 *Roll. Abr.* 747: *Dyer* 89.

But a tenant for life, and he in remainder in fee, (being an infant,) join in a fine, the infant alone may bring error for the error in respect of the person of the infant, which is the cause of the action for him, and for no other. 1 *Leon.* 31, 2 *Cro. Eliz.* 115.

A writ of *error* may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as a vouchee. 1 *Roll. Abr.* 748, 755.

If a man is indicted for felony, and thereupon a *capias* and *exigent* are awarded, but he dies before attainder, his administrators may have *error* upon this award of the *exigent*, because by the award of the *exigent*, his goods were forfeited; and this is *ad grave damnum*, &c. though the principal judgment can never be given. 11 *Co.* 41. *b.*

Writ of *error* lies in *B. R.* to reverse a *fine* levied in the *Common Pleas*, and to cancel the same if it be erroneous: And if there be not an original, or not proper writs of covenant, or if there be any fraud, &c. writ of *error* may be brought to make the fine void. *Co. Lit.* 9. See titles *Final and Recovery*.

2. It was formerly holden, that a writ of *error* could not be brought before the judgment given; and if it bore *teste* before, it was no *spoliadic*, for the words of the writ are, *Si j. d. cum ad illu. sit, &c.* 1 *Roll. Abr.* 749. But it seems now agreed, that a writ of *error* that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution; but the judgment must be given before the return of the writ. *March* 140: 1 *Vent.* 255: *Mor.* 461: 3 *K. b.* 308: 1 *Vent.* 96: *Latib.* 133, and see 1 *Term Rep.* 279.

But a writ of *error*, that bears *teste* before any plaint entered, is not good. *March* 140.

So where the defendant, upon an indictment of *barrettry*, brought a writ of *error*, bearing *teste* before the assize: it was disallowed, because if such practice should obtain, it would disappoint all proceedings there. 1 *Vent.* 255: 3 *K. b.* 308.

A writ of *error* cannot be brought after twenty years. *Harl.* 345. The statute of limitations must be pleaded to a writ of *error*, as well as to an original action. *Id.* 346.

II. 1. Writ of *error* will not lie in the Exchequer chamber on judgment in replevin in *B. R.* nor on judgment in action of *scandalum magnatum*. 2 *Nelf.* 708, 709. But on judgment in replevin in *C. B.* there may be writ of *error* brought in *B. R.* The Stat. 7 *Liz.* c. 8, (see post *Dio* III.) is only to relieve on the merits of the cause, as it stood on the first judgment.

Error de recordo quod contra iustitiam lies in the court of *B. R.* for errors in fact in the judgment of the same court; as nonage of the parties, want of an original, &c. which doth not proceed from the error of the judges; and this writ is allowed without bail. *Cro. Jac.* 254. And errors in fact may be corrected in *C. B.* the same term, without this writ, which lies not in the Exchequer chamber. *Id.* 620.

If judgment is given in *B. R.* in civil actions, a writ of *error* will not lie in the same court, only for errors in fact triable by a jury; but upon a judgment in criminal cases, *error* will lie in *B. R.* whether the error be in fact or in law; though it lies also in Parliament. 3 *Salk.* 147.

Where a judgment in *C. B.* is affirmed upon a writ of *error* in *B. R.* and afterwards a *fine facias* is brought on that judgment, and the plaintiff hath judgment thereon; no writ of *error* lieth in the Exchequer Chamber, because the

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the record was not in *B. R.* by bill, but by writ of *error*. 1 *R. H. Rep.* 264: 3 *Salk.* 148—See 1 *Salk.* 263.

Writ of *error* cannot be brought on any record which is not a judgment. 1 *Salk.* 115.

The Court of *B. R.* having allowed the sufficiency of a return to a writ of *mandamus*, and therefore refused to grant a peremptory writ, the party applying brought his writ of *error* in Parliament. Held that no writ of *error* lay in this case, it being merely an award of the court, and not a strict formal judgment. 3 *Rev. P. C.* (8vo. ed.) 505.

The Court of *C. P.* have held, that, though writ of *error* may lie on a judgment of nonsuit, yet the Court will on motion to take out execution grant it, as such writ of *error* must be evidently merely for the purpose of delay and evasion. 1 *H. Black. Rep.* 432.

No writ of *error* will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the county court, &c. *Co. Lit.* 238*b*. Nor of a decree or sentence in Chancery proceeding according to equity. 37 *H. 6. Bro. Error* 95: 1 *Roll. Ab.* 744. But of a judgment given in the limited Court of Chancery, called the Petty-bag, which proceeds according to the Common-law, and holds plea of *scire facias* for repeal of the King's letters patent, &c. a writ of *error* lies in *B. R.* 1 *Roll. Ab.* 744: *Dyer* 315: 4 *Inst.* 80: 1 *Co.* 303.

Error lies for variance between the original writ and declaration; or want of an original: and where proceedings are so erroneous, as not to be amended; for faults in verdicts, executions, &c. or when any thing material is omitted in a judgment, writ of *error* lies, and the judgment shall be reversed: to where the titles of inferior courts are wrong or insufficiently named, &c. their judgments may be reversed. But where faults are small, they sometimes pass as *verum clerici*. 2 *Nelf. Abr.* 714, 715, 721, &c. 728.

By the practice of the Court of *Common Pleas*, a defendant coming in by *capas utlagatum* the same term in which an *exigent* is returnable, may avoid the outlawry without a writ of *error*, by shewing that he purchased a *superfedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c.; or by shewing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and *exigent*, or other process, or the want of such addition as is required by *Stat.* 1 *H. 5. c.* 5: 2 *Hawk. P. C.* 659—661: 1 *Roll. Ab.* 742, 3.—And see *Nat.* 5 *Eliz. c.* 23 §§ 13, 14.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of *error*, for the judgment being *judicial*, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon such indictment, the King need bring no writ of *error*; but the offender may be newly indicted, for the judgment being *quod lat pñe* &c., &c. may be given as well for the insufficiency of the indictment, as for the party's innocence. 3 *Inst.* 214.

Also any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by shewing the special matter, without writ of *error*, because it is void, as

where a commission authorizes to proceed on an indictment taken before *A. R. C.* and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only. 3 *Inst.* 231: 2 *Hawk. P. C.* 459.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he hath no remedy by writ of *error*, to reverse the attainder. 6 *Co.* 5*a*.

Wherever a new jurisdiction is erected by act of parliament, and the court or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the Common-law, a writ of *error* lies on their judgments; but where they act in a summary method, or in a new course different from the Common-law, there a writ of *error* lies not, but a *certiorari*. 1 *Salk.* 253. See title *Certiorari*.

2. *Error in the King's Bench* is thus prosecuted: the clerk of the county makes out the writ of *error*, from a *procure* or copy of the declaration left with him; which is to be allowed with the clerk of the *errors*, and a certificate of the allowance of the writ must be served on the defendant's attorney in *error*; also the plaintiff's attorney in the action, is to procure an original to warrant his judgment; and warrants of attorney must be filed, and bail put in, where required, &c. And then the proceedings are by *scire facias ad audiendum errores* against the plaintiff in the action, wherein judgment was obtained; and the writ of *error* being received by the sheriff to whom directed, he is to give notice to the plaintiff in *error* to shew cause why execution should not be on the judgment, and make a return to that purpose; then a rule is to be given with the clerk of the rules for the plaintiff in *error* to assign his errors by such a day, which if he shall not do before the rule is out, the plaintiff in the original action may take out execution against him.

If the plaintiff in *error* assign errors in the record, then the defendant must plead *In nullo est erratum*, and thereupon enter the cause with the clerk of the papers, for the errors to be argued; and paper books for the counsel and judges, are to be made out, &c. If some part of the record be not returned, a *certiorari* must be prayed to bring it into court; and if matters of fact are alleged in *error*, as nonage, death of the plaintiff, &c. a proper plea must be made thereto, and issue thereupon taken and tried as in any other issue: but if only matters of law are assigned, the errors are argued by counsel on both sides, and the judgment is either reversed or affirmed: and when judgment is affirmed, the defendant in *error* may proceed against the defendant in the action, by taking out execution on the *affirmetur*, or bringing action of debt on the judgment; or he may prosecute the bail by *scire facias* upon their recognisance. But it is said by some, that an assignment of errors in *fact* and in *law*, is bad on demurrer; by others, that the assignment of *error* in law may stand, and the fact be considered as nothing. See *Quere*. Where there is an error in fact, if the writ of *error* ought not to be *coram vobis residens*, i. e. in the court where the judgment was given. In this case, however, we must except the want of warrants of attorney, &c. which are *facts*; and it is every day's practice to assign such, with errors in law; and the usual course is, if defendant in *error* does not pray a *certiorari*, for the plaintiff to pray it.

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When a judgment is reversed or affirmed in the *Exchequer Chamber*, the transcript of the record thereof will be remitted back to the Court of *K. B.* to be entered up at the end of the judgment there: and if such judgment shall be affirmed in the *Exchequer Chamber*, yet a writ of *error* may be brought thereupon returnable in parliament.

If you would bring a writ of *error* in parliament to reverse a judgment in *B. R.* there must be a petition to the King for his warrant, which petition has the allowance of the Attorney-General, and then the King writes on the top of it *Fiat Justitia*; whereupon a writ of *error* is made out by the clerk of the *errors*. And then the Lord Chief Justice of *B. R.* carries the record, and a transcript thereof, up to the House of Lords in full Parliament, and after they are examined there, leaves the transcript with the Lords, but brings back the record: and this being done, the attorney for the defendant in *error*, gets some Lord to move that the plaintiff in *error* may assign his *errors*; but if for the plaintiff, motion is to be made, that upon his assigning *errors*, the defendant may appear and make his defence, and counsel be heard on both sides: then, after the judgment is either affirmed or reversed, the clerk of the parliament remands the transcript of the record into *B. R.* with the affirmation or reversal thereof, to be entered upon the record of the said court, which court, if affirmed, awards execution, *See Dyer 385.—See Cowp. 843.*

A writ of *error* in parliament is made returnable immediately; or on a prorogation to the next session, and it doth not determine by a prorogation. But if a parliament is dissolved before the *errors* are heard, it is otherwise. And on motion, execution hath been granted in *B. R.* on a judgment in such a case, the record being never out of the court. *Raym. 5. 2 Nels. Ab. 731.*

Where a writ of *error* was brought in *B. R.* in the life time of *Geo. I.* but was not argued till after the accession of *Geo. II.* when the judgment was affirmed, on a writ of *error* in parliament, this judgment was reversed; it being held that the first writ of *error*, *The King being sole plaintiff in the cause*, was absolutely abated. This was the case of the Deanery of *Armagh* in *Ireland*. 3 *Bro. P. C.* (8vo. ed.) 507.

When appeals lay to *England* to reverse a judgment given in the *King's Bench* in *Ireland*, a writ was procured from the curstior, directed to the Chief Justice of the Court of *B. R.* in *Ireland*, requiring him to summon the plaintiff in the action there, to appear in *K. B.* to answer the *errors*; whereupon a transcript of the record was sent over, (not the record itself of the judgment, which remained in *Ireland*;) and when the *errors* were argued, if the judgment was reversed, there went a writ to the Chief Justice of *Ireland* to reverse it; so that the judgment was not actually reversed here, but there. And where the judgment in *Ireland* was affirmed here, there could be no writ of execution granted here; but on affirmance of the judgment a writ went, reciting all the proceedings, directed to the judges of *B. R.* in *Ireland*, commanding them to issue process of execution. *Cio. Car. 368: 1 Salk. 321.*

The party bringing the writ of *error* is to cause the roll where the judgment is entered, to be marked with the word *error* in the margin, that *neither* party may have notice on the record that the writ of *error* is brought,

and this marking of the roll, on giving notice thereof, is as it were a *superseas* in itself to hinder execution: Though a *superseas* is to be made out, allowed and left with the sheriff of the county: and the plaintiff's attorney is not obliged to search the record, whether writ of *error* is brought or not; but may make out execution upon the judgment, if no *superseas* be taken forth, or he hath no notice of the writ of *error*. *Tinn. 24 Car. B. R.*

On a writ of *error* of a judgment in the Common Pleas, or other inferior court, in every adversary suit, the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases. 1 *Rel. Abr. 753: 5 Co. 39.*

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgement or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of *B. R.* may send for the fine itself, and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file; besides, should the record itself be removed and affirmed, it could not be ingrossed for want of a chirographer in *B. R.* 1 *Rel. Abr. 752: 1 Bendl. 51: Dyer 89: Godb. 248: 2 R. l. Rep. 233: F. N. B. 20.—See title Fine and Recovery.*

If the Judges of the Common Pleas, or other judges upon a writ of *error*, will not certify all the record, the party that sues the writ of *error* may alledge diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record. *F. N. B. 25 a.* But diminution cannot be alledged upon a writ of *error* brought upon a judgment in any inferior court. 1 *Sid. 40.—Yet see infra.*

By *Stat. 3 Jac. 1. c. 8*, he that brings writ of *error*, to reverse a judgment in a superior court, in all cases *after a tender*, or in any action of debt, upon *bond for payment of money only*, or on a contract, must put in good securities to prosecute his writ of *error* with effect, and pay the debt and damages if judgment be affirmed. and by *Stat. 19 Geo. 3. c. 70. § 5*, this is extended to writs of *error* to reverse judgments in inferior courts where the damages are under 10*l.* If bail be not put in, on the writ of *error* brought upon a judgment in the courts at *Windsor*, in those cases where bail is required, the writ of *error* is no *superseas* as to the execution, though such writ is in being, until a *rule nisi* is entered, or judgment affirmed, &c. And it is the same where insufficient bail is given, on rule to put in better bail, or justify those put in, which if the plaintiff doth not do, execution is ordered upon the judgment, with a *writ of error* to the writ of *error*, *See M. b. 9 W. 3. B. R.*

A plaintiff in *error* is, in the time appointed by the rule for that purpose, to certify the record into *B. R.* or the court will grant a *rule nisi* upon the writ of *error*. *Mch. 22 Car. B. R.—See post Dic. V.*

The court will not let the plaintiff in *error* quash his own writ of *error*; though they may grant leave to discontinue it. 5 *Mod. 67.* If a verdict is for a defendant in *error*, and judgment is affirmed, costs are allowed by *Stat. 3 Hen. 7. c. 10*, on occasion of the delay of execution. And by *Stat. 4 & 5 An. c. 16*, upon quashing writs of *error*, for defect or variance from the record, &c. the defendant is to have costs as if judgment were affirmed. When a writ of *error* is not in delay of execution, as where

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it is brought after the execution is executed, the plaintiff shall not have damages and costs. *Co. Jac* 636.

When a writ of *error* is brought to reverse a judgment in an inferior court, though the record is not certified as it ought, yet execution cannot be sued; but on certificate of the neglect, &c. a writ of *execution of the judgment* may be issued. 1 *Lil Ab.* 526. Upon a writ of *error*, if the clerk below will certify the record wrong, action on the case lies against him; and if he make no return, the plaintiff may have the writ of *execution* out of Chancery. *M. C. 12* 245.

If an erroneous judgment be for the defendant in an inferior court, and it is reversed in *B. R.* and the merits appear for the plaintiff, he shall have judgment; but if the merits be against the plaintiff, the defendant shall have new judgment in like manner as in the Exchequer Chamber; for the judges are to *reform*, as well as to affirm or reverse. 7 *M. C.* 2. 2. If a writ of *error* to reverse a judgment be discontinued for want of prosecution; execution cannot be had upon the judgment, until the discontinuance is erased from the court where discontinued. 1 *L. J.* 518. If a writ of *error* is brought to remove a record of a judgment given in *C. B.* and the plaintiff in *error* leaves the record there, without removing it before the return of the writ; or in case there be a longer return day than is convenient in the writ of *error*, if it is purchased the beginning of *Michaelmas* term, and made returnable in *Flower* term; the court may award execution, although the writ of *error* be delivered. *Fest. Cont.* 10: *D. C.* 245.

III. Erroneous judgments given in the court of *B. R.* were only reformed by the parliament till *Stat. 27 Eliz.* cap. 8. By that statute, a writ of *error* lies out of the Chancery upon all judgments given in the *King's Bench*, when the suit is by bill, (except the King is a party to the suit) returnable in the *Exchequer Chamber*, before the Judges of the Common Pleas, and Barons of the Exchequer, &c. who may examine the *errors*, and reverse or affirm the judgment; other than for *error*, concerning the jurisdiction of the court, or want of form in writs, pleadings, &c. and after the *errors* are examined, and judgment affirmed or reversed, the record is sent back to the *King's Bench*, to proceed and award execution; but if the suit is by original writ, or on *quod tunc*, &c. where the King is party, writ of *error* lies only in parliament.

A *quod tunc* action of debt is a civil suit. *C. 13* 382. And a writ of *error* on it, lies from the *King's Bench* to the *Exchequer Chamber*. *D. C.* 353.—See title *Exchequer*.

Not only on reversing or affirming a judgment, the Exchequer Chamber is to send back the record into *B. R.* but also if the plaintiff in the writ of *error* is nonsuit, or if the suit is discontinued in the Court of Exchequer Chamber, the record shall be sent back: and the Court of Exchequer shall give costs and damages to the plaintiff in the original action for his delay, &c. though if the plaintiff in *error* was plaintiff in the original action, there no costs can be given. 2 *M. C.* 122: 2 *Nel. M. C.* 707.

Where a writ of *error* de mines in the Exchequer Chamber, by abatement or discontinuance, the judgment is not again in *B. R.* till a *venue* is entered. 1 *Salk* 261. The Exchequer Chamber doth not award a *fec. fac. ad aud. et d. errors*; but notice is given to the parties concerned. 1 *Pent.* 34.

The court of parliament is the supreme court, where anciently causes of great consequence, as between the *Magnate Regni*, were heard and determined; hence the *demer* resort is to the House of Lords, to which a writ of *error* lies; and therefore, if a writ of *error* be brought of a judgment in the King's Bench into the Exchequer Chamber, and there the judgment is reversed; yet a writ of *error* lies of such judgment into parliament, and the lords may reverse such second judgment. *Sho. v. Parl. Cas.* 24, 110: 1 *Term.* 334: *Raym.* 330: 2 *Jon.* 99: 2 *L. v.* 232.

So a writ of *error* lies into parliament upon a judgment in *B. R.* either in a cause brought there by writ of *error*, or originally commenced there. 1 *Rol. Ab.* 745.

And though upon a judgment in the King's Bench, since the *Stat. 27 Eliz.* cap. 8, the party may elect either to bring a writ of *error* in the Exchequer Chamber, or in parliament; yet if the cause commenced in the King's Bench by *original writ*, there lies no writ of *error* but into parliament; also if he elects to bring *error* in the Exchequer Chamber regularly, he cannot after bring *error* in parliament upon the first judgment. 1 *Saund.* 345. *Carth.* 10. S. P.—see 2 *Rol. Ab.* 492: 2 *L. v.* 232.

To reverse a judgment given in the Court of Common Pleas, the writ of *error* is made returnable in the King's Bench, and *error* is not to be brought in parliament: though where a writ of *error* is brought in *B. R.* upon a judgment given in *C. B.* and the judgment is reversed or affirmed in *B. R.* the party grieved may have writ of *error* returnable in parliament. *Stat. 31 Eliz.* c. 1: 1 *L. l. Ab.* 519, 521. Erroneous judgment in the Court of Exchequer, is to be examined by the Lord Chancellor, &c. with some of the justices, and such other sage persons as they think fit; and if any *error* be found, they shall correct the rolls, and send them into the Exchequer, in order to make execution, &c. *Stat. 31 L. l. 3. cap. 12.*

No writ of *error* lies in *Banco* or *Banco Regis*, upon a judgment given within the *five ports*; but by custom such judgment is examinable by bill in nature of a writ of *error coram domino eusdem fidei sui galeano quinq. portum aqua curru jura de Shipway*. 4 *Inst.* 224.—See title *Cinqu. Ports*.

If a judgment be given in the court of Stannaries of the Duchy of Cornwall, no writ of *error* lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be an appeal to the guardian of the Stannaries, and from him to the Prince; and when there is no Prince, to the King's Privy Council. 1 *Rol. Abr.* 745.—See 4 *Inst.* 230: 2 *Danco. Abr.* 304.

Upon a judgment given in the *Hustings* in *London*, a writ of *error* lies at *St. Martin's* before certain justices. 1 *Rol. Ab.* 745: 1 *L. v.* 309: 2 *Saund.* 253. S. P. and upon a judgment of the said justices, a writ of *error* lies in parliament. See 2 *L. on.* 107.—See title *Differences*.

In *Wales*, at the Great Sessions, there a writ of *error* lay on *personal* actions to the council of the *Marches* of *Wales*, and if they gave an erroneous judgment, it was final; for *Stat. 34 & 35 H. 8. c. 16*, ordained this writ to the council there; and no writ of *error* was granted of such erroneous judgment: upon *errors* in *real* or *mixed* actions however in *Wales*, writ of *error* lay into the *King's Bench*. *Fest. Cont.* 71. And so now it does in *personal* actions by *Stat. 1 W. & M. c. 27*.—See title *Courts of Wales*.

E R R O R. IV.

In some cases, a writ of error lies in the same court wherein the record is.

If upon a judgment in *B. R.* there be error in the process, or through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices. *F. N. B.* 21; *Popb.* 181; 1 *Rel. Abr.* 746.

So if one is indicted of treason or felony in *B. R.* or being indicted elsewhere, the indictment is removed in *B. R.* and by process of that court he is erroneously outlawed, and so returned; a writ of error may be brought in *B. R.* for the reversal thereof. 3 *Inst.* 214.

Also if an erroneous judgment in point of law be given in *B. R.* upon an indictment in *London*, a writ of error may be brought in the same court; for though in civil cases error does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an error in law as fact. 1 *Sid.* 208.

But if an erroneous judgment be given, and the error lies in the judgment itself, and not in the process, a writ of error does not lie in *B. R.* of such judgment. 1 *Rel. Abr.* 746.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for insufficiency is quashed in the King's Bench, the plaintiff in error may have a writ *coram vobis resilen*. But such new writ is not a *superfideas* in itself as the first writ was, and therefore he must move the court for a *superfideas*, and put in bail thereon. *Carth.* 368, 9.

So if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of error *coram vobis resilen*. As also a *superfideas* on putting in bail; for such second writ being void, is as if there had been none before. *Carth.* 369, 370.

IV. The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; so that if the plaintiff in error delay to sue forth his *sci. fac. ad audiend. errores*, the defendant hath no way to compel him, but by suing out a *scire facias quare executionem non*, &c. And if thereupon the plaintiff in error doth not plead that his errors are assigned, but suffer judgment to pass upon two *nibils*, no errors afterwards assigned shall prevent execution. *Carth.* 41. The *sci. fac. ad audiendum errores* is only used in *B. R.* In the Exchequer Chamber notice is given. It is said the usual practice is, that the defendant in the writ of error, by consent doth voluntarily take notice of the assignment of errors, and this consent is testified by his pleading *In nullo est erratum* and then there is no occasion for a *scire facias ad audiend. error*. *Ibid.*

Errors are to be assigned in the term, or the writ of error will be quashed. 1 *Lit. Abr.* 524. When the record is in court by writ of error, the plaintiff in error is to assign his errors; and may have a *scire facias* before the record is entered: and the manner of assigning errors, according to the ancient practice, is to put a bill into court, and lay in the bill, *in hoc erratum est*, &c. shewing in certain in what things. *F. N. B.* 20. The assignment of errors, *in omnibus erratum* is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold. *Jenk. Cont.* 84. Errors in law not assigned in the record may be assigned after a *scire facias ad audiend. errores*, as the record is in *Ver. L.*

court; but it is not so of a warrant of attorney, which is an error in fact, and not upon record. *14. 140. 5 Rep.* 37.

If one in execution brings error, he ought to assign the errors in his proper person: and in cases of outlawry for felony, errors sufficient must be certainly alledged in writing, before the writ of error is allowed. *Jenk. Cont.* 165, 179. Where a recovery is had, and error brought, if the original writ doth not abate by death; but is abatable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity, a partial array returned, aid denied, &c. that should have been pleaded, and were not: these shall not be assigned for error; for they are waived. 9 *Rep.* 47; 21 *H. 6.* 29.

The assigning general errors is to say that the declaration, &c. is not sufficient in law: and that judgment was given for the plaintiff, where it ought to have been for the defendant. and the errors of a judgment are now to be assigned on the record, to appear with it to the court.

If the plaintiff in error assigns errors in fact, and errors in law, which are not assignable together, and the defendant in error pleads *in nullo est erratum*; this is a confession of the error in fact, and the judgment must be reversed, for he should have demurred for the duplicity. *Style* 67; 1 *Lev.* 76. *Salk.* 258; 6 *Mod.* 113, 206.

Also if an error in fact be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country. 1 *Sid.* 93; *Raym.* 59. Because, in *nullo est erratum* is in the nature of a demurrer, which confesses the fact, if well pleaded, or well assigned.

But if an error in fact be ill assigned, *in nullo est erratum* is no confession of it; as if it be assigned, that such a one at the time of the return of the venire was not sheriff, and the record be removed into *B. R.* by certiorari, there *in nullo est erratum* is no confession of that error, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*. *Cro. Jac.* 12, 29, 521; *Raym.* 231. *Cro. Car.* 421. 1 *Rel. Ab.* 758.

So if the plaintiff in error assigns an error in fact, viz. that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in error pleads *in nullo est erratum*, yet it shall not amount to a confession, but shall be taken only for a demurrer. *Yl.* 58.

Also if an error in fact, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that such a day there was no court of Common Pleas sitting, because that is against the record, and in such case *in nullo est erratum* is only a demurrer, so if a man says he did not appear, and the record says he did, *in nullo est erratum* is no confession, but a demurrer, because it is against the record. *Cro. Car.* 12, 29, 52; *Yl.* 58. *Raym.* 231; 1 *Leit.* 252. 3 *Keble.* 259; 1 *Le.* 76.

It has been held, that an error in fact cannot be assigned in the Exchequer Chamber: though by some authorities, errors in fact may be assigned as errors in law. 2 *Mod.* 194. 2 *Nell.* *Abr.* 708.

By *Stat.* 20 *Car.* 2. c. 6. In actions real, personal, and mixed, the death of either party between verdict and judgment, shall not be alledged for error.

It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being things of the greatest credit,

E R R O R. V. VI.

cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it. 1 *Roll. Abr.* 757.

An original writ of the same term, in which final judgment is given, will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a preceding term. 1 *Wils.* 181.

Hence it is, that in a writ of error to reverse a fine, the plaintiff cannot assign, that the *conusor* died before the *teste* of the *dedimus*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the Commission, and the *dedimus* issued. *Dyer* 89: 1 *Roll. Abr.* 757—See title *Fine and Recovery*.

V. The defendant in error may plead a release of all errors, or a release of all suits, and these pleas, if found for him, will for ever bar the plaintiff in error. 1 *Roll. Abr.* 788.

So where by a writ of error the plaintiff shall recover, or be restored to any *personal* thing, as debt, damage, or the like, a release of all actions *personal* is a good plea; and when *land* is to be recovered or restored in a writ of error, a release of actions *real* is a good bar; but where by a writ of error the plaintiff shall not be restored to any *personal* or *real* thing, a release of all actions *real* or *personal* is no bar. *Co. Lit.* 288 b: 8 *Co.* 152: 1 *Roll. Abr.* 788: 2 *Roll. Abr.* 405.

Also if a man loses in a real action, and he releases all his right to the land, and so where there is a fine levied, this shall bar him of his writ of error; for no person can bring a writ of error to reverse a judgment that is not intitled to the land, &c. for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title; *possession always carrying with it the presumption of a good title, till the right owner appears.* 1 *Roll. Abr.* 747, 748: *Dyer* 90 a: 3 *Leo.* 26: *Cro. Eliz.* 469: 1 *Roll. Abr.* 789. If the tenant, pending a *præcipe* against him, aliens in fee, and after judgment is given against him, and he brings a writ of error; this scottment is not any bar to the writ, because he was privy to the judgment after. 1 *Roll. Abr.* 788: *Bridge* 77: 1 *Roll. Rep.* 306. In a writ of error to reverse a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entered into part, for before the possession was taken from him, he might have error to reverse the judgment, though not to have restitution. 1 *Lev.* 72.—See title *Fine and Recovery*.

In a *sci. fac.* against a tertenant, he may plead a release of error, though he be not privy to the judgment. 9 *II.* 6. 45: *Bro.* 9 *S. C.*

But the tertenants cannot plead in abatement of the writ of error, but only in bar as a release, &c. in maintenance of their title. 1 *Lev.* 72.

After *in nullo est erratum* pleaded, the party affirms the record to be perfect, and he is foreclosed to say there is error in it: though the court is not restrained from examining into it. 1 *Salk.* 270. The judges are not bound to search for errors in the record, which were not assigned; but may if they will; and if they find error they ought to reverse the judgment. *Jenk. Cent.* 159.

VI. A judgment, as being an *intire* thing, cannot be reversed in part, and stand good as to other part; or be reversed as to only party; and remain good against the rest: though if there be error in awarding execution, the execution only shall be reversed, and not the judgment. *Hob.* 90: *Carth.* 235. If judgment is entered against joint defendants, when one of them is dead, the judgment shall be reversed for error as to all of them; for in such case the plaintiff ought to make a special entry of the death of the party, with *Nihil ulterius versus eum fiat*, and then take judgment only against the others. *Ibid.* 149.

The Court of Exchequer Chamber have not any authority, but to reverse or affirm the judgment, &c. for they cannot make execution. *Cro. Eliz.* 108. But where judgment is given for the defendant, and the plaintiff brings a writ of error; if the judgment is reversed, the court which reverses the judgment shall give judgment for the plaintiff, as the other court ought to have done. *Id.* 117, 118. In the Exchequer Chamber, after reversal of a judgment, &c. in *B. R.* the court gave judgment, that the plaintiff recover, &c. but because they wanted power to award a writ of inquiry which was necessary, being on a demurrer, therefore it was sent back into *B. R.* for the execution of that writ, and thereupon to give final judgment: but if the judgment is against the plaintiff in *B. R.* upon a special verdict, and that judgment is reversed in the Exchequer Chamber, there being no writ of inquiry requisite, the Court of Exchequer Chamber doth not only give judgment of reversal, but a compleat judgment for the plaintiff in the action. *Carth.* 181. If erroneous judgment be had by consent of parties, it may be reversed in the Exchequer Chamber; for consent of parties may not change the law; but if the consent is entered upon and made part of the record, it may be good. *Hob.* 5: *Cro. Eliz.* 664. The reversal in the Exchequer Chamber, is *res judicata*: no writ of error lies upon such judgment, except in parliament; and it is by six judges at least, by *Stats.* 27 *Eliz.* c. 8: 31 *Eliz.* c. 1.

When judgment is given in *B. R.* for the plaintiff in error, there shall be only a *judicium revocetur*, &c. entered with costs: if for the defendant in error, that the plaintiff *nil capiat per breve suum de errore*. The Chief Justice of *B. R.* &c. or the eldest judge ought to allow a writ of error, which is in judgment of law a *superfideas* until the errors are examined, and the judgment affirmed or reversed. *Cro. Jac.* 534. As a plaintiff having erroneous judgment may reverse it; and new judgment may be given for him, so if a judgment is reversed, the plaintiff may bring a new action for the same cause. 1 *Lev.* 310. Where a judgment is pleaded in bar of another action, &c. and judgment given on that plea; writ of error may be had to reverse the second judgment. *Cro. Eliz.* 503: *Jenk. Cent.* 259. And debt lies upon a judgment in *B. R.* after a writ of error brought; which is only a *superfideas* to the execution. 1 *Lev.* 153. But the court will stay proceedings in such action on giving judgment.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all. 1 *Roll. Abr.* 776: *Cro. Jac.* 289, 303: *Allen* 74, 75. *Style* 121, 125, 406.

See further as to the proceedings on a Writ of Error. *Impey's Pract.* K. B.

ERTHIOTUM, An ancient word for a meeting of the neighbourhood, to compromise differences among themselves; it is mentioned in *Leg. Hen. 4. c. 57.*

ESBRANCATURA, from the Fr. *esbrancer*, Cutting off branches or boughs in forests, &c. *Hoved. 784.*

ESCALDARE, To scald: *Escaldare porci*, was one of our ancient *tenures in frankalmoign*; as appears by the inquisition of the serjeancies and knights-foes in the 12th and 13th years of King John, within the counties of *Essex* and *Hertford*. *Lib. Rub. Scaccar. MS. 137.*

ESCAMBIO, derived from the Span. *cambiar*, to change. Was a license granted to make over bills of exchange to another beyond the sea: for by the *Stat. 5 R. 2. c. 2*, no merchant ought to exchange or return money beyond sea, without the King's licence. *Rdg. Orig. 194.* See title *Exchange*; *Bill of Exchange*.

ESCAPE.

ESCAPUM, from the Fr. *eschapper*, i. e. *effugere*, to fly from. A violent or privy evasion out of some lawful restraint; as where a person is arrested or imprisoned, and gets away before he is delivered by due course of law. *Standf. P. C. cap. 26, 27.—Terms de Ley.*

Escapes are either (A) in civil, or (B) in criminal, cases.

(A) As to ESCAPES in CIVIL CASES.

I. 1. *Where the party shall be said to be legally committed, so that the suffering him to go at large will be adjudged an Escape*; 2. *What degree of Liberty, or going at large, shall be deemed an Escape*; 3. *What Persons are answerable for an Escape.*

II. 1. *Of the Difference between voluntary and negligent Escapes*; and 2. *Between Escapes on Mesne Process and Execution.*

III. 1. *Of the Nature of the Action to be brought for an Escape*, and 2. *Of the Manner, laying it.*

IV. *Of the Party's Defence sued for the Escape; and therein of pleading fresh Suit.*

I. 1. It seems agreed as a general rule, that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such a person to go at large is an escape, for he cannot judge of the validity of the process or other proceedings of such court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous; but if the court has no jurisdiction of the matter, then all is void, and consequently the officer not punishable for suffering a person taken upon such void authority to escape. *Moor 274: Dyer 66, 175, 306: Popb. 203: 1 Leon 30: 5 Co. 64: 8 Co. 141 b: Crid. Jac. 280, 289 2 Bull. 64, 237, 256.* If a *ca. fa.* issue after a year and a day, without suing out a *scire facias*, this error will not excuse the sheriff in an escape. *(Cro. Car. 288: Salk. 273.* But though a sheriff may not take advantage of an erroneous process; yet he shall of a void process, on which it is no escape to let a prisoner go.

If at the petition of A. and the rest of the creditors of B. a commission under the Statutes against bankrupts is issued out against B. and thereupon the commissioners sit and offer interrogatories to C. and he refuses to be ex-

amined, and by them is thereupon committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, and A. was prejudiced by the escape, he may maintain an action against the gaoler: *1 Rol. Rep. 47: Moor 834. pl. 1123, 8. C.*

The sheriff cannot be charged with an escape before he had the party in actual custody by a legal authority, and therefore if an officer, having a warrant to arrest a man, sets him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. *Bro. Escape 22.*

But if A. is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of F. S. upon the delivery of the writ, A. by construction of law is immediately in the sheriff's custody, without an actual arrest, and if he escapes, the plaintiff may declare, that he was arrested by virtue of the second writ, which is the operation it has by law, and not according to the *fact*. *5 Co. 89.* But where the sheriff, not having actually arrested a defendant, but accepted the undertaking of an attorney to put in bail, who put in bail, and the sheriff had returned a *cepi corpus*, held per Lord Mansfield at Surry assizes, summer 1775, in *Hulson and Alaman, Esq.* that the sheriff was not liable, upon a writ of *non est inventus*, on another process, to an action, either for an escape or a false return, or for negligence in not taking the defendant, no actual negligence being proved; and the plaintiff was non-suited.

Note, the writ returned *cepi corpus* was a *latitat*, returnable three or four days after the other process, which was an original, but that difference was not, in this case, considered as material.

If a person out upon bail renders himself in discharge of his bail, and a *redditis* is entered in the judge's book, and a *commitment* filed in the office, and the prisoner afterwards escapes; yet if no notice was given to the marshal of such render, nor no entry made of the commitment in his book, the prisoner shall not be deemed in custody to as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial. *1 Salk. 272, 3. Fide post.*

It hath been held, that entering a *commitment* upon the roll was not sufficient to charge the marshal with any escape, without proving an actual imprisonment, but that proving the party to be actually in prison, though there be no entry made in the marshal's book is sufficient. *1 Sid. 210: 1 Keb. 775.*

And now, for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, it is enacted, by *Stat. 8 & 9 W. 3. c. 27. §. 9.* "That if any one, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand, at his office for that purpose, or, in default thereof, shall forfeit the sum of 50*l.* and if such marshal or warden, or their respective deputy, &c. exercising the said office, or other keeper, &c. of any other prison, shall give a note in writing that

E S C A P E, (A). I. 2. 3.

such person is an actual prisoner in his or their custody, every such note shall be taken as a sufficient evidence, that such person was at that time a prisoner in actual custody."

A *commitment* upon the roll is good evidence in escape, without an entry in the marshal's book. *Ld. Raym.* 705.

2. Every person in prison by process of law is to be kept *in salutis et animae custodiā*, in order to compel them the more speedily to pay their debts, and make satisfaction to their creditors. *Plowd.* 36: 3 Co. 44: 2 Inst. 381: 1 Rol. Ab. 806.

If therefore a defendant *being taken in execution*, be afterwards seen at large, for any the shortest time, even before the return of the writ, this is an escape. 2 Bl. Rep. 1048.

Persons in the King's Bench and Fleet prisons, are to be actually detained within the said prisons; and if they escape, action of debt lies against the warden, &c. 1 R. 2. c. 12. But now the marshal or warden grant the liberty of the rules to such as they think proper, (not criminally charged,) on proper security. Keepers of those prisons suffering prisoners either upon contempt or mesne process, or in execution, to be out of the rules (except on rule of court, &c.) are guilty of an escape; and persons conniving at an escape shall forfeit 500*l.* &c. by 8 & 9 W. 3. c. 27. And by this statute, where any prisoner in execution escapes, the creditor may have any other new execution against him.

If the bailiff of a liberty, who has the return and execution of writs, remove a prisoner taken in execution to the county gaol, situated out of the liberty, and there deliver him into the custody of the sheriff, this is an escape for which an action of debt lies. 2 Term Rep. 5.

By Stat. 5 An. c. 9, If any person in custody, for not performing any decree in Chancery, &c. escape, the party for whom the money is decreed may have the same remedy against the sheriff, as if the prisoner had been in custody on *certiorari*. A prisoner in execution should not be allowed to go out of the gaol; for if he goes out, though he returns again, it is an escape. 3 Rep. 43, 44: 2 Inst. 380, 381. And yet in London, by special custom there, in some cases the prisoner may go abroad with his keeper, and it will be no escape. *Ibid.*—See *Hob.* 202. Where the justice of the court, and plaintiff in the suit, agree that the prisoner shall be at liberty, and he go out and return at his time; it is no escape: but this may not be without the sheriff's consent. *Doe* 275.

If a plaintiff by word licente the sheriff to deliver the prisoner, no action will lie for this as an escape. 27 H. 8. 24.

If there be an escape by the plaintiff's consent, when he did not intend it, the law is hard that the debt should be thereby discharged; as where one was in execution in *R.* and some proposals being made to the plaintiff in behalf of the prisoner, seeing there was some likelihood of an accommodation, the plaintiff consented to a meeting in a certain place in London, and desired the prisoner might be there, who came accordingly: this was held to be an escape, with the plaintiff's consent, and he could never after be in execution at his suit for the same matter. 2 Mod. 136.

It hath been adjudged no escape to let a prisoner go where the sheriff hath the prisoner in custody, if it be before the return of the writ: it is sufficient if the officer

have the party at the return of the writ. &c. *Moog* 299: 1 Salk. 401: 2 Nels. 739, 740. Yet it hath been held, that where a *habere corpus* is granted to bring a person into court, if the sheriff on the way let him go at large in the county, or carry him round about a great way, &c. it will be an escape. 1 Mod. 116. And an escape in one place is an escape in all places; for a prisoner being once escaped, and at large, it shall be intended he is confined to no place. 1 Lil. Abr. 537. Committing the marshal of the Marshalsea to prison, was held an escape in law of all the prisoners there. See *Style* 375.

If a woman, warden of the Fleet prison, marries her prisoner, or if a sheriff, &c. marries a woman in execution with him, in either case it will be deemed an escape in law. *Plowd.* 17.

If a man hath judgment against two persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody. 1 Rol. Abr. 810. But in an action on the case, tried before Lord Mansfield, in *Swiry*, for an escape of one of two defendants, under very favourable circumstances for the officer, his Lordship left it to the jury, whether they would find the whole of plaintiff's debt, in damages, or only half, and the jury found only half.

By Stat. 8 & 9 W. 3. cap. 27. sect. 8, It is enacted, "That if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to shew any prisoner committed in execution, to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law."

3. In civil actions the sheriff is to answer for the escape of his bailiff; as the bailiff is for that of his servant: and action on the case lies against the sheriff for an escape upon mesne process, because the plaintiff is prejudiced in his suit by it. *Co. Plaz.* 623, 625: 1 Danv. Abr. 183.—See also *Co. Jus.* 419: *Dyer* 241.—See *Bull. Ni. Pri.* 59, 60. Where a person is in custody on mesne process, and being outlawed after judgment at the suit of another, the judgment creditor brings a warrant on a *capias utlagatum*, and delivers it to the sheriff's officer, who hath him in custody; if the officer afterwards permits the person to escape, though he refuse to execute the warrant, the sheriff is chargeable in action on the case. 5 Rep. 89.

Where one has the custody of a gaol of freehold or inheritance, and commits it to another person, who is insufficient, the superior is answerable for all escapes suffered by his inferior; but if the inferior be sufficient, the action should be brought against him, and not against the superior. See 9 Co. 98: 2 Jun. 60: 2 Lev. 158: 1 Vent. 314: 2 Mod. 119 & 4 Rep. 98.

Also by Stat. 8 & 9 W. 3. cap. 27. sect. 11, it is enacted, "That the offices of marshal of the King's Bench prison and warden of the Fleet, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, &c. of the said prisons, or either of them, shall then belong respectively, in his or their respective proper person, &c. or by their sufficient deputies; for which deputies, and for all forfeitures, escapes, and other misdemeanors in their offices by such deputies permitted,

&c.

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Or, the said person, in whom the aforesaid inheritances respectively are, shall be answerable; and the profits and inheritances of the said offices shall be sequestrated, &c. to make satisfaction for such forfeitures, escapes, &c. respectively, as if permitted, &c. by the persons themselves, in whom the respective inheritance of the said prisons shall then be."

A prisoner escapes out of the *King's Bench*, or *Marshall's*, or the *Fleet*; the keeper of the prison out of which he escaped is to be charged with it; but if the escape be from either of the *Counters*, the action must be brought against the sheriffs of *London*. *Dyer* 278: 3 *Rep.* 52.

Action of escape against the warden of the *Fleet* for an escape upon *mesne process*; the prisoner returns to the *Fleet* the same day, and the plaintiff afterwards proceeds to final judgment against him, yet the action lies against the warden. 1 *Wils.* 294. In an escape upon *mesne process* out of the borough court, brought in *B. R.* against the bailiff thereof, the defendant shall not take advantage in *B. R.* of any error in the process below. 1 *Wils.* 255.

Action of escape will not lie against the executor or administrator of a sheriff, &c. for an escape, because it was *personal*, and *moritur cum persona*: but it may be otherwise if there be a judgment recovered against the sheriff before he died. *Dyer* 322. See post III. 2.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor. *Cro. Eliz.* 625. But the death should be suggested. By *Stat.* 8 & 9 *W. 3. c. 11. sect. 7*, the death of one plaintiff or defendant, where the action will survive *to*, or *against* the survivor, shall not abate the suit. But the death must be suggested on the roll. See title *Abatement*.

An old sheriff omits turning over a prisoner in execution to the new sheriff; it is said to be an *escape*; so where there are two executions against a man, and in the indenture of turning over mention is made but of one, &c. 3 *Rep.* 71.

II. There are two kinds of escapes; *voluntary* and *negligent*: *Voluntary*, is when one arrests another for felony, or other crime, and lets him go by consent; in which case the party that *permits the escape* is esteemed guilty of the crime committed, and must answer for it: *Negligent escape*, is when one is arrested, and afterwards escapes against the will of him that arrested him, or had him in custody; and is not pursued by fresh suit, and taken again before the party pursuing hath lost sight of him. *Crompt. Just.* 36. And for these negligent escapes, the gaoler, &c. is to be fined. One *negligent* escape will not amount to a forfeiture of a gaoler's office, as one *voluntary* one will; but many negligent escapes will do it: and the fine for suffering a negligent escape of a person *attainted*, was by the Common law of course 100*l.* and in other cases at the discretion of the court. 3 *Lev.* 288; 2 *Lev.* 81.—See post as to *Escapes in Criminal Cases*.

If any prisoner escapes who was in execution, his creditors may retake him by *cap. ad satisfac.* or bring action of debt on the judgment, or a *scire facias* against him, &c. 1 *Vent.* 269; 3 *Salk.* 160. If a man escapes, with the consent of the gaoler in a civil case, he cannot retake

him. 3 *Rep.* 32, 52: 1 *Sid.* 330. But the plaintiff may retake him at any time. *Stat.* 8 & 9 *W. 3. c. 27*.

If the plaintiff permit the prisoner to escape, he cannot afterwards retake him; and if the body and goods, &c. of a consor are taken in execution upon a statute-merchant, if the consor agrees that he shall go at large, it is a discharge of the whole execution, and the consor shall have his lands again: it is otherwise if the sheriff had permitted him to escape, the execution on the lands would not be discharged. 2 *Nels. Abr.* 737.

A difference is to be observed between *permissive* and *negligent escapes*, with respect to the sheriff; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him. *Carter* 212.

An escape from the rules of the *King's Bench* prison, without the *Marshal's* knowledge, is not a *voluntary* escape. 2 *Term Rep.* 126.

If the marshal of the *King's Bench*, or warden of the *Fleet*, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office. 3 *Mol.* 146: *Carter* 212. And there is likewise a farther penalty of 500*l.* added by 8 & 9 *W. 3. c. 27*, above-mentioned.

There is this difference between an escape on *mesne process* and *execution*; if the sheriff arrest a person on *mesne process*, and he is rescued by *J. S.* he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him; for in this case, though the sheriff may, yet he is not obliged to raise the *posse comitatus*. 1 *Rel. Abr.* 807: 1 *Jon.* 207: 1 *Rel. Rep.* 388: 3 *Lev.* 46. But after judgment on a *capias ad satisfaciendum*, the sheriff cannot return a rescue, for in such case the sheriff is obliged to raise the *posse comitatus*, if needful, and, therefore, if he return a rescue, an action of escape lies, or a new *capias*; for the return of an ineffectual execution is as none. 1 *Rel. Abr.* 807: *Cro. Car.* 240, 255: 2 *Co.* 42.—See *Ni. Pri.* 59, 60, and 6 *Rep.* 51: *Cro. Eliz.* 868. and this Dictionary title *Rescue*.

III. 1. At Common law the plaintiff had no remedy against the sheriff for an escape, whether upon *mesne process*, or in execution, but by special action upon the case. 2 *Inst.* 382: 1 *Shro.* 176: 2 *Saund.* 34: *Haid.* 30.

But now, by an equitable construction of *Westm.* 2, 13 *E. 1. cap. 11*, action of debt is given against the sheriff; and by *Stat.* 1 *Rich. 2. cap. 12*, against the warden of the *Fleet*; (which extends to all gaolers and keepers of prisons though infants or feme covert. 2 *Ind.* 382;) for escapes in execution.

The plaintiff, at his election, may maintain either an action upon the case, or debt, for an escape in execution. *Cro. Jac.* 361, 533, 619: *Cro. Eliz.* 877: *Dyer* 278*b*. See 1 *Jon.* 144; 1 *Syd.* 304. *S. C.*

If a prisoner in custody upon a *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him in his own right. *Cro. Jac.* 361, 533, 619: *Cro. Eliz.* 877.

An action of escape is not a local action, and therefore if one escape out of the *Marshall's*, which is in *Surrey*,

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the action may be laid in *M. d. l. s. c.* Dyer 278 b. See 1 Jon. 144: 1 Sid. 354. S. C.

It is usual now, on an escape on *in fine process*, to declare against the sheriff, &c. in *case*: on execution, in *debt*.

The distinction seems now to be thus settled.—If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process to escape, he is liable to an action *on the case*. Cro. Eliz. 625: Com. 69.—But if, after judgment, a gaoler or sheriff permits a debtor to escape who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated, and ascertained, to satisfy the creditor his whole demand. 2 Inst. 382.

In debt against the sheriff or gaoler for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, and the legal fees of execution. 2 Term Rep. 126.

2 In this action it is not necessary to set forth all the formalities required by law in other cases. Cro. Eliz. 877: See 2 Strou. 424.

Therefore, if upon a judgment obtained by the testator, the executor brings a *fiere facias*, and has judgment, whereupon a *capias ad satisfaciendum*, and B. is arrested, and suffered to escape, the plaintiff, in an action against the sheriff for this escape, may declare briefly upon the judgment in the *scire facias*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment. Carth. 148, 149: 3 Mod. 324, S. C. Cro. Eliz. 877.

So if a defendant is arrested on a *special capias*, founded on an original returnable in B. R. in action for his escape, it is not necessary to set forth the original.

If the plaintiff declares that he sued out a writ of execution against J. S. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading *nil trel record*, which he might do if the plaintiff had set forth the judgment. 1 Saund. 37, 38: 1 Lev. 191. and 1 Sid. 306. S. C. See title *Debt*.

If A. recovers against B. as executor, and has him in execution and the sheriff suffers him to escape, the action must be brought as executor in the *debt* only, and not in the *debet* and *detinet*. 1 Lutw. 893: Comb. 114: S. C.

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say, *prout patet per recordum*; yet upon a general demurrer this shall be good; for the gist of the action was the escape, and the commitment only inducement. 2 Salk. 565: 5 Mod. 8. S. C. See 3 Lev. 393.

If in escape the plaintiff declares, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture) and that he escaped; this is sufficient, and the plaintiff shall have judgment; for the substance of the issue is found, though not pursuant to the declaration. 1 Sid. 5.

So in an action on the case for the escape of A. where the jury found that A. was taken by J. S. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that

he suffered him to escape, the plaintiff had judgment. Cro. Jac. 380.

An administratrix may maintain an action in her own name against the marshall for the escape of a prisoner in execution on a judgment obtained by her as administratrix. 2 Term Rep. 126.

Under a count for a *voluntary* escape, the plaintiff may give evidence of a *negligent* escape; and the defendant may plead a re-taking on a fresh pursuit to such count without traversing the voluntary escape. *Id. Ibid.*

In debt for an escape against the sheriff, the indorsement of *non est inventus* on the *ca. sa.* is sufficient evidence of its having been delivered to him. But a legal arrest must be proved in such action. Cowp. 63.

By the Stat. 8 & 9 W. 3. cap. 27. sect. 12, it is enacted "That it shall be lawful for any person, having cause of action against the warden of the Fleet prison, upon bill filed in the courts of Common Pleas or Exchequer against the warden, and a rule being given to plead there-to to be out eight days at most after filing such bill, to sign judgment against the warden, unless he plead to the bill within three days after such rule is out."

IV. If the prison takes fire, by means whereof the prisoners escape, this shall excuse the sheriff, and he may well plead it. 1 Rol. Abr. 808.

So if the prison is broke by the King's enemies, this shall excuse the sheriff, for he can have no remedy over against them. 4 Co. 84: 1 Rol. Abr. 808.

But if the prison was broke by *rebels* and *traitors*, the King's subjects, this shall not excuse him, for he may have his remedy over against these. *Ibid.*

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other county; and if he retakes the prisoner on fresh pursuit before action brought, it shall excuse the sheriff, for there the prisoner shall be said to be in execution still. 3 Rep. 44: Cro. Jac. 657: 1 Jon. 144: 1 Rol. Abr. 808. And where the sheriff is to answer the debt and damages for such escape, he shall have his counter remedy against the party escaping; and may take him at any time and place, and imprison him till he hath satisfied the sheriff as much as he hath paid to the plaintiff; or he may bring an action upon the case against the prisoner, and so relieve himself. 5 Rep. 52: Cro. Eliz. 393.

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. See 1 Mod. 116: 1 Sid. 13.

But now, by Stat. 8 & 9 W. 3. cap. 27. sect. 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner for whose escape such action is brought, did, *without his consent, privacy or knowledge*, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 500*l.*" See title *Sheriff*.

A voluntary return of a prisoner, after an escape, before action brought is equivalent to a re-taking on a fresh pursuit: but it must be pleaded. 2 Term Rep. 126.

Next

ESCAPE, (B). I. II.

(B). Next as to ESCAPES IN CRIMINAL CASES.

- I. 1. *When shall be deemed an Escape; 2. where it shall be adjudged Voluntary, and where Negligent.*
- II. *Where the Prisoner may be re-taken after an Escape, and where the Escape is excused by such a Re-taking; or by Killing the Prisoner, if he cannot be re-taken.*
- III. 1. *How the Officer suffering an Escape is to be indicted, and 2. how the Escape is to be tried and adjudged.*
- IV. *Of the Punishment of 1. voluntary, and 2. negligent Escapes; and 3. Of Persons aiding and assisting Prisoners to attempt their Escape.*

I. 1. A man must be committed to prison by lawful mittimus; or breach of prison and escaping is not felony. If a party is committed for treason, to break prison and escape is but felony; but if a prisoner let out traitors, it will be treason. *H. P. C. 109: 2 Inst. 590.* Where one is imprisoned for petit larceny, or killing a man *se defendendo*, &c. to break prison and escape is not felony; and if a prison be set on fire, not by the privy of the prisoner he may break prison for the safety of his life. *2 Inst. 590.* A gaoler refusing to receive a person arrested by the constable for felony, whereby he is let go, is guilty of an escape; but there must be an actual arrest, which arrest must be justifiable, to make an escape; for if it be for a supposed crime, where no crime was committed, and the party is neither indicted nor appealed, &c. it is no escape to suffer a person to go at large. *1 & 2 Coron. 224: Bro. Esca 27, 28.* If a private person arrest another for suspicion of felony, he is to deliver him to a public officer, who ought to have the custody of him; for if he let him go, it will be an escape. *2 Hawk. P. C. c. 19.* And if no officer will receive him, he is to deliver him to the township where arrested; or get him bailed.

1. A mere private man, knows *B* to have committed felony, and thereupon arrests him; he is lawfully in custody of *A*. until he be discharged, by delivering him to a constable or common gaol; and therefore if he voluntarily suffers such person to escape, though he were no officer, nor *B*. indicted, it is felony in *A*. But it is otherwise if he never takes him nor attempts it, and lets him go. *1 Hale's Hist. P. C. 594.* Justices of peace in their sessions are empowered to inquire of escapes of persons arrested, and imprisoned for felony. *Stat. 1 R. 3. c. 3.*

2. There can be no doubt, but that where-ever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him, either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with. And it seems to be the opinion of Sir Matthew Hale, that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which by the law he hath no colour of right to give him.

Thus, to bail a person not bailable by law is a negligent escape. *Plowd. 476.* And it is said that the crime is equal in a justice of peace, for taking a felon out of prison, without bail; or suffering him to go at large

without commitment, &c. where the offender confesseth the felony, as it is in the case of a gaoler's permitting an escape. *Dalt. 382.*

If the gaoler so closely pursue the prisoner, who flies from him, that he retake him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape; and *a forinvi* therefore, if he kill him in the pursuit, he is in like manner guilty, tho' he never lost sight of him, and could not otherwise take him, not only because the King loses the benefit he might have had from the attainder of the prisoner, by the forfeiture of his goods, &c. but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. *2 Hawk. P. C. c. 19. See post. Div. II.*

II. It seems to be clearly agreed by all the books, that an officer making a fresh pursuit after a prisoner, who hath escaped through his negligence, may retake him at any time after, whether he find him in the same or in a different county. And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him where-ever he finds him, without mentioning any fresh pursuit; and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. But where a gaoler hath voluntarily suffered a prisoner to escape, it is said by some that he can no more justify the retaking him, than if he had never had him in custody before, because by his own free consent he hath admitted, that he hath nothing to do with him.

Wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is shabby at the discretion of the court, notwithstanding he retook him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which implies an offence, and consequently that it must be punishable. It is true indeed, that in an action against a gaoler for suffering one arrested in a civil action to escape, it is a good excuse for the gaoler, that before the action brought, he took the prisoner upon *fresh suit*, which is well maintained by shewing that he pursued him *in mediocritate*, after notice of the escape, though it were some hours after it, and retook him; but it does not from hence follow, that the like excuse will serve for the negligent escape of a criminal, because this is an offence against the publick, but the other is only a private damage to the party: neither will it be an hardship to the officer, to be exposed to such punishment as the court, in discretion, shall think fit to impose upon him for the negligent escape of a criminal, as it would be to be liable to an action of escape, for suffering a person in his custody, in a civil action, to escape; for that in the former case the court would moderate his fine according to the circumstances of the whole matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all reasonable care; but in the other case, if he should be liable to an action, his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt, for which the party was in custody.

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If the escape should be adjudged against him. However it is certain, that it will be no advantage to a gaoler to re-take his prisoner, after he has been fined for the escape, as is shown in the precedent section of *Hawk. P. C.* also it is clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be contented to submit to such fine as his negligence shall appear to deserve. 2 *Hawk. P. C. c. 19.*

III. 1. The indictment must expressly shew, that the party was actually in the defendant's custody for a crime, action, or commitment for it; and that it is not sufficient to say, that he was in the defendant's custody, and charged with such a crime; for that a person in custody may be so charged, and yet not be in custody by reason of such charge: and it seems also, that every such indictment must expressly shew that the prisoner went at large. Also it seems necessary, to shew the time when the offence was committed, for which the party was in custody, not only that it may appear, that it was prior to the escape, but also that it was subsequent to the last general pardon. Also it seems clear, that every indictment for a voluntary escape must, alledge that the defendant *feloniè & voluntarie A. B. aut laudem re permisit*; and must also shew the species of the crime for which the party was imprisoned; for it is not sufficient to say in general, that he was in custody for felony, &c.

The crime of the prisoner escaping, for which the gaoler is answerable, must be such as it was at the time of the escape; as where a person is committed for dangerously wounding another, it is trespass only, and not felony, till the party wounded is dead: and he who suffers another to escape who was in custody for felony, cannot be arraigned for such escape as for felony, until the principal is attainted, but he may be indicted and tried for misprision before the attainder of the principal. And in high treason it is said the escape is immediately punishable, whether the party escaping be ever convicted or not. 2 *Hawk. P. C. c. 19.* See post IV. 1.

2. Where persons, being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any further inquiry, unless he have some reasonable matter to alledge in his excuse; as that the prison was set on fire, or broke open by enemies, &c. for he shall be concluded, by the record of the commitment, to deny that the prisoners were in his custody. 2 *Hawk. P. C. c. 19.*

As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented; for by *Stat. West. 1. c. 3.* it is enacted that "Nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief, or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as he or they have taken or received, and as much also unto the King."

It hath been adjudged, that this statute restrains on the court of King's Bench from receiving such presentments; for that its jurisdiction includes in it that of justices in eyre, and this court is itself the highest court of eyre. 2 *Hawk. P. C. c. 19.*

It is farther enacted by *Stat. 31 Ed. 3. c. 14.* "That the escape of thieves and felons, and the chattels of felons, and of fugitives, and also escapes of clerks convicted, out of their ordinary's prison, from thenceforth to be judged before any of the King's justices, shall be levied from time to time, as they shall fall, as well of the time past as time to come." By which it seems to be implied, that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain, that justices of gaol-delivery may punish justices of peace for a negligent escape, in admitting persons to bail, who are not bailable. 2 *Hawk. P. C. c. 19.*

And it is farther enacted, by *Stat. 1 Ric. 3. cap. 3.* "That justices of peace shall have authority to inquire, in their sessions, of all manner of escapes of every person arrested and imprisoned for felony."

Wherever an escape is finable, the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive; such amercements being reckoned among those *minima de quibus non curat lex*; and this distinction seems to be well warranted by the old books. 2 *Hawk. P. C. c. 19.*

IV. 1. A voluntary escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass; and whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed: and it is said to be no excuse of such escape, that the prisoner had been acquitted on an indictment of death, and only committed till the year and day be passed, to give the widow or heir of the deceased, an opportunity of bringing their appeal, 1 *Hawk. P. C. c. 19.*

But the officer cannot be thus punished till the original delinquent hath actually received judgment, or been attainted upon verdict, confession, or outlawry of the crime for which he was so committed or arrested: otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might be acquitted of the charge against him. But, before the conviction of the principal party, the officer thus neglecting his duty may, be fined and imprisoned for a misdemeanor. 1 *Hal. P. C. 588, 9.* 2 *Hawk. P. C. c. 19.*

Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he were never to rightfully intitled to such custody; for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason, but because he is a wrongful one. 2 *Hawk. P. C. c. 19.*

Also if the warrant of a commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems, that

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that it may be probably argued, that the gaoler suffering an escape, is as much punishable, as if the prisoner were actually taken. *2 Hawk. P. C. c. 19.*

None shall suffer capital punishment for the crime of another, so that a principal gaoler is only liable for a voluntary escape suffered by his deputy. *2 Hawk. P. C. c. 19.*

2. Whoever *de facto* occupies the office of gaoler is liable to answer for a negligent escape; and it is no way material whether his title to the office be legal or not. *2 Hawk. P. C. c. 19.* A sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself, and the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him; but if the gaoler who suffers an escape, have an estate for life, or years in the office, it is not agreed how far he in reversion is liable to be punished. *2 Hawk. P. C. c. 19.*

Wherever a person is found guilty, upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the King, which seems most properly to be called a Fine.

It hath been holden, that a negligent escape may be pardoned by the King before it happens, but that a voluntary one cannot so be pardoned. *2 Hawk. P. C. c. 19.*

And it seems by the Common law, the penalty for suffering the negligent escape of a person attainted, was of course 100*l.* and for suffering such escape of a person indicted, and not attainted, was 5*l.* but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and if the party had twice escaped, it seems, that the penalties above mentioned were of course to be doubled; yet it seems, that the forfeiture was to be no greater for suffering a prisoner, committed on two several accusations, to escape, than if he had been committed but on one. *2 Hawk. P. C. c. 19.*

As to the manner offences of this kind are punishable by statute, it is recited by *Stat. 5 Ed. 3. c. 8*, "That persons indicted of felonies in times past, had removed the indictments before the King and there yielded themselves, and by the marshals of the King's Bench had been incontinently let to bail, and after had done many evil deeds, &c." And thereupon it is enacted, "That if any such prisoner be found wandering out of prison, by bail, or without bail, and that he be found at the King's suit, or at the suit of the party, the marshal which shall be found thereof guilty, shall have half a year's imprisonment, and be ransomed at the King's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer by their assent such prisoners to escape, they shall be at law, as before the time of the statute they had been. And the King intendeth not by this statute to lose the escape, where he ought to have the same."

Also it is enacted by *Stat. 19 H. 7. c. 10*, "That every sheriff have the custody of the King's common gaols, during the time of his office, except all gaols whereof any person or persons have the keeping of estate of inheritance."

And that all letters patent made for term of years, or years, of the keeping of the said gaols, &c. shall be annulled and void. The penalties for escapes, inflicted by the subsequent part of this statute, have been expired about 300 years. See *Ruffhead's Statutes: 1 Burn's Jurr. and Keble's Hawk. P. C. ii. c. 20. § 35. p. 207.*

3. By *Stat. 16 Geo. 2. c. 31*, It is enacted, That persons who in any ways assist a prisoner, committed for treason, or felony, to attempt his escape from any gaol, shall be adjudged guilty of felony and be transported; and if the prisoner be committed for any other crime; or upon process for 100*l.* debt, &c. the offenders are liable to fine and imprisonment. And where any person renders any arms, instrument or disguise, to a prisoner in gaol for felony, &c. or for his use, in order to an escape, it is likewise felony and transportation. Also if one assist any prisoner to escape from any constable, or other officer or person in whose custody he is, by virtue of a warrant of commitment for felony, it is declared to be the like offence.

See also *Stat. 6 Geo. 1. c. 23. § 5: 24 Geo. 3. c. 56*; where to assist felons convict to make their escape from the persons to whom they are delivered to be transported is felony without clergy. See *3 P. Wm. 439.*

The indictment on the above *Stat. 16 Geo. 2. c. 31*, must state that the instruments were conveyed to the prisoner, with a design to effectuate his escape. But no indictment can be maintained on this statute for contributing to the escape of a prisoner committed on suspicion only. See *Litch's Hawk. P. C. ii. c. 21. § 11.*

See further, relative to this subject of assisting prisoners to escape, this Dict. title *Rescue*: and *2 Hawk. P. C. c. 21.*

See further as connected with the general subject of Escape, titles *Prison-breaking*, *Prisoner*.

RESCAPE-WARRANT. If any person committed or charged in custody in the King's Bench or Fleet prison, in execution, or on mesne process, &c. go at large; on oath thereof before a judge of the court where the action was brought, an escape-warrant shall be granted, directed to all sheriffs, &c. throughout England, to retake the prisoner, and commit him to gaol where taken, there to remain till the debt is satisfied: and a person may be taken on a Sunday upon an escape-warrant. *Stat. 1 Ann. c. 6.* And the judges of the respective courts may grant warrants, upon oath to be made before persons commissioned by them to take affidavits in the country, (such oath being first filed) as they might do upon oath made before themselves. *5 Ann. c. 9.*

A sheriff ought not to receive a person taken on an escape-warrant, &c. from any but an officer; not from the rabble, &c. which is illegal. *3 Salk 149.* A person being arrested and carried to Newgate by virtue of an escape-warrant, moved to be discharged, because he said he was abroad by a day-rule when taken; but it appearing by affidavit, that he was taken upon the escape-warrant before the court of B. R. sat that morning, they refused to set him at liberty. *2 Ld. Raym. 927.*

ESCAPIO QUIETUS. He that by charter is *quietus de escapio*, is delivered from that punishment which by the laws of the forest lieth upon those whose beasts are found within the land where forbidden. *Crompt. Jurisd. 196.*

ESCHEAT.

ESCAPIUM. Hath been used for what comes by chance or accident. *Cowel.*

ESCEPPA, A Stopp, or measure of corn. *Mon. Ang. tom. 1. p. 283, See Sceppa.*

ESCHEAT. *Escheata*: from the old French *eschair* to fall, or happen.] The casual descent, in the nature of forfeiture, of lands and tenements within his manor to a lord; either on failure of issue of the tenant dying seized, or on account of the felony of such tenant. See this Dict. title *Tenure*, II 7: and 2 *Comm.* 251—256.

By attainder, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable. Great care must be taken to distinguish between forfeiture of lands to the King, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. But in fact escheat operates in subordination to this more ancient and superior law of forfeiture. 2 *Inst.* 64: *Salk.* 85: See title *Forfeiture*; *Tenure*.

The doctrine of escheat upon attainder, taken singly, is this, that the blood of the tenant, by the commission of any felony; (under which denomination all treasons were formerly comprised. 3 *Inst.* 15: *1st. 25 Ed.* 3. c. 2. § 17) is corrupted and stained, and the original donation of the feud is thereby determined. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason for ever, in case of other felony, for only a year and a day. 2 *Inst.* 36: See title *Tenure* II. 7.

It has been holden, that a saving against the corruption of blood in a statute concerning felony, doth by consequence save the land to the heir, so as not to escheat; because the escheat to the lord for felony is only *pro defectu hereditatis*, occasioned by the corruption of blood: but it hath been adjudged, that a saving against the corruption of blood, in a statute concerning treason, doth not save the land to the heir: for in treason the land goes to the King by way of immediate forfeiture. 3 *Inst.* 47. 1 *Salk.* 85.

Inheritances of things not lying in tenure, as of rents, commons, &c. cannot escheat to the lord, because there is no term: nor descent, by reason the blood is corrupted: though they are forfeited to the King by an attainder of treason, and the profits of them shall be also forfeited to the King on attainder of felony, during the life of the offender; and after his death it is said the inheritance shall be extinguished. 2 *Hack. P. C.* c. 49. which see.

In case of escheat, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he has at the time of his offence committed shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This further illustrates the distinction between forfeiture and escheat. If therefore a father be seized in fee, and the son commits treason and is attainted, and then the father dies:

the land shall escheat to the lord, because the son by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life, but nothing shall be forfeited to the King, for the son never had any interest in the lands to forfeit. *Co. Litt.* 13. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood. Here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the King for a year and a day, and so long after as the offender lives. 3 *Inst.* 47. See titles *Attainder*; *Forfeiture*.

Husband and wife, tenants in special tail; the husband is attainted of treason and executed, leaving issue; on the death of the wife the lands shall escheat, because the issue in tail ought to make his conveyance by father and mother, and from the father he cannot by reason of the attainder. *Dyer* 322. If tenant in fee simple is attainted of treason, and executed, upon his death the fee is vested in the King, without office found, yet he must bring a *scire facias* against the tenants; lands shall never escheat to a lord of whom they are holden, until office found. 3 *Rep.* 10.

Escheat seldom happens to the lord for want of an heir to an estate; but when it doth, before the lord enters, the *homage jury* of the lord's court ought to present it. 2 *Inst.* 35. Land shall escheat to the lord, where heirs are born after attainder of felony, 3 *Rep.* 40. Though if the King pardons a felon before conviction, the lord shall not have his lands by escheat; for the lord hath no title before attainder. *Owen* 67: 2 *Nell. Abr.* 744. If on appeal of death or other felony, process is awarded against the party, and pending the process he conveyeth away the land, and after is outlawed, the conveyance is good to defeat the lord of his escheat; but if where a person is indicted of felony, pending the process against him, he conveys away his land, and afterwards is outlawed, the conveyance shall not prevent the lord of his escheat. *Co. Litt.* 13. See further this Dict. titles *Attainder*, *Corruption of Blood*; *Forfeiture*.

As a consequence of this doctrine of escheat, all lands of inheritance immediately reverting in the lord, the wife of the felon was liable to lose her dower, till the *Stat.* 1 *Ed.* 6. c. 12: and still by *Stat.* 5 & 6 *Ed.* 6. c. 11, the wife of one attaint of high treason shall not be endowed. See title *Dower*.

There is one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a Corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by the escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. See title *Corporation*.

ESCHEATOR, *eschætor*] Was an officer appointed by the Lord Treasurer, &c. in every county, to make inquests of titles by escheat; which inquests were to be taken by good and lawful men of the county, impanelled by the sheriff. *Stats.* 14 *Ed.* 3. c. 8. 34 *Ed.* 3. c. 13. 8 *H.* 6. c. 16. These escheators found offices after the death of the King's tenants,

ESCHEATOR.

tenants, who held by knight-service, or otherwise of the King; and certified their inquisitions into the Exchequer; and Fitzherbert called them officers of record. *P. N. B.* 100. No *eschetor* could continue in his office above one year; and whereas before the statute of *Westm.* i. c. 24. *Escheators*, sheriffs, &c. would seize into the King's hands the freehold of the subjects, and thereby disseise them; by this act it is provided that no seizure can be made of lands or tenements into the King's hands, before office found. *3 Inst.* 206. And no lands can be granted before the King's title is found by inquisition. *Stat.* 18 H. 6. c. 6. The office of *eschetor* is an ancient office; and was formerly of great use to the crown; but having its chief dependance on the court of wards, which is taken away by act of parliament, it is now in a manner out of date. *4 Inst.* 225. There was anciently an officer called *Escheator of the Jews*. *Claus.* 4 Ed. 1. m. 7.

ESCHECCUM. A jury or inquisition. *Matt. Paris.* Anno. 1240.

ESCHIPARE. To build or equip.—*Du Cange.* See *Eschippamentum*.

ESCROW. A deed delivered to a third person, to be the deed of the party making it, upon a future condition, when a certain thing is performed; and then it is to be delivered to the party to whom made. It is to be delivered to a stranger, mentioning the condition; and has relation to the first delivery. *2 Rol. Abr.* 25, 26: *Co. Lit.* 31. A delivery as an *escrow* signifies, in fact, as a *scrowl* or writing, which is not to take effect as a deed, till the condition be performed. *Co. Lit.* 36. See title *Deed* III. 7.

ESCUAGE. See title *Tenure* II. 8.

ESCURARE. To scour or cleanse. *Charta Antiqua.*

ESGLISE. Fr.] A church; in the old books a division containing the law relative to *advowsons*, *churchwardens*, &c. *L. Fr. Dist.*

ESSINGÆ. The Kings of Kent, so called from the first King Oetha, who was surnamed *Ese*: he was grandfather of King Ethelbert.

ESKETORES. from the Fr. *eschetor*.] Robbers or destroyers of other men's lands and fortunes.—*Plac. Parl.* 20 Ed. 1.

ESKIPPAMENTUM. *Skippage*, tackle or ship furniture: *Sir Rob. Cott.*

ESKIPPER. Fr.] To ship, and *skipped* is used for shipped. *Crompt. Jur. Cur.*

ESKIPPESON. Shipping or passage by sea. *Humphrey Earl of Bucks*, in a deed dated 13 Feb. 22 H. 6, covenants with Sir Philip Cherbwind, his lieutenant of the castle of Calais, to give him allowance for his soldiers, *skippeson* and *re skippeson*, viz. passage and re-passage by ship.

ESLISORS. See *Elsons*.

ESNECY. *æsnecia*, *dignitas primogeniti*.] A private prerogative allowed to the eldest coparcener, where an estate is descended to daughters for want of heir male, to choose first after the inheritance is divided. *Fleta*, lib. 5. c. 10. *Jus æsnecia* is *jus primogenituræ*; in which sense it may be extended to the eldest son, and his issue, holding first: In the statute of *Marlebridge*, cap. 9, it is called, *initia par: hereditaria*. *Co. Litt.* 166. See title *Election*.

ESPERONS. Spurs, *esperons de or*, gilt spurs. *7 Co. Rep.* 13.

ESPERVARIUS. Fr. *espervier*.] A sparrow-hawk. *Chart. Forest.* cap. 4.

ESQUIRE.

ESPLEES. *expletia*, from *explet*.] The products which ground or land yield; as the hay of the meadows, the herbage of the pasture, corn of the arable, rent and services, &c. And of an advowson, the taking of tithes in gross by the parson; of wood, the selling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll, &c. These and such like issues are termed *esplees*. And it is observed, that in a writ of right of land, advowson, &c. the demandant ought to alledge in his count, that he or his ancestors took the *esplees* of the thing in demand; otherwise the pleading will not be good. *Trin. de Ley*. Sometimes this word hath been applied to the farm, or lands, &c. themselves.—*Plac. Parl.* 30 Ed. 1.

ESPOUSALS. *ponsalia*.] Are a contract or mutual promise between a man and a woman to marry each other; and where marriages may be consummated, *esponsals* go before them. Marriage or matrimony is said to be an *esposal de presenti*, and a conjunction of man and woman in a constant society. *Wood's Inst.* 57. See title *Marriage*.

ESQUIRE. from the Fr. *Escu*, and the Lat. *Scutum*, in Greek *αντρος*, which signifies an hide of which shields were anciently made and afterwards covered.] An *Esquire* was originally he who attending a knight in the time of war, did carry his shield, whence he was called *Escuier* in French, and *Scutifer* or *Armiger*, (i. e. armour-bearer) in Latin.

Hotoman saith, that those whom the French call *Esquires* were a military kind of vassals, having *jus scuti*, viz. liberty to bear a shield, and in it the ensigns of their family, in token of their gentility or dignity: but this addition hath not now for a long time had any relation to the office or employment of the person to whom it hath been attributed, as to carrying of arms, &c. but has been merely a title of dignity, and next in degree to a knight.

A sheriff of a county being a superior officer, retains the title of *Esquire* during his life; in respect of the great trust he has in the common-wealth. The chief of some ancient families are *esquires* by prescription. *Blount*.

Esquires and Gentlemen are confounded together by Sir *Edward Coke*, *2 Inst.* 668. He there observes that every *Esquire* is a Gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour; the grant of which adds gentility to a man's family. It is indeed a matter somewhat unsettled what constitutes the distinction, or who is a real *Esquire*; for it is not an estate, however large, that confers this rank upon its owner. *Camden* who was himself a herald, distinguishes them the most accurately. And he reckons up four sorts of them. 1. The eldest sons of knights, and their eldest sons in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of *esquires* *Spelman* calls *armigeri natalitii*; as he denominates the sons themselves of peers *armigeri honorarii*.—3. *Esquires* created by the King's letters patent or other investiture, and their eldest sons; see post *Esquires of the King*. 4. *Esquires* by virtue of their offices; as justices of the peace and others who bear any office of trust under the crown: [if styled *Esquires* by the King in their commissions and appointments.] To these may be added *esquires* of Knights of the Bath, each of whom constitutes three at his installation; and all foreign,

foreign, nay *Irish* peers; for not only these but even the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in law, and must so be named in all legal proceedings.—Barristers at law seem also now in full possession of the title of Esquire, though originally, as it should seem, attained by usurpation; and being perhaps nearly the same kind of unnecessary addition to their superior degree, as if it were to be annexed or prefixed to that of *M. A.* or *L. L. D.*

The Court of *C. P.* however refused to hear an affidavit read, because a Barrister named in it was not called Esquire. 1 *Wils.* 224.—See 1 *Comm.* 406; and the notes there. *Spelm. Gloss.* 43. and this Dict. title *Precedency*.

ESQUIRES OF THE KING. Are such who have the title by creation: these, when they are created, have put about their necks a collar of *S. S.* and a pair of silver spurs is bestowed on them: and they were wont to bear before the Prince in war, a shield or lance. There are four esquires of the King's body, to attend on his Majesty's person. *Camd.* 111.—These are now disused.

ESSENDI QUIETUM DE TOLONIO. A writ to be quit of *toll*; it lies for citizens and burgesses of any city or town that by charter or prescription ought to be exempted from *toll*, where the *toll* is exacted of them. *Reg. Orig.* 258. See titles *Toll*; *Corporation*; *London*.

ESSOIGN or ESSOIN. *Essonium*, *Fr. Essoine*.] An excuse for him that is summoned to appear and answer to an action, or to perform suit to a court baron, &c. by reason of sickness and infirmity, or other just cause of absence. It is a kind of imparlance, or craving of a longer time, that lies in real, personal and mixed actions: and the plaintiff as well as the defendant shall be *essoigned* to save his default. *Co. Litt.* 131. For the mode of entering an *Essoin*, See *Rast.* 520.

The causes that serve to *essoins*, and the *essoins* are, divers under these heads. 1. *Essoin de ultra mare* whereby the defendant shall have forty days. 2. *De terra sancta*, where defendant shall have a year and a day. 3. *De malo veniendi*, which is likewise called the common *essoins*. 4. *De malo lecti*, wherein the defendant may by writ be viewed by four knights. 5. *De servitio Regis*: *Bract. lib.* 5: *Britton*, cap. 122: *Fleta. lib.* 6. And besides the common *essoins de malo veniendi*, i. e. by falling sick in coming to the court, and other *essoins* abovementioned, there were several other excuses, to save a default in real actions; as constraint of enemies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 *Co. Inst.* 125.

After issue joined in dower, *quare impedit*, &c. one *essoins* only shall be allowed. *Stat.* 52 *H.* 3. c. 13. And in writs of assise, attaints, &c. after the tenant hath appeared, he shall not be *essoined*; but the inquest shall be taken by default. *St.* 3 *Ed.* 1. c. 42. *Essoin ultra mare* will not be allowed, if the tenant be within the four seas; but it shall be turned to a default, c. 44. There is no *essoins* permitted for an appellant. *St.* 13 *Ed.* 1. c. 28. Nor doth *essoins* lie where any judgment is given; or the party is distrained by his lands; the sheriff is commanded to make him appear; after the party is seen in court, &c. 12 *Ed.* 2. *St.* 2.

No *essoins de servitio Regis* lies when the party is a woman; in a writ of dower; where the party hath an attorney in his suit, &c. *Ibid.* The *essoins* day in court is regularly the first day of the term; but the fourth day after is allowed of favour. 1 *Lill.* 540, 569: 1 *Inst.* 135.

A corporation is not entitled to an *essoins*. And the court discourages *essoins*, and will be glad to use any means to prevent such delay of the defendant, 1 *Term. Rep.* 16: 2 *Wils.* 164.—An *essoins* lies not on a capias to arrest; and the plaintiff may declare and sign judgment, if no plea. 2 *Str.* 1194.

ESSOIN DAY OF THE TERM. The first return in every term, is, properly speaking, the first day in that term: And thereon the court sits to take *essoins*, or excuses for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoins* day of the term. But the person summoned hath three days' grace, beyond the return of the writ in which to make his appearance, and if he appears on the fourth day inclusive, the *quarto die post*, it is sufficient. 3 *Comm.* 277: See title *Term*.

ESSOIN DE MALO VILLE. Is when the defendant is in court the first day; but gone without pleading, and being afterwards surprised by sickness, &c. cannot attend, but sends two *essoiners*, who openly protest in court that he is detained by sickness in such a village that he cannot come, *pro lucrari* & *pro perdersi*; and this will be admitted, for it lies on the plaintiff to prove whether the *essoins* is true or not.

ESSOINS AND PROFFERS. Words used in the statute 38 *H.* 8. c. 21. See *Profer*.

ESTABLISHMENT OF DOWER. Is the assurance or settlement of dower, made to the wife by the husband, on marriage: And *assignment of dower*, signifies the setting it out by the heir afterwards, according to the establishment. *Brit. cap.* 102, 103. See title *Dower*.

ESTACHE. From the *Fr. Estacher*, to fasten.] A bridge, or stank of stone and timber. *Cowel*.

ESTANDARD, or Standard. An ensign for horsemen in war. See *Standard*.

ESTATE.

Fr. Estat. Lat. Status.] That title or interest which a man hath in lands or tenements, &c.

An *Estate* in lands, tenements and hereditaments, (says Blackstone) signifies such interest as the tenant hath therein; so that if a man grants all his *estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby. *Co. Litt.* 345. It signifies the [*stat.*] condition, or circumstance, in which the owner stands, with regard to his property. And, to ascertain this with precision and accuracy, estates may be considered in a threefold view: first, with regard to the quantity of interest which the tenant has in the tenement; secondly, with regard to the time at which that quantity of interest is to be enjoyed; and, thirdly, with regard to the number and connections of the tenants.

First with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates, into such as are *freehold*, and such as are *less than freehold*.

ESTATE.

An estate of freehold, *hereditamentum*, or frank-tenement, is defined by *Britton* v. 19, so to "the possession of the soil by a freeman." And *St. Germain*, (*Doct. Stud.* 3. 2. d. 22) tells us "that the possession of the land is called in the law of England the frank-tenement, or freehold." Such estate therefore, and no other, as requires actual possession of the land, is legally speaking freehold: which actual possession can, by the course of the Common-law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by *Littleton* § 59, that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance and estates for life could not by Common-law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates. 2 *Comm.* 103; 4.

Mr. *Christian*, in his note on the above passage says; a freehold estate, seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure; that is, now, of all which is not copyhold. The learned Commentator himself has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free; being a separate and distinct inheritance from the lands themselves." And, in this view, they must be distinguished and excepted from other incorporeal hereditaments, issuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also. 1 *Blackst. Tracts*, 116.

Estates of freehold, may then be considered, either as estates of inheritance, or estates not of inheritance.—The former are again divided into inheritances absolute, otherwise called fee-simple, and inheritances limited; one species of which is usually called fee-tail.

As to estates and tenants in fee-simple, See this Dict. titles *Fee*, and *Fee simple*.

Limited fees, or such estates of inheritance as are clogged and confined with conditions or qualifications of any sort may be divided into two kinds. 1. *Qualified or base fees*. 2. *Fees conditional*, so called at the Common-law; and afterwards fee-tail in consequence of the statute *de donis*. As to these latter see this Dict. titles *Tail* and *Fee Tail*.—A base or qualified Fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs tenants of the manor of Dale; in this instance whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated.—This estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that donation depends upon the concurrence of collateral circumstances which qualify and debate the purity of the donation, it is therefore a qualified or base fee. 2 *Comm.* 109. See 1 *List.* 27.

Of estates of freehold, not of inheritance but, for life only, some may be called *conventional*, as being expressly

created by the act of the parties; others are merely legal, or created by construction and operation of law. As to estates for life expressly created by deed or grant, see this Dict. title *Life Estate*.—As to the estate of tenant in tail after possibility of issue extinct, see title, *Tail and Fee Tail*.—As to tenant by the Curtesy and tenant in Dower, see those titles.

Of estates less than freehold there are three sorts; 1. Estates for years; 2. Estates at will; as to both which see this Dict. title *Lease*; 3. Estates by sufferance: as to which see this Dict. title *Sufferance*.

Besides these several divisions of estates, in point of interest, another species may be mentioned, viz. *Estates upon condition*; as to which see at large title *Condition*; and titles *Mortgage*; *Statute-Merchant*; *Statute-Staple*; *Elegit*.

According to the above division Estates are considered solely with regard to their duration or the quantity of interest which the owners have therein. With regard to the time of their enjoyment, when the actual receipt of the rents and profits begins, Estates may be considered as either in possession or expectancy;—Of expectancies, there are two sorts; one created by the act of the parties, called a *Remainder*; the other by act of law, called a *Reversion*.—Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and abides in the tenant, not depending on any subsequent circumstance or contingency, as in the cases of estates executory) little or nothing is to be peculiarly observed; all the estates already spoken of, and treated of under the titles referred to, are of this kind. But the doctrine of estates in expectancy, contains some of the nicest and most abstruse learning in the English law.—And as to so much of it as relates to *Remainders* and *Reversions*, see this Dict. under those titles, and titles *Executory Devise*; *Limitation*.

Estates, with regard to the certainty and the time of the enjoyment of them, are distinguished by *Fearne* in the introduction to his Essay on Contingent Remainders and Executory Devise, into. 1. Estates vested in possession. 2. Estates vested in interest; as reversions; vested remainders; such executory devises, future uses, conditional limitations and other future interests as are not referred to, or made to depend on, a period or event that is uncertain. 3. Estates contingent; as Contingent Remainders; and such executory devises, future uses, conditional limitations and other future interests as are referred to, or made to depend on an event that is uncertain.—An estate is vested, when there is an immediate fixed right of present or future enjoyment.—An estate is vested in possession, when there exists a right of present enjoyment.—An estate is vested in interest when there is a present fixed right of future enjoyment.—An estate is contingent when a right of enjoyment is to accrue, on an event which is dubious and uncertain.

With respect to the number and connections of their owners, the tenants who occupy and hold them, Estates of any quantity or length of duration, whether in actual possession or expectancy may be held in four different ways; in severalty; in joint-tenancy; in coparcenary; in common.—He that holds lands in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and all estates are supposed to be of this sort, unless

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unless where they are expressly declared to be otherwise; and in laying down general rules and doctrines, they are usually applied to such estates as are held in severalty. As to estates in joint-tenancy, in coparcenary and in common, see titles *Joint-tenants*; *Parceners*.

As to the title to estates, see this Dict. title; and the references there; and as to the different nature of estates according to their several tenures, see this Dict. tit. *Tenure*.

Estates are acquired divers ways, viz. by descent from a father to the son, &c. *Conveyance*, or grant from one man to another; by gift or purchase; died or will: And a fee simple is the largest estate that can be in law. 1 *Lit.* 541.

Estates are real, of lands, &c. or personal, of goods or chattels; otherwise distinguished into *freeholds*, that descend to the heir, and chattels which go to the executors: Some estates are made by the words of deeds, and others made by law; as an estate in frank-marriage given to a cousin, makes a gift in tail.

Also there is an estate that is implied, where tenant in tail bargains and sells his land to a man and his heirs; by this he hath an estate descendible, and determinable upon the death of the tenant in tail. *Co. Lit.* 10 Rep. 97. If I give lands in *Dale* to a certain person for life, and after to his heirs or next heirs, he hath the fee simple; and if it be to his first males, he will have an estate tail. 1 Rep. 66. A man grants to one and his heirs and assigns for his life, and a year over; this is an estate for life only. 39 E. 3. 25; *Lit.* 46. If a lease be made, and not expressed for what number of years, it is an estate at will. 2 *Shep. Ab.* 81.

The word estate generally in deeds, grants, and conveyances, comprehends the whole in which the party hath an interest or property, and will pass the same. 3 *Mod.* 46. A person in possession of an estate mortgaged in fee, by will gave it to his two daughters, and their heirs; one of them married, and then died: And it being a question, whether her share should be held real or personal estate, and go to the heir, or her husband administrator? It was adjudged for the heir; for here the mortgaged lands shall descend as other lands of inheritance, and be subject to the same rules. *Preced. Canc.* 266. In such case, if the mortgage in fee be paid off, the money shall be considered as land, and belong to his heirs, as the estate in the land would have done. *Ibid.* See title *Mortgage*.

Personal estate was devised by a man to his wife for life, and what she left at her death to be divided between his kindred: He died, and the widow married again; this devise over was held good in equity, on a bill brought to have an inventory taken of the estate, and security given not to imbezzle it. But if the same were of small value, that the widow could not live thereupon, without spending the stock, it would be otherwise. See titles *Will*; *Executive Devise*.

How far the Acceptance of one Estate shall destroy another.

If a lessee for term of twenty years, accepts of a lease of the same land for ten years, by the lessee's acceptance of the new lease, the term of twenty years is determined in law. 2 *Roll. Abr.* 469.

Lease for years to R. B. rendering rent; the next year a lease was made of the same lands to the lady P for ninety nine years; the next year the same lands were demised to the said R. B. for forty-one years, who accepted

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the lease, but that did not extinguish his first lease; because the lessor by making the intermediate lease to the lady P, had only a reversion, and could not afterwards give any interest to R. B. But if it had not been for this intermediate lease, then the acceptance of the second lease for forty-one years had been a surrender of the first. *Hutt.* 104.

If a man hath a lease for years, which is good in law, and afterwards accepts a new lease of the same lands, which is void in law, this is no surrender in law of the good lease. *Hutt.* 105. *Baker v. Willoughby*; *Mills v. Whitewood*, *ibid.* S. P.

A man, in consideration of a marriage to be had with M. R. made an estate to her for life of certain lands in full satisfaction of her dower; afterwards they married, and the husband died, and the widow brought a writ of dower against the heir, who pleaded in bar the acceptance of the estate for life: adjudged no good plea; for such acceptance did not bar her of her dower at the Common-law, because she had no title of dower when the acceptance was made; and besides no collateral acceptance can bar any right of inheritance or freehold. See 4 Rep. 1. *Vermon's case*, and this Dict. title *Dower*.

A man made a lease of a manor for thirty years, accepting the wood, &c. and afterwards made a lease of the woods to the same lessee for sixty years, and a third lease to him of the manor for thirty years, without any exception; resolved, that by the acceptance of this future lease, the lease for sixty years was surrendered, because by such acceptance the lessee had affirmed, that the lessor had authority to make a new lease. 5 Rep. 11: *Lee's case*.

In a special verdict in trespass, the case was, a lease was made to husband and wife for their lives, and afterwards they accepted a new lease for themselves and their son: *habendum* to all three of them, *a die datús indenturæ*, for the term of their lives with a letter of attorney to make livery: adjudged, that the acceptance of a second lease, to commence *a die datús*, was a surrender of the first, and this by the express agreement in writing of the lessees themselves; for otherwise the lessor had no power to make a new lease. *Moor* 636.

ESTOPPEL, From the Fr. *Esloper*, i. e. *Oppsare, obstruere*.] An impediment or bar to a right of action arising from a man's own act: or where he is forbidden by law, to speak against his own deed; for by his act or acceptance he may be estopped to alledge or speak the truth. *P. N. B.* 142: *Co. Lit.* 352. If a person is bound in an obligation by the name of A. B. and is afterwards sued by that name on the obligation; now he shall not be received to say in abatement, that he is misnamed, but shall answer according to the obligation, though it be wrong; and so far as he is the same person that was bound, he is estopped and forbidden in law to say contrary to his own deed; otherwise he might take advantage of his own wrong, which the law will not suffer. *Terms de Ley*. If a man enters into a bond, with condition to give to another all the goods which are devised to him by the father; in this case the obligor is estopped to plead that the father made no will, but he may plead that he had not any goods devised to him by his father. 1 *Nelf. Abr.* 751.

In a deed, all the parties are estopped to say any thing against what is contained in it: it estops a lessee to say that

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that the lessor had nothing in the land, &c. And parties and privies are bound by *estoppel*. *Lit. 58: Co. Lit. 352: 4 Rep. 53.* None but privies and parties shall regularly have advantage by *estoppel*: But if a man makes a lease of part of a term whereby he is *estopped*; and after assign away the term, the assignee will be *estopped* also. *30 H. 6. 2: 4 Rep. 56.* In *estoppel*, both parties must be *estopped*; and therefore, where an infant or feme covert makes a lease, they are not *estopped* to say that it is not their deed, because they are not bound by it; and as to them it is void. *Cra. Eliz. 36.* See title *Deed*. And though *estoppels* conclude parties to deeds to say the truth; yet jurors are not concluded, who are sworn *ad veritatem de et super premissis dicendam*: For they may find any thing that is out of the record; and are not *estopped* to find truth in a special verdict. *4 Rep. 53: Lut. 570.*

An *estoppel* shall bind only the heir, who claims the right of him to whom the *estoppel* was. *8 Rep. 53.* Acceptance of rent from a disseisor by the disseisee, may be an *estoppel*: And a widow accepting less than her thirds for dower, is an *estoppel*, &c. *2 Darr. Abr. 130, 671.*

Our books mention three kinds of *estoppel*, viz. By matter of record, by matter in writing, and by matter in pais. *Co. Lit. 352.* If a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them, and the heirs of one of them; this will be an *estoppel* to the other to demand fee-simple according to the deed; for the fine shall enure as a release. *6 Rep. 7, 44.* Tenant in tail suffers a recovery, that his issue may avoid; he himself shall be *estopped* and concluded by it, and may not demand the land against his own recovery. *3 Rep. 3.*

The taking of a lease by indenture of a man's own land, whereof he is seised in fee, is an *estoppel* to claim the fee during the term. *Moor, Cas. 323: And. 121.* A lease is made to one man for eighty years, and then to another by deed indented for the same term, this second lease may be good by way of *estoppel*. And if the first determine by surrender, forfeiture, &c, the second lessee shall have the land. *Co. Rep. 155.* If a lessor at the time of making the lease hath nothing in the land, but after he gets it by purchase or descent, it is a good lease by *estoppel*. *Dyer 256: Plowd. 344: Co. Lit. 47.* A recital in a deed shall not *estop* a person, unless it be of a particular fact, or where it is material; when it may be an *estoppel*. *Cio. Eliz. 362.*

The lord, by deed indented, reciting that his tenant holds of him by such services, whereas he doth not, confirms to the tenant, saving the services; it is no *estoppel* to the tenant. *35 H. 6. 33: Plowd. 130.* If one make a deed by *duress* of imprisonment, and when he is at large makes a defeasance to it; he is *estopped* to say it was *per duress*. *Bro. Defeas. 17.* Where the condition of a bond is in the particularity, as to infeasor J. S. of the manner of D. or to pay such a sum of money as he stands bound to pay to W. S. or to stand to the sentence of J. S. in a matter of tithes in question between them; here the party is *estopped* to deny any of these things, which in the condition he did grant: But if a condition be in the generality, to infeasor one of all his lands in D. or to be non-suit in all actions, &c. it is no *estoppel*. *Dyer 196: 18 Ed. 4. 54.*

If a man in pleading confess the thing he is charged with, he cannot afterwards deny it: Though a plaintiff shall not be *estopped* to alledge any thing against that

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which before he hath said in his writ, or declaration; and one may not be *estopped* by the record upon which he was convicted. *22 H. 7. 24: 2 Leon. 3. 17.*

An *estoppel* ought to be certain and affirmative, and a matter alledged that is not traversable, shall not *estop*; one may not be *estopped* by acceptance, before his title accrued; an *estoppel* must be insisted and relied on; and where there is *estoppel* against *estoppel*, it puts the matter at large. *Co. Lit. 352: Hob. 207.* *Estoppels* are to be pleaded relying on the *estoppel*; without demanding judgment *fi actio*, &c. *4 Rep. 53.* See title *Pleading*.

ESTOVERS. See title *Common of Estovers*. This word hath been taken for any kind of sustenance; as *Bracton* uses it, for that sustenance or allowance, which a man committed for felony is to have out of his lands or goods for himself and his family during his imprisonment. *Bract. lib. 3. tract 2. cap. 18.* And the *Stat. 6 Ed. 1. cap. 3.* applies it to an allowance in meat, clothes, &c. In which sense it has been used for a wife's alimony.

ESTOVERS HABENDIS, Writ *de*. A writ at Common law, for a woman divorced from her husband, *à mens et thoro*, to recover her alimony, sometimes called her *estovers*. *1 Lev. 6.* See title *Baron and Feme*.

ESTRAY, *Extrahura*, from the old Fr. *Estrayeur*.] Is any beast that is not wild, found within a lordship, and whose owner is not known. In which case if it be tried and proclaimed according to law in the church and two nearest market-towns on two market days, and is not claimed by the owner within a year and a day, it belongs to the king; and now most commonly, by grant of the crown to the lord of the liberty. *Brit. cap. 17.* Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property as *sheep, oxen, swine* and *horses*.—But animals upon which the law sets no value, as a dog or cat; and animals *feræ naturæ*, as a bear or wolf cannot be considered as estrays. *1 Comm. 289.* Swans may be *estrays*, but no other fowl, and are to be proclaimed, &c. *1 Rol. Abr. 878.* If the beast stray to another lordship within the year, after it hath been an *estrays*, the first lord cannot re-take it, for, until the year and day be past, and proclamation made as aforesaid, he hath no property; and therefore the possession of the second lord is good against him. *Cio. Eliz. 716: Finch L. 177.* If the cattle were never proclaimed, the owner may take them at any time; And where a beast is proclaimed as the law directs, if the owner claims it in a year and a day, he shall have it again, but must pay the lord for keeping. *1 Rol. Abr. 879: Finch 177.*

An owner may seize an *estrays*, without telling the marks, or proving the property, (which may be done at the trial, if contested,) and tendering amends generally is good in this case, without shewing the particular sum; because the owner of the *estrays* is no wrong-doer, and knows not how long it has been in the possession of the lord, &c. which makes it different from trespass, where a certain sum must be tendered. *2 Salk 686.* In case of an *estrays* the lord ought to make a demand of what the amends should be for the keeping; and then if the party thinks the demand unreasonable, he must tender sufficient amends; but if what he tenders is not enough, the lord shall take issue, and it is to be settled by the jury. *Nov 144.* A beast *estrays* is not to be used in any manner, except in case of necessity; as to milk a cow, or the like, but not to ride an horse. *Cio Jac. 148. 1 Rol. 673.* *Estrays of the*

the Forest are mentioned in the statute of 27 H. 8. cap. 7. The King's cattle cannot be strays or forfeited, &c.

ESTREAT. *Extratum.* The true copy or note of some original writing or record, and especially of fines, amerciaments, &c. imposed on the rolls of a court, to be levied by the bailiff or other officer. *F. N. B.* 37, 76. *Stat. Westminster 2. c. 8.*—Justices, commissioners, &c. are to deliver their *estreats* into the Exchequer yearly after Michaelmas: And fines to have writs, which shall be entered in the *estreat*, in order as they are entered in the Chancery Rolls, &c. *Stats. 51 H. 3. Stat. 5: 16 Ed. 2.* These *estreats* relate to fines for crimes and offences, defaults and negligences of parties in suits and officers, non-appearance of defendants, and jurors, &c. And all forfeited recognizances are to be first *estreated* in the Exchequer, by sheriffs of counties: on which process issues to levy the same to the use of the King. *Stat. 22 & 23 Car. 2. cap. 22.*

Estreats are to be levied on the right persons: And sheriff's *estreats* must be in two parts, indented and sealed by the sheriff, and two justices of the peace; who are to view them, and one of them is to remain with the sheriff, and the other with the justices. *Stat. 11 H. 7. c. 15.* The *estreats* of fines, at the quarter sessions, are to be made by the justices, and to be double, one whereof is to be delivered to the sheriff by indenture. *Stat. 14 R. 2. cap. 11.* Fines, post fines, forfeitures, &c. must be *estreated* into the Exchequer twice a year, on pain of 50 l. And officers are to deliver in their returns of *estreats* upon oath. *Stats. 22 & 23 Car. 2. c. 22: 4 & 5 W. & M. c. 24.* It is the course of the court of B. R. to send the *estreats* twice a year into the Exchequer, viz. on the 1st day of the two *quarable terms*; but in extraordinary cases there may be a rule to *estreat* them sooner. 1 *Salk.* 45. Amerciaments are not usually discharged on motion, and there ought to be a *confessio* of the *estreat*; though the court may give leave to the sheriff to compound them. *Ibid.* 54: 1 *Nels.* 207: See *Stats. 3 Ed. 1. c. 45: 27 Ed. 1. R. 1. c. 2: 3 H. 1. c. 1: 3 Geo 1. c. 15. s. 12*: and further titles *Sheriff; Justices of Peace.*

ESTRECIATUS, *Strengthened*, applied to roads. *R. Hoveden*, p. 783.

ESTREPE, *Fr. Estropier.* To make spoil in lands to the damage of another, as of the reversioner, &c.

ESTREPEMENT, *Estrepamentum* from the *Fr. Estropier*, mutilate, or from the *Lat. Extricare.* Any spoil made by tenant for life, upon any lands or woods, to the prejudice of him in reversion; It also signifies the making land barren by continual ploughing. *Stat. 6 Ed. 1. cap. 13.* It seems by the derivation, that *estrepement* is the unreasonable drawing away the heart of the ground, by ploughing and sowing it continually, without manuring or other good husbandry, whereby it is impaired: And yet *est opier* signifying mutilate, may no less be applied to the cutting down trees, or lopping them further than the law allows. In ancient records, we often find *vastum & estrepamentum facere*; to make strip and waste.

This word is used for a writ, which lies in two cases; the one, by the *Stat. of Glouc 6 E. 1. c. 13*, when a person having an action depending, as a *formedon*, writ of right, &c. sues to prohibit the tenant from making waste, during the suit; the other is for the demandant, who is adjudged to recover seisin of the land in question, after judgment and before execution sued by the writ of

habere facias possessionem, to prevent waste being made till he gets into possession. *Stat. Glouc 76: Rep. 115: 31: P. N. B. 60, 61: 3 Rep. 115.*

In suing out these two writs, this difference was formerly observed; that in an action merely proffessory where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*; nay, even at the time of suing out the original writ or writ of *prohibere*. But in an action where damages were recovered, the demandant could only have a writ of *estrepement*, if he was apprehensive of waste, after verdict had; for with regard to damages before the verdict was given, it was presumed the jury would consider that in assessing the damages. *R. N. B. 60, 1.* But now it seems to be held by an equitable construction of the *Stat. of Glouc.* and in advancement of the remedy, that a writ of *estrepement* to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands: for perhaps the tenant may not be able to satisfy the demandant his full damages. *Id.* 61. And therefore now in an action of waste itself to recover the place wasted, and also damages, a writ of *estrepement* will lie as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint: neither is he at liberty to assign or give in evidence any waste made after suing out the writ: it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit debarred of any further remedy. 5 *Rep.* 115.

If a writ of *estrepement* forbidding waste be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the foundation of this writ, wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem*; and if upon verdict it be found that he did, the plaintiff may recover costs and damages; or the party may proceed to punish the defendant for the contempt. *Moor* 100.

As a writ of *estrepement* may be directed either to the tenant and his servants, or to the sheriff; if it be directed to the tenant and his servant, and they are duly served with it, if they afterwards commit waste, they may be committed to prison for this contempt of the writ. But it is said not to be so, when directed to the sheriff, because he may raise the *posse comitatus* to resist them who make waste. *Hob.* 85. Though it hath been adjudged, that the sheriff may likewise imprison offenders, if he be put to it; and that he may make a warrant to others to do it. 5 *Rep.* 115: 2 *Inst.* 329.

The writ of *estrepement* lies properly where the plaintiff in a real action shall not recover damages by his action; and as it were supplies damages; for damages and costs may be recovered for waste, after the writ of *estrepement* is brought. See *Moor* 100: 2 *Inst.* 328. If tenants commit waste in houses assigned a feme for dower, on her bringing action of dower, writ of *estrepement* lies. 5 *Rep.* 115: See *Cro. Eliz.* 114: *Moor* 622. But pending a writ of partition between coparceners, if the tenant commit waste, this writ will not be granted; because there is equal interest between the parties, and the writ will not lie, but where the interest of the tenant is to be disproved. *Goldsb.* 50: 2 *Nels.* Abr. 754.

In the Chancery, on filing of a bill, and before answer, the court will grant an injunction to stay waste, &c. 1 *Lil.* 547. See titles *Chancery; Waste.*

ETHELING or **ÆTHELING**, *Sax.*] Signifies noble, and among the English Saxons, it was the title of the Prince, or the King's eldest son. *Camden. See Adeling.*

EVASION, *Evasio.*] A subtle endeavouring to set aside truth, or to escape the punishment of the law; which will not be induced. If a person says to another that he will not strike him, but will give him a pot of ale to strike self, and accordingly he strikes, the returning of it is punishable; and if the person striking be killed, it is murder; for no man shall evade the justice of the law, by such a pretence to cover his malice. 1 R. P. C. 81. No one may plead ignorance of the law to evade it, &c.

EVENINGS, The delivery at even or night of a certain portion of grass or corn, &c. to a customary tenant, who performs the service of cutting, mowing, or reaping, for his lord, given him as a gratuity or encouragement. *Kennet's Gloss.*

EVESDROPPERS, See *Eaves-droppers*.

EVICTION, From *evincere* to overcome.] A recovery of land, &c. by form of law. If land is evicted, before the time of payment of rent on a lease, no rent shall be paid by the lessee. 10 Rep. 128. Where lands taken on extent are evicted or recovered by better title, the plaintiff shall have a new execution. 4 Rep. 66. If a widow is evicted of her dower or thirds, she shall be endowed in the other lands of the heir. 2 Danv. Abr. 670. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 Rep. 121.

EVIDENCE,

EVIDENTIA.] Proof by testimony of witnesses, on oath; or by writings or records.

It is called *Evidence*, because thereby the point in issue in a cause to be tried, is to be made *evident* to the jury; for *probationes debent esse evidentes et perspicue*. Co. Lit. 283. The evidence to a jury ought to be upon the oath of witnesses; or upon matters of record, or by deeds proved, or other like authentic matter, 1 Lil. Abr. 547. And evidence containeth testimony of witnesses, and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. Co. Lit. 283.

The system of evidence, as now established in our courts of Common-law, is very full, comprehensive and refined; a summary of the law on the subject is here presented.

The nature of the present work will not allow room for the numberless niceties and distinctions of what is, or is not, legal evidence to a jury. A few of the general heads and leading maxims, relative to this point, as well in civil, as criminal cases, together with some observations on the manner of giving Evidence, are first selected.

Evidence, as has been already remarked, signifies that which demonstrates, makes *evident* or clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no, he cannot give a release of this bond in Evidence, for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz. that the bond has no existence.

Again; Evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge.—As to the latter see title *Jury*.—The former, or *Proof*, (to which in common speech the name of Evidence is usually confined) are either written; or *parol*, that is by word of mouth. Written proofs, or Evidence, are, 1, Records; and 2, Ancient deeds of 30 years standing, which prove themselves; but 3, Modern deeds; and, 4, Other writings, must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found there is any better evidence existing than is produced, the very not producing it is a presumption, that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted, but the very deed of lease itself, if in being; but if that positively be proved to be burnt or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced; or *parol* evidence given of it's contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases, (as in proof of any general customs, or matters of common tradition or repute,) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts. So too, books of accounts, or shop-books, are not allowed of themselves to be given in evidence for the owner, but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence. Bull. N. P. 282, 3; Salk. 285. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the Stat. 7 Jac. 1. c. 12, (the pen-ners of which seem to have imagined that the books of themselves were evidence at Common-law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

With regard to *parol* Evidence, or *Witnesses*; there is a process to bring them in by writ of *subpoena ad testificandum*; which commands them, laying aside all pretences and excuses, to appear at the trial on pain of one hundred pounds, to be forfeited to the king; to which the Stat. 5 Eliz. c. 9, has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him: except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth.

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All witnesses of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though the jury from other circumstances will judge of their *credibility*. Infamous persons are such as may be challenged as jurors, *propter delictum*; and therefore shall never be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause. *Bull. N. P.* 284: 1 *Pent.* 97.

One witness (if credible) is *sufficient* evidence to a jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, as the civil law universally requires.

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to *positive* proof, *circumstantial* evidence or the doctrine of *presumptions* must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances which either *necessarily*, or *usually* attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitum præsumptioni donec probetur in contrarium. Co. Litt.* 373. Violent presumption is many times equal to full proof; for there those circumstances appear, which *necessarily* attend the fact. *Ibid.* 6. As if a landlord sues for rent due at *Michaelmas* 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. *Gill. Evid.* 161. Probable presumption arising from such circumstances as *usually* attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant; (*Co. Litt.* 373;) unless it be clearly shewn that the rent of 1754, was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing: *Light*, or rash presumptions have no weight or validity at all.

The oath administered to the witness, is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows; whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorney, the counsel, and all by *exhibitors*; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country. And if either in his directions or decisions he misstates the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*; stating the point wherein he is supposed to err: See title *Bill of Exceptions*.—Or if the legal effect of a record or other evidence is doubted, this may be tried on a *Demurrer to Evidence*; See that title.—3 *Comm.* 367—372.

The true theory of Evidence is admirably explained in *Bull. Ni. Pri.* part VI. from *Gilbert's Law of Evidence*; and it concludes with taking a view of all the general Rules of Evidence together, from whence the following abstract is given.

1. The first general rule is that the best evidence must be given that the nature of the thing is capable of. The true meaning of this rule is that no such evidence shall be brought as *ex natura rei* supposes still a greater evidence behind; in the party's possession or power, for such evidence is altogether insufficient and proves nothing. But if it is proved that an original deed, will, &c. is in the hands of the adverse party, or is destroyed without default of the party who ought to produce it, a copy will be admitted; because then such copy is the best evidence.

2. No person interested in the *question* can be a witness. There is no rule in more general use and none that is so little understood. See 1 *Term Rep.* 302. And there are some exceptions to it. *e. g.* 1. A party interested will be admitted in a criminal prosecution in most instances; 2. he may be admitted for the sake of trade and the common usage of business; as porters, apprentices, &c. to prove delivery of goods, &c. though it tend to clear themselves of neglect. See 3 *Term Rep.* 29: *Sir.* 647, 1083. 3. Where no other evidence is reasonably to be expected. 4. Where he acquires the interest by his own act, after the party who calls him as a witness has a right to his evidence. 5. Where the possibility of interest is very remote. See 1 *Term Rep.* 163, 4, and more at length, this title, Div. II. 1.

3. The third general rule is, that *hearsay* is no evidence.—For no evidence is to be admitted but what is upon oath and if the first speech were without oath, another oath that there was such a speech makes it no more. Besides, if the speaker be living, it is not the best evidence. But *hearsay* has been admitted in corroboration of a witness's testimony.

4. In all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally.

5. *Ambiguitas verborum latens verificatione supplitur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.*

6. In every issue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed until it be proved:

but

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but when the affirmative is proved, contest it with opposite proofs, of some matter or position totally inconsistent with what is affirmed.

7. No evidence need be given of what is agreed by the pleadings. For the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly before them.

8. Whenever a man cannot have the advantage of the special matter by pleading, he may give it in evidence on the general issue. See title *Pleading*.

9. If the substance of the issue be proved, it is sufficient. As to this, see also titles *Pleading*; *Modes of Form*.

The doctrine of evidence in CRIMINAL CASES is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein by several statutes and resolutions a difference is made between civil and criminal evidence.

1. In all cases of high treason, petit treason, and misprision of treason, by *Stats. 1 Ed. 6. c. 12*, and *5 & 6 Ed. 6. c. 11*, two lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence confess the same. By *Stat. 1 & 2 P. & M. c. 10*, a further exception is made as to treasons in counterfeiting the King's seals or signatures, and treasons concerning coin current within this realm; and more particularly by *c. 11*, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The *Stats. 8 & 9 W. 3. c. 25*; *15 & 16 Geo. 2. c. 28*, in their subsequent extensions of this species of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted and attainted, by the like evidence, and in such manner and form, as may be had and used against offenders for counterfeiting the King's money. But by *Stat. 7 W. 3. c. 3*, in prosecutions for these treasons to which that act extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall countervail the necessity of such proof, must be in open court. In the construction of which act it hath been holden, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. *Foster* 240, 4. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the Common-law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same *Stat. 7 W. 3. c. 3*, it is declared that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. See *2 State Trials* 144; *Foster* 235. And therefore in *Sir John Fenwick's case*, in King William's time, where there was but one witness, an act of parliament, (*Stat. 8 W. 3. c. 4*) was made on purpose to attain him of treason, and he was executed. *5 State Trials* 40. But in almost every other accusation, one positive witness is

sufficient; except in cases of indictments for perjury, where one witness is not sufficient, because then there is only one oath against another. *10 Mod.* 194.

2. From the reversal of colonel Sydney's attainder by act of parliament in 1689, (*8 State Trials* 472,) it may

writing in
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the same person. *2 Hawk. P. C.* 431; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury. *Lord Preston's case*, *A. D.* 1690, *4 State Trials* 463; *Francis's case*, *A. D.* 1716, *6 State Trials* 69; *Laver's case*, *A. D.* 1722, *Ibid.* 279; *Hemmy's case*, *A. D.* 1758: *4 Burr.* 644.

3. By the *Stat. 21 Jac. 1. c. 27*, a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it. See title *Bastard*.

4. All presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And *Sir Matthew Hale* in particular lays down two rules most prudent and necessary to be observed. 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead: on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing. *2 Hal. P. C.* 200.

Lastly it was an ancient and commonly received practice, (*1 State Trials passim*), that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of *Mary I.*, that she first desired such evidence to be received in a court of justice. Afterwards in one particular instance (when embezzling the queen's military stores was made felony by *Stat. 31 Eliz. c. 4*.) it was provided that any person, impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence;" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath. *2 Bull.* 147; *Cro. Car.* 291. The consequence of this still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the Crown. *Sir Edward Coke* protests very strongly against this tyrannical practice; declaring that he never read in any act of parliament, book, case, or record, that in criminal cases the party accused shall not have witnesses sworn for him; and therefore there is not so much as *scintilla juris* against it. *3 Inst.* 79. See also *2 Hal. P. C.* 283, and his Summary 264. And the House of Commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, (*Stat. 4 Jac. 1. c. 1*.) when felonies committed by Englishmen in Scotland were ordered to be tried

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in one of the three Northern counties, they insisted on a clause and carried it against the efforts of both the Crown and the House of Lords, against the practice in the courts of England, and the express law of Scotland, "that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath as can be produced for his clearing and justification." At length by Stat. 7 W. 3. c. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by Stat. 1 Ann. st. 2. c. 9, that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him. 4 Comm. 356—360.

Having given the foregoing general view, more minute information on this subject may be thus classed,

I. Of written Evidence: *Wherein of Matters of Record as also of Writings under Seal, and other Writings and Depositions in Chancery or other Courts.*

II. Unwritten Evidence: *Wherein*

1. *Who may be Witnesses.*

2. *Of the Number of Witnesses, and of compelling them to appear; as also of the Manner of their giving Evidence.*

3. *Of proof, presumpt. &c. and hear-say Evidence.*

1. *Evidence by records and writings.* Is where acts of parliaments, statutes, judgments, fines and recoveries, proceedings of courts, and deeds, &c. are admitted as evidence. A general act of parliament may be given in evidence; and need not be pleaded; and of these the printed statute book is good evidence: But in the case of a private act, a copy of it is to be examined by the records of parliament, and it is to be pleaded. *Trials per pais* 177, 232. Journals and other proceedings in the House of Commons have been held to be no evidence. *State Trials*, vol. 3. 470; Though it is otherwise, vol. 3. 800. A history of England, or printed trial, may not be read as evidence. 1 Lill. 557. Camden's *Britannia* was not allowed as evidence: But it has been held, that an history may be evidence of the general history of the realm, though not of a particular custom, &c. *Stinner's Rep.* 623.

An exemplification of the inrolment of letters patent under the great seal, may be pleaded in evidence. 3 Inst. 173. This exemplification is a copy or transcript of letters patent made from the inrolment thereof, and sealed with the great seal. But neither an exemplification nor *constat* was pleadable at Common law, because there was only the tenor of an enrollment; and the tenor of a record is not pleadable; but they are now pleadable by Stat. 3 & 4 E. 6. c. 4: 13 Eliz. c. 6.

A patent may be exemplified under the great seal in Chancery; and also any record or judgment in any of the courts at *Westminster*, under the proper seal of each court: all which exemplifications may be given in evidence to a jury. 1 Lill. 583: *Shp.* 134. A rule made, or writ filed, in any court at *Westminster*, may be exemplified in the court where made or filed. But nothing but matter of record ought to be exemplified. 3 Inst. 173.

Records and inrolments prove themselves; and a copy of a record or inrolments sworn to, may be given in evidence. Co. Lit. 117, 262. A transcript of a record in

another court, may be given in evidence to a jury. 1 Lill. Abr. 551. There is a difference between pleading a record, and giving the record in evidence; if it be pleaded, it must be *sub pede sigilli*, or the judges cannot judge thereof: Though where it is given in evidence, if it be not under the seal, the jury may find the same, if they have other good matter of inducement to prove it. *Style's Rep.* 22.

A fine or recovery may be given in evidence, without vouching the roll of the recovery; for the part indented is the usual evidence that there is such a fine: But it is said *the fine ought to be shown with the proclamations under seal.* 10 Rep. 92: 2 Rol. Abr. 574.

By Stat. 14 Geo. 2. c. 20, where any person has purchased or shall purchase for a valuable consideration, any estate, whereof a recovery was necessary to complete the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may after the end of 20 years from the time of such purchase, produce in evidence the deed, making a tenant to the *precipe*, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence, that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered. Provided the person making such deed had a sufficient estate, and power to make a tenant to the *precipe*, and to suffer such common recovery.

A record of an inferior court, hath been rejected in evidence, and the party put to prove what was done: And proceedings of county courts, courts baron, &c. may be tried by a jury; for it hath been adjudged, that they cannot be proved by the rolls, but by witnesses. *Lit.* 75. But court-rolls of a court baron, when shewn, are good evidence; and in many cases, copies of the court-rolls are allowed as evidence. *Trials per pais* 178, 228.

Inrolment of a deed is proved on certifying it by an examined attested copy; though inrolment of a deed which needs no inrolment, or by which the estate does not pass, is only evidence to some purposes. 3 Lev. 387.

By Stat. 10 An. c. 18, where any bargain and sale inrolled is pleaded with a *proferet*, the party to answer such *proferet* may produce a copy of the inrolment.

With respect to the production of Deeds in evidence, the general rule is, that the deed itself must be given in evidence, and must be proved by one witness at the least. But if the opposite party produce the deed on notice, it shall be read without any proof of the execution. *Bull. N. P.* 254: 2 Term Rep. 41.

An ancient deed proves itself, where possession has gone accordingly: But later deeds must be proved by witnesses. Co. Lit. 6. If all the witnesses to a deed are dead, continual and quiet possession is presumptive evidence of the truth of it; yet it may receive farther credit by comparison of hands and seals. *Wood's Infr.* 599. When witnesses to deeds are dead, their hand-writing must be proved, 2 Inst. 118. And where there are several witnesses to a deed, and they are all dead but one, a *subpoena* must be taken out against the living witness, and strict inquiry made after him, and affidavit is to be made that he cannot be found, before the hand-writing of the deceased witnesses are to be proved. 1 Lill. 556.

An old deed proved to have been found among deeds and evidences of lands, may be given in evidence to a jury; though the executing of it cannot be proved and made out.

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out. 3 *Salk.* 153. A deed may be good evidence, though the seal is broken off: And where a deed is burnt, &c. the judges may allow it to be proved by witnesses, that there was such a deed, and this be given in evidence. 1 *Lev.* 25. But the court will not allow the jury, on a trial at bar, to carry deeds, writings or books with them out of court, as evidence to consider of, but such as have been proved: Though by the assent of parties, or by assent of the court without the parties, they may be delivered to the jurors. *Cro. Eliz.* 421. All deeds or writings under seal, and given in evidence, they may have; and nothing which was not given in evidence, for the court gives their direction to the jury upon the evidence given in court. 1 *Lil.* 313.

It is dangerous to suffer any, who by law ought to shew forth any deed, to prove in evidence, that there was such a deed, which they had seen or read, &c. For there might be imperfections in the deed, or it may be on condition, with limitation, &c. 10 *Rep.* 92. A deed, though sealed and delivered, if not stamped according to act of parliament, cannot be pleaded or given in evidence in any court. See *Stat.* 5 & 6 *H. & M. cap.* 21, and several subsequent statutes; the latter of which extend to bills, notes, receipts, agreements, &c. And these stamps have been frequently the means of detecting forgeries; for the Stamp-office put secret marks on the stamps, which from time to time are varied: so that where a deed is forged of a date antecedent, it may easily be discovered by stamps being upon it, not in use at the time it bears date. A deed cannot be proved by a counterpart of it or copy, if the original is in being, and may be had; though it may be when the original cannot be procured. *Co. Lit.* 225: 10 *Rep.* 92. The counterpart of an ancient deed hath been allowed to be given in evidence. *Mod. Cus.* 225. But it hath been held that the counterpart of a deed, without other circumstances, is not sufficient evidence; unless in case of a fine, when a counterpart is good evidence of itself. 1 *Salk.* 287.

Where a deed was cancelled by fraud, that being proved, it was allowed to be evidence in an action under the deed. *Hutl.* 138. The recital of a deed is no evidence without shewing the deed; or proving that there was such a deed, and it is lost. *Co. Lit.* 352: *Faugh.* 74. Recital of a lease, in a deed of release, is good evidence, that there was such a lease against the releasor, and those claiming under him; but not against others, except there be proof that there was such a lease. 1 *Salk.* 286. A settlement set forth in a bill in Chancery, and admitted in the answer; and where it was proved that the deed was in the possession of such a one, &c. hath been adjudged a good evidence of the deed of settlement where not to be found. 5 *Mod.* 384.

The probate of a will, when it concerns personal estate only, may be given in evidence: But where title of lands is claimed under a will, the original will must be shewn, not the probate: Though if the will be proved in the Chancery, copies of the proceedings there will be evidence. 2 *Rot. Abr.* 687: *Trials per pais* 234: 1 *Salk.* 286; and *Raym.* 335. In certain cases the Ledger-book of the Ecclesiastical Court in which the will is entered, is sufficient evidence, being a roll or record of the court. *Bull. N. P.* 215, 6.

A bill in Chancery has been admitted as slight evidence against the complainant: An answer in Chancery is evi-

dence against the defendant himself, though not against others. 1 *Vent.* 66: *Trials per pais* 167. But when a party gives an answer in Chancery in evidence at a trial, though he insist to read only such a part of it; yet the other side may require to have the whole read. 5 *Mod.* 10. As in case of a writing permitted to be read to prove one part of an evidence, which may be read to prove any other part of the evidence given to the jury.

Depositions of witnesses in Chancery between the same parties, may be given in evidence at law, if the witnesses are dead, and the bill and answer proved. *Trials per pais* 167, 297, 234. Regularly depositions in Chancery, of a witness, may not be given in evidence, if he be alive; unless he be in another kingdom, not subject to the dominion of our King. *Ibid.* 359. But depositions in Chancery, after answer, between the same parties, may be read as evidence, though the witnesses are not dead, if they cannot be found on search. *Shower* 3: 1 *Salk.* 278. Depositions in Chancery in perpetuum rei memoriam, are not to be given in evidence, so long as the parties are living. 1 *Salk.* 286. And it hath been adjudged, that these depositions to perpetuate testimony, on a bill exhibited, shall not be admitted as evidence at a trial at law, except an answer be put in. *Raym.* 335. If depositions are taken out of the realm, he who makes them is supposed there still, and they shall be read as evidence; but if it appears he is in England, they cannot be read, but he must come in person. 1 *Lil.* 555. Things done beyond sea may be given in evidence to a jury; and the testimony of a public notary of things done in a foreign country, will be good evidence. 6 *Rep.* 47.

Depositions cannot be given in evidence against any person who was not party to the suit; and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. *Hardr.* 22, 472: *Bunb.* 50. pl. 84—91: pl. 148—321. pl. 403: 9 *Mod.* 229: *Carth.* 181: *Fern* 113: *Gillb. Evid.* 62: *Ch. Prc.* 212. See this Dict. title *Depositions*.

Depositions in the Ecclesiastical courts may not be given in evidence to a jury at a trial; but a sentence may in a cause of tithes, &c. And the sentence of the Spiritual court is conclusive evidence in causes within their jurisdiction. 1 *Salk.* 290: 2 *Nelf. Abr.* 761.

Depositions before a coroner are admitted as evidence, the witnesses being dead. 1 *Lev.* 180: Likewise they have been admitted where a witness hath gone beyond sea. 2 *Nelf. Abr.* 760. The confession of a prisoner before a magistrate, &c. may be given in evidence against him. See 2 *Hawk. P. C.* c. 46. and the notes there. The examination of an offender need not to be on oath, but must be subscribed by him, if he confesses the fact; and then be given in evidence upon oath by the justice of the peace who took the same. The examination of others must be on oath, and proved by the justice, or his clerk, &c. as to their evidence, if they are dead, unable to travel, or kept away by the prisoner. *H. P. C.* 19, 162: *Kil.* 18, 55: *Wood's Inst.* 647.

The examination of an informer before a justice, taken on oath, and subscribed, may be given in evidence on a trial if he be dead, or not able to travel, &c. which is to be made out on oath. 2 *Hawk. P. C.* c. 46.

By *Stats.* 1 & 2 *P. & M.* c. 13. 2 & 3 *P. & M.* c. 10, Justices of peace shall examine persons brought before them

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them for felony, and those who brought them, and certify such examination to the next gaol delivery: but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. *Bull. N. P.* 242.

A verdict against one, under whom either the plaintiff or defendant claims, may be given in evidence against the party so claiming; but not if neither claim under it. *Mich.* 1656. *B. R.* In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, if he recovers against one, he shall not give that verdict in evidence against the rest. *3 Mod.* 141.

In a court of common law, a decree in Chancery is no evidence. Letters may be produced as evidence against a man, in treason, &c. Although a witness swear to the hand and contents of a letter, if he never saw the party write, he shall not be allowed as evidence. *Skin.* 673. In general cases the witness should have gained his knowledge from seeing the party write; but under some circumstances, that is not necessary; as where the handwriting to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it though he had never seen him write.—So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write. On an indictment for writing a treasonable libel, proof of the hand-writing is sufficient, without proof of the actual writing. *Bull. N. P.* 236.

Since no witnesses are present when goldsmiths' notes or promissory notes are given, such notes are allowed as evidence of the receipt of money, or other thing. *1 Salk.* 283. A church-book some writers say is not to be admitted as evidence; though others say it may. *Cro. Eliz.* 411. It is said copies of public books of corporations, &c. shall be evidence. *1 Lev.* 25: *1 Lil.* 551. But as to books of corporations, where things are entered not of record, the originals are to be produced as evidence.

A pedigree drawn by a herald at arms, will not be admitted for evidence, without shewing the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstantial evidence: But a copy of an inscription on a grave-stone, has been given in evidence in such a case. *2 Rol. Abr.* 686, 687. An almanack wherein the father had written the day of the nativity of his son was allowed in evidence to prove the nonage of the son. *Raym.* 84.

Matter in law ought not to be given in evidence at a trial, but only matters of fact, unless it be in case of a special verdict; matter in law is disputable, and reserved to be spoken to in arrest of judgment. *Vaugh.* 143. 147. In debt the defendant may give in evidence, that he paid money on an obligation before the day, &c. *2 Nels. Abr.* 755. And a release may be given in evidence, *on nil debet.* *5 Mod.* 19. Though in *indebitatus assumpsit* the plaintiff shall not give any specialty in evidence to prove his debt, as a bond, indenture, &c. because he may bring action of debt upon that specialty. *Magn.* 340.

Entry and expulsion may be given in evidence in debt for rent: Coveiture may be given in evidence to avoid a deed, &c. *Mal. Cas.* 230. Usurious contracts, &c. may be given in evidence. *2 Nels.* 756. Fraud may be

given in evidence, *on the general issue*: And tampering with witnesses may be given in evidence against a party &c. *5 Rep.* 60. But many things are to be pleaded; as justifications without title, in trespass, &c. and cannot be given in evidence upon Not guilty. *Trials per pais* 404. If in trespass *Nisi quia* be pleaded; a licence may not be given in evidence to excuse the trespass; for it must be pleaded. *Kel.* 59. And if the issue in detinue is *non detinet*, it shall not be given in evidence that the goods were pledged for money, and the money not paid; this is not good without pleading it: But a gift of the goods by the plaintiff may be given in evidence. *Co. Lit.* 283. But in an action of *traverse*, for evidence that they were pledged, for money lent or owing, and the money not being paid, or tendered, is a good bar to the action.

So in an issue in waste, *no waste done*, the defendant may give in evidence, that it came by lightning, tempest, or enemies; but that he repaired before action brought, must be specially pleaded, &c. *1 Inf.* 282. If an issue be taken on the cutting of twenty oaks, evidence may be for ten; because either is a breach of covenant not to do waste. *2 Shep. Abr.* 142. In *ejectione firmæ*, the plaintiff declares for 100 acres of land, and gives evidence only for forty, it will be good for so much. *Cro. Eliz.* 13. But if the point in issue be the sealing and delivery of a lease, and the witnesses prove it sealed and delivered, but did not know the lessor that sealed it: Or where proof is not made of *livery and seisin*, on issue of a lease for life: Or if on an issue upon a taking by *capias ad satisfaciendum*, and evidence be of taking by *capias ut legatum*, &c.; in all these cases the evidence will not be good to maintain the issue. *Plowd.* 14: *Kelw.* 55, 59: *Hob.* 55. See further titles Pleading: General Issue.

II. 1. The King cannot be a witness under his sign manual, &c. *2 Rol. Abr.* 686. Though it has been allowed he may, in relation to a promise made in behalf of another. *Hob.* 213. A peer produced as an evidence, ought to be sworn. *3 Keb.* 631. It is no exception to an evidence, that he is a judge, or a juror, to try the person; for a judge may give evidence going off from the Bench. *2 Hawk. P. C. c.* 46. And a juror may be an evidence as to his particular knowledge; but then it must be on examination in open court, not before his brother jurors. *1 Lil.* 552. Members of corporations shall be admitted or refused to give evidence in actions brought by corporations, as their interest is small or great; whereby it may be judged whether they will be partial or not. *2 Lev.* 231, 241. But they will not generally be admitted; though inhabitants not free of the corporation may be good witnesses for the corporation, as their interest is not concerned; and members may be *disfranchised* on these occasions. *Ibid.* 236.

In actions against church-wardens and overseers of the poor for recovery of money mispent on the parish account, the evidence of the parishioners, not receiving alms, shall be allowed. *Stat.* 3 & 4 *W. & M. cap.* 11. In informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie, shall be admitted. *Stat.* 1 *Ann. cap.* 18.

By *Stat.* 27 *Geo.* 3. c. 29, In actions on penal statutes, inhabitants of any place are witnesses to prove an offence, though

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though the penalty be given to the poor, or otherwise for the benefit of the said parish or place, provided the penalty does not exceed 20*l*.

Kinsmen, though other to near, tenants, servants, masters, attorneys for their clients, and all others that are not infamous, and which were not understanding or are not parties in interest, may give evidence in a cause, though the credit of servants is left to the jury. *1 Ast. Abr.* 68; *1 Port.* 249. A counsellor, attorney, or solicitor, is not to be examined as an evidence against their clients, because they are obliged to keep their secrets; but they may be examined, as to any thing of their own knowledge before retained, not as counsel or attorney, &c. *1 Port.* 97.

The bail cannot be an evidence for his principal. If the plaintiff makes one a defendant in the suit, on purpose to impeach his testimony, under a pretence of his being a party in interest, he may nevertheless be examined *de bene esse*; and if the plaintiff prove no cause of action against him, his evidence shall be allowed in the cause. *2 Lill. Abr.* 701. But in civil suits, and indictments for trespasses, &c. the plaintiff or prosecutor usually goes through his evidence, and those defendants who are not affected, are sometimes by direction of the judge, acquitted, and then give evidence for the other defendant or defendants, and sometimes they have been examined, without the form of an acquittal. If a man makes himself a party in interest, after a plaintiff or defendant has an interest in his evidence, he may not by this deprive them of the benefit of his testimony. *Skin. Rep.* 586.

One that hath a legacy given him by will, is not a good witness to prove the will; but if he release his legacy, he may be a good evidence. *Skin.* 704. It is the same of a deed; he that claims any benefit by it, may not be an evidence to prove that deed, in regard of his interest: And a person any ways concerned in the same title of land in question, will not be admitted as evidence. *Ibid.* 705. But it has been held, that an heir apparent may be a witness concerning a title of land; and yet a remainder-man, who hath a present interest, cannot. *1 Salt.* 385. If a legatee is permitted to be sworn and examined, the counsel cannot afterwards except against his evidence. *1 Ld. Raym.* 730.

To obviate all difficulties and inconveniences, it is enacted by *Stat. 25 Geo. 2. c. 6*, That any devise to a person being witness to any will or codicil, shall be void: And such person shall be admitted as a witness—And that any creditor attesting a will or codicil, by which his debt is charged upon land, shall be admitted as a witness to the execution, notwithstanding such charge—The credit of every such witness being left to the consideration of the court and jury.

Witnesses competent at law, are competent to prove a nuncupative will by *Stat. 4 Ann. c. 16. s. 14*: The son of a legatee is no witness to a will in the spiritual court; nevertheless it is held, he may be a good evidence to prove a nuncupative will, within the intent of the statute of frauds. *1 L. Ray.* 85. See title *Will*.

A grantee who is a bare trustee, it is said, is a good witness to prove the execution of the deed made to himself. *1 P. Wil.* 290: If an action is brought against many persons for taking of goods, one of them concerned may be admitted as an evidence against the rest. *Comberb.* 367, See *1 Mod.* 282: In criminal cases, as of robbery on the

highway, in action against the hundred; in rapes of women, or where a woman is married by force, &c. a man or a woman may be an evidence in their own cause. *1 Port.* 243. And in private enormous cheats, a person may give evidence in his own cause, where no body else can be a witness of the circumstances of the fact, but he that suffers. *1 Salt.* 286. Upon an information on the statute against usury, he that borrows the money, after he hath paid it, may be an evidence; but not before. *Raym.* 191.

An alien infidel, may not be an evidence; but a Jew may, and he sworn on the *Old Testament*. *1 Inst.* 6. A Quaker shall not be permitted to give evidence in any criminal cause; (unless he will take an oath): Though on other occasions, his solemn affirmation shall be accepted instead of an oath. *Stat. 7 & 8 W. 3. c. 3. cap. 34*. See title *Quakers*.—The oath of a Gentile sworn according to the circumstances of his religion, has been admitted in a civil matter. *1 Ast.* 21. And by *Wilkes, C. J.* an infidel in general, is an admissible witness, for the term does not imply that he is an atheist; but wherever it appears that a witness has no idea of a God or religion, he shall not be permitted to give his testimony. *1 Ast.* 40, 45.

Persons *non sane memoriam*; those that are attainted of conspiracy, or in a *præmunire* upon the statute *5 Eliz. c. 1*; *Papists* recusants convicted, on the *Stat. 3 Jac. 1. c. 5*, are disabled to give evidence; but see contra *1 Hawk. P. C. c. 12. s. 6*. So persons convicted of felony, perjury, &c. And if one by judgment hath stood on the pillory, or been whipped; for his infamy he shall not be admitted to give evidence, whilst the judgment is in force: But the record of conviction must be produced, on objecting against his testimony; and the witness shall not be asked any question to accuse himself, though his credit may be impeached by other evidences, as to his character in general, so as not to make proof of particular crimes, whereof he hath not been convicted. *3 Inst.* 108, 219; *3 Lev.* 426. If after a man hath stood in the pillory, &c. he be pardoned, he may be an evidence: And notwithstanding judgment of the pillory infers infamy at common law; by the civil and canon law it imports no infamy, unless the cause for which the person was convicted was infamous; and therefore such may be a good witness to a will, if not convicted of any infamous act. *3 Lev.* 426, 427. It has been held, that it is not standing in the pillory, disables a person to give evidence; but standing there upon a judgment for an infamous crime, as forgery, &c. If for a hbel, a man may be a witness. *5 Mod.* 74; *3 Nelf. Abr.* 557.

Persons excommunicated cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion. But persons outlawed may be witnesses, because they are punished in their properties and not in the loss of their reputation, and the outlawry has no manner of influence on their credibility. *Bull. N. P.* 292, 3.

A man is convicted of felony, and afterwards pardoned, he may be a good evidence. *Raym.* 369. So where burnt in the hand, which is quasi a statute pardon; and it is said this burning in the hand restores the offender to his credit. *Ibid.* 330. A person who was condemned to be hanged for burglary, but having a pardon for transportation, hath been allowed to be a good evidence. *5 Mod.* 28. One outlawed for treason and pardoned may be an evidence.

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State Trials, vol. 3. 515. Persons acquitted, or guilty of the same crime, (while they remain unconvicted) may be evidence against their fellows. *Kel.* 17. Though no evidence ought to be given of what an accomplice hath said, who is not in the same indictment. *State Trials*, vol. 2. 414. An informer may be a witness, though he is to have part of the forfeiture, where no other witnesses can be had. *Wood's Inst.* 598. Members of either House of Parliament may be witnesses on impeachments. *State Trials*, vol. 2. 632.

Idiots, madmen, and children, are excluded from giving evidence for want of skill and discernment.

2. In addition to what has been already said as to the number of witnesses, we may mention that it is required by *Stat. 29 Car. 2. cap. 3*, "That all devises of lands shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void." See title *Will*.

If a witness, served with a process in a civil cause, refuse to appear, being tendered reasonable charges, and having no lawful excuse, action on the case lies against him, whereon damages shall be recovered: And a feme covert not appearing, action may be brought against the husband and her. *Stat. 5 Eliz. cap. 9. s. 1 Leon.* 112.

If there is a doubt that a witness will not attend, the best way is to serve him with the original *subpoena*, keeping a copy, and if he is at any distance from the place of trial, tender reasonable charges: if he does not appear at the trial, call him three times on his *subpoena*, and then, if occasion requires, the party may bring his action, or move for an attachment.

In a criminal cause, if a witness refuse to appear and give evidence, being served with process, the court will put off the trial, and grant attachment against him; and, as refusing to give evidence is a great contempt, the party may be committed and fined. 1 *Salk.* 278.

Preventing evidence to be given against a criminal, is punishable by fine and imprisonment; and a person was fined one thousand marks in such a case. *Hill.* 1663. *B. R.* Persons dissuading a witness from giving evidence, &c. and jurors or others disclosing evidence given, are likewise offences punished by fine and imprisonment. 2 *Hawk. P. C. c. 22*.

By *Stat. 26 Geo. 3. c. 71. § 16*, (made to prevent *boresailing*, and which see under that head,) The justice before whom complaint shall be made for any offence against the act, may summon any person, other than the party complained against, to appear before him to give evidence; and in case such person shall wilfully refuse or neglect to attend or give evidence, he shall forfeit 10*l.* and in default of payment, or in case of inability shall stand committed to gaol, for not more than two months, nor less than one. And similar punishments are inflicted by other Statutes.

Where necessity requires, witnesses may be examined apart in court, till they have given all they have to say in evidence; so that what one has deposed, may not induce another to give his evidence to the same effect. *Forster.* 54.

A witness shall not be examined where his evidence tends to clear or accuse himself of a crime. *State Trials*, vol. 1. 557. Nor is he bound to give any answer by which he confesses or accuses himself of any crime. And a witness shall not be cross-examined till he hath gone through the evidence on the side whereon produced. *Ibid.*

vol. 2. 772. The court in criminal cases, is to examine the witnesses, and not the prisoner or prosecutors. *Ibid.* vol. 1. 143. Though in case of the court, counsel are frequently admitted to examine the evidence. An evidence shall not be permitted to read his evidence, but he may look on his notes to refresh his memory. *Ibid.* vol. 4. 45. An evidence may not recite his evidence to the jury, after gone from the bar, and he hath given his evidence in court; if he doth, the verdict may be set aside. *Cra. Elem.* 199. One that is to be an evidence at a trial, ought not to be examined before the trial, but by the consent of both parties, and a rule of court for that purpose.

No evidence ought to be produced against a man in a trial for his life, but what is given in his presence. *State Trials*, vol. 4. 227. And evidence shall not be given against the prisoner for any other crime than that for which prosecuted. *Ibid.* vol. 3. 947. A prisoner may bring evidence to prove that the witnesses gave a different testimony before a justice of peace, or at another trial: though he may not call witnesses to disprove what his own witnesses have sworn. *Ibid.* vol. 2. 623, 792. And no objection can be made to the evidence after verdict given. vol. 4. 35. It is justifiable to maintain or subvert an evidence, but not to give him any reward; for this, if proved, will avoid his testimony. *Ibid.* vol. 2. 470.

A witness shall not be examined to any thing that does not relate to the matter in issue. *Ibid.* vol. 2. 343. And where an issue is not perfect, no evidence can be applied, nor can the justices proceed to trial. *Brownl.* 42, 47, 435. If evidence doth not warrant and maintain the same thing that is in issue, the evidence is defective, and may be demurred upon; but proving the substance is sufficient. *Trials per Pais* 425. Evidence may be given of facts before and after the time they are laid in the indictment. And where a place is laid only for a venue in an indictment, or an appeal, (and not made part of the description of the fact) proof of the same crime may be made at any other place in the same county; and after a crime hath been proved in the county where laid, evidence may be given of other instances of the same crime, in another county, to satisfy the jury. 2 *Hawk. P. C. c. 46*.

But where a certain place is made part of the description of the fact against the defendant, the least variation as to such place between the evidence and indictment is fatal. 2 *Hawk. P. C. c. 46*. It hath been also adjudged, that where an indictment sets forth all the special matter, in respect whereof the law implies malice, variance between the indictment and evidence as to the circumstances of the fact, doth not hurt; so that the substance of the matter be found by the evidence. *Ibid.*

The burthen of proving lies on the plaintiff; and the presumption shall stand, until the contrary appear: though that which plainly appeareth, need not be given in evidence. 7 *Rep.* 40: *Co. Lit.* 233. The defendant's counsel is to conclude by way of answer to the evidence given to the jury by the plaintiff's: but he who doth begin to maintain the issue to be tried, ought to conclude and sum up the evidence given, which is no more than to put the jury in mind how he hath proved his cause. 1 *Lil.* 551. When a witness hath been fully examined by the party producing him, and cross examined by counsel for the adverse party, the court will sometimes ask a question or two of the witness, when the jury may put any questions they think proper to the judge, for him to put to the witness, after which counsel on either

side-

side cannot ask a single question of the witness, without leave of the court; and in fact the usual method is to pray the court, "Is not it proper, to ask such a question, or to examine to such a fact, &c. which may have dropped from the witness, after both counsel had finished their examination of him. If it is proper and necessary, the court will do it, otherwise not."

3. It seems to have been agreed, as a general rule, (even before the statute of frauds and perjury,) that no parol evidence could be admitted to controul what appeared on the face of a deed or will, not only from the danger of perjury, but from a presumption, that whatever the parties at that time had in contemplation, was reduced into writing. 5 Co. 68 u. b.; 3 Co. 155 u. Kelw. 49.

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence, that may be offered to a jury, and such as may be used only to inform the conscience of the court; viz. that in the first case no such evidence should be admitted; because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. 2 Vern. 98, 337, 625.

Also to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator: as where the testator had two sons both named John, and he devised lands to his son John; here parol evidence was admitted to shew which of his sons he meant; and it being proved, that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence, the will must be void. 2 Vern. 98, 337, 625. So parol evidence may be admitted to explain the intent of a testator in cancelling a will. Cowp. 53.

Parol evidence to prove that a bond was given, in lieu of dower, refused. 1 Will. 34. Parol proof admitted that the testator intended his wife executrix should have the residue undisposed of. Id. 313. Debt upon bond with condition for payment of money to Lydia Dovey, who is a third person, she declares the defendant owes her nothing, and upon proof thereof, a verdict was for the defendant; such declaration was properly given in evidence, for Lydia Dovey is to be considered as the real plaintiff. Id. 257.

Parol evidence shall not be admitted to annul or substantially vary a written agreement. 3 Will. 275: Str. 794: 3 Term Rep. 590. So parol evidence shall not be received, to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease. 2 Bl. Rep. 1249.

Parol evidence may be admitted to prove other considerations than those mentioned in a deed, as where the conditions mentioned in the deed were 10,000*l.* and natural love and affection, and the premises were worth 30,000*l.* an issue was directed to try whether natural love and affection made any part of the consideration; and it being found that they did not, the deed was set aside. 7 Bro. P. C. 70: cited 3 Term Rep. 473.

By the statute of frauds, several things must be evidenced by writing, of which, before that statute, parol evidence had been sufficient. See this Dict. title Fraud.

Sometimes violent presumption will be admitted for evidence without witnesses; as where a person is run through the body in a house, and one is seen to come out of the house with a bloody sword, &c. But on this the court ought not to judge hastily. 1 Inst. 6, 673. And though presumptive and circumstantial evidence may be sufficient in felony, it is not so in treason. State Trials, vol. 4. p. 397.

Persons once in being shall be intended still living, if the contrary is not proved. 2 Ed. Rep. 451. But now by Stat. 19 Car. 2. c. 6, it is enacted, "That if any person or persons, for whose life or lives estates have been, or shall be granted, shall remain beyond the seas, or else, where absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." See title Life-Estate.

As to hearsay evidence, it seems agreed, that what another has been heard to say, is no evidence, because the party was not on oath; also, because the party, who is affected thereby, had not an opportunity of cross-examining; but such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence. 1 Mod. 383; Skin. 403.

Also what a witness hath been heard to say at another time, may be given in evidence, in order either to invalidate or confirm the testimony he gives in court. 2 Hawk. P. C. c. 46. So what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, for or against him. Id. ib.

A witness by hearsay of a stranger shall not be allowed, except perhaps to confirm the evidence of a witness that spoke of his knowledge. Wood's Inst. 644.

If a person who gave evidence in a former trial, be dead; upon proof of his death, any person who heard him give evidence, may be admitted to give the same evidence between the same parties; but a copy of the record of the trial when the evidence was given ought to be produced. 3 Inst. 2: Lill. Abr. 705.

And evidence given at one trial in criminal cases, has been held not to be evidence at another's trial. 2 State Trials, 863.

As to evidence in passing a bill of attainder, see 5 State Trials, 114, 124, 132, 676. But the same evidence is requisite on an impeachment in parliament, as in private courts.

See further as to Evidence, New Abr. v. 2. tit. Evidence: Vin. vol. 3. passim; 3 Com. Dig. tit. Evidence; and v. 5. tit. Testimony: Gilbert's Law of Evidence: Bull. N. Pri.: Espinasse's N. Pri. &c. &c. 2 Hawk. P. C. c. 46: this Dict. tit. Baron and Feme; I. 2; Treason; and other apposite titles.

EWAGE, from the Fr. *eau*, water.] Toll paid for water-passage; see Aquage.

EWBRICE, Sax. *ew*, i. e. *conjugium*, and *bryce*, *fructus*.] Adultery or marriage-breaking: from this Saxon word *ew*, marriage; we derive our present English *woo*, to court.

EWE, *ew*,] A German word signifying law; it is mentioned in *Leg. W.* 1.

EXACTION, is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between *exaction* and *extortion* is this: *extortion* is where an officer extorts more than his due, when something is due to him; and *exaction* is, when he wrests a fee or reward, where none is due; for which the offender is to be fined and imprisoned, and tender to the party twice as much as the money he so takes, *Co. Lit.* 368: 10 *Rep.* 100; see title *Extortion*.

EXACTOR REGIS, The King's exactor or collector of Taxes; sometimes taken for the *sheriff*. *Niger Liber Scacc.* par. 1. cap. ult.

EXAMINATION, *examinate*.] A searching by, or cognizance of a magistrate. See this Dict. titles *Commitment*; *Evidence*; *Justice*.

With respect to examinations touching church benefices, see title *Benefice*.

EXAMINERS IN THE CHANCERY, *examinateurs*] Two officers of that court, who examine upon oath, witnesses produced by either side, in *London*, or near it, on such interrogatories as the parties to any suit exhibit for that purpose; and sometimes the parties themselves are, by particular order, likewise examined by them. In the country, witnesses are examined by *commissioners*, (usually attorneys not concerned in the cause,) on the parties joining in commission, &c. See title *Depositions*.

EXAMNIAL ROLL. In the old way of exhibiting *sheriff's accounts*, the illiviable fines and desperate debts were transcribed into a roll under this name; which was yearly read, to see what might be gotten. *Hale's Sber. Acco.* 67.

EXCAMBIATORES, A word used anciently for *exchangers* of land: but *Cowel* supposes them to be such as we now call *brokers*, that deal upon the *Exchange* between merchants.

EXCEPTION, *exceptio*.] Is a stop or stay to an action; and divided into *dilatory* and *peremptory*. *Bract.* lib. 5. tract. 5. In law proceedings, it is a denial of a matter alledged in bar to the action; and in Chancery it is what is alledged against the sufficiency of an answer, &c. The counsel in a cause are to take all their *exceptions* to the record at one time; and before the court hath delivered any opinion thereon. 1 *Lill. Abr.* 559. And on an indictment for treason, &c. *exception* is to be taken for misnaming, false *Lain*, &c. before any evidence is given in court; or the indictment shall be good. *Stat.* 7 *W.* 3. c. 1. See titles *Indictment*; *Treason*.

Where, by a general pardon, any particular crime is excepted; if a person be attainted, &c. of that offence, he shall have no benefit of the pardon. 6 *Rep.* 13: 2 *Nelf. Abr.* 765. And when a pardon is with an *exception* as to persons, the party who pleads it ought to shew, that he is not any of the parties excepted. 1 *Lev.* 26. A negative expression may be taken to enure to the same intent as an *exception*; for an *exception* in its nature is but a denial of what is taken to be good by the other party, either in

point of law or pleading. And *exceptions* in law *excepta* *ferunt regulam*. 1 *Lill. Abr.* 559.

EXCEPTION TO EVIDENCE, &c. See this Dict. title *Bill of Exceptions*.

EXCEPTION IN DEED AND WRITINGS, Keeps the things from passing thereby; being a saving out of the deed, as if the same had not been granted; but it is to be a particular thing out of a general one, as a room out of an house, ground out of a manor, timber out of land, &c. And it must not be of a thing expressly granted in a deed: also it must be of what is severable from, and not inseparably incident to, the grant. *Co. Lit.* 47: 1 *Lev.* 287: *Co. El.* 244.

Where an *exception* goeth to the whole thing granted or demised, the *exception* is void. *Co. El.* 6. A man makes a lease of a manor, excepting all courts, &c. the *exception* is void as to the courts; for having leased the manor, it cannot be such without courts. *Hob.* 108: *Moor* 870. A lease was made of all a man's lands in *L.* excepting his manor of *H* and he had no lands in *L.* but the said manor; it was adjudged that the manor passed, and that the *exception* was void, *Hob.* 170: 2 *Nelf. Abr.* 764. A lease of an house and shops, except the shops; though this may extend to other shops, it is void as to the shops belonging to the house demised, because it is repugnant to the lease. *Dyer* 265.

If an *exception* crosses the grant, or is repugnant to it, the same is void: and if there be a saving or *exception* out of an *exception*, it may make a particular thing as if never excepted; as if a lease be made of a rectory, excepting the parsonage-house, saving to the lessee a chamber; this chamber not being excepted out of the lease, shall pass by the lease of the rectory. *Hob.* 72. 170: *Co. El.* 372: *Owen* 20.

By *exception* of trees, the soil is not excepted, but only sufficient nutriment for the trees: for the lessee shall have the pasture growing under them, though the lessor shall have all the benefit of the trees, mast, fruit, &c. and the trees are parcel of the inheritance. 5 *Rep.* 11: 11 *Rep.* 48, 50. But it has been adjudged, that, by an *exception* of woods, underwood and coppices, the soil of the coppices is excepted. *Poph.* 146: *Cro. Jac.* 487. If a lessee for years assign over his term, excepting the trees, &c. the *exception* is not good; because no one can have a special property in the trees, but the owner of the land. 2 *Nelf.* 764. Though where lessee for life makes a lease for years excepting the wood, &c. this may be a good *exception*, although he hath not any interest in it but as a lessee, in regard he is chargeable in waste, &c. and hath not granted his whole term. *Cro. Jac.* 296: 1 *Lill. Abr.* 560. These *exceptions* are commonly in leases for life and years; and must be always of a thing *in esse*. *Co. Lit.* 47. See titles *Grant*; *Dead*; *Lease*; *Condition*.

EXCHANGE, *Excambium* or *cambrum*; with the Civilian, *permutatio*. The King's Exchange, is the place appointed by the King for exchange of plate or bullion for the King's coin, &c. These places have been divers heretofore; but now there is only one, viz. the *Mint* in the Tower. See *Stat.* 25 *Ed.* 3. *St.* 5. c. 12: 5 & 6 *Ed.* 6. c. 19. and this Dict. titles *Coin*; *Money*.—There is also a *Royal Exchange of Merchants* in London.

Exchange among merchants is a commerce of money, or a bartering or exchanging of the money of one city or country

EXCHANGE.

country for that of another; money in this sense, is either real or imaginary; real, any real species current in any country at a certain price, at which it passes by the authority of the State, and of its own intrinsic value; and by imaginary money is understood all the denominations made use of to express any kind of money, which is not the full value of any real species. See *Monetary*.

The method of exchange for money used in England ought to be *par pro par*, according to value for value, and our exchange is grounded on the weight and fineness of our own money, and the weight and fineness of that of other countries, according to their several standards, proportionable in their valuation; which being truly and justly made, reduces the price of the exchange necessary of any nation or country to a certainty. But this course of exchange is of late abused, and money is become a merchandise, that rises and falls in its price in regard to the plenty and scarcity of it. At *London*, all exchanges are made upon the pound sterling of 20*s*. In the *Low Countries*, *France* and *Germany*, upon the *French crown*; *Spain* and *Italy*, &c. upon the *ducato*; and at *Florence*, *Venice*, and other places in the *Streights*, by the *dollar* and *Florin*. See title *Bill of Exchange*.

EXCHANGES OF GOODS AND MERCHANDISES. Were the original and natural way of commerce, precedent to buying; for there was no buying till money was invented; though in exchanging, both parties are as buyers and sellers, and both equally warrant. 3*Salk.* 157.

EXCHANGE OF LANDS. A mutual grant of equal interest in lands or tenements, the one in consideration of the other: and is used peculiarly in our Common-law for that compensation which the warrantor must make to the warrantee, value for value, if the land warranted be recovered from the warrantor. *Bract. lib. 2. cap. 16. de comp. Conv. 1. vol. 170.* Also there is a tacit condition of re-entry in this deed, on the lands given in exchange, in case of eviction; and on the warranty so, to claim and recover over in value, &c. For if either of the parties is evicted, even of a part, the exchange is defeated. 4*Rep.* 121: *Cro. Eliz.* 903.

The word *Exchange* is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. 1*Inst.* 50, 51. The estates exchanged must be equal in quantity of interest, value is immaterial: as fee-simple for fee-simple, a lease for 20 years for a lease for 20 years, and the like. *Litt.* § 64, 5. And the exchange may be of things that lie either grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance; for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. *Litt.* § 62.—Entry however must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety. 1*Inst.* 50.

An exchange may be made of lands in fee-simple, free-tail, for life, &c. The estates granted are to be equal, as fee-simple for fee-simple, &c. though the lands need not be of equal value, or of the like nature: for a rent in fee issuing out of land, may be exchanged for land in fee; *Litt.* 63, 64: *Co. Litt.* 50, 51. If an exchange be made between tenant for life, and tenant in tail after possibility of issue extinct, the exchange is good; because their estates are equal. 11*Rep.* 80: *Moor* 665.

An exchange made between tenant in tail and another of unequal interest, may be good during his life: but his issue, when of full age, shall avoid it. And exchanges made by infants, by persons *non sui juris* married; a husband of the wife's land, &c. are not void, but voidable only; by the infant at his full age, the wife of the person *non sui juris*, and the heirs after the death of the husband, who may waive the nullity and disavow to them. *Perk.* § 277, 281.

Two jointenants and two tenants in common may exchange their lands; and by this deed, freeholds pass without livery and seisin; but the word exchange is to be used; and there must be execution of the exchange, by entry on the lands in the life of the parties, or the exchange will be void. 1*Inst.* 51: 1*And.* 9.

Littell expresses himself concerning an exchange as of a transaction between two; and in the case of *Essex College*, 2*Will.* 2. p. 484, the court held, that an exchange in the strict legal sense of the word, cannot be between three; the principles of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation is entirely dependent; and the case, above mentioned, of tenants in common exchanging with jointenants is not irreconcilable to this rule; because though four persons may be named, yet they constitute only two distinct parties; and consequently there is the same reciprocity as if the transaction were between two persons only.—And this applies to any number of persons, if so combined, as to make only two distinct relative parties. 1*Inst.* 50, 51: 1*And.* in *note*.

Sometimes lands intended to pass by exchange, not having the qualities and incidents of exchanged lands, may pass by way of gift or grant; as if two persons are seised of two acres of land, and one of them by deed gives his acre to the other, and the other his acre to him, and each of them gives livery of seisin upon his acre given in exchange; here the acres will pass from one to the other, but not in a way of exchange, because there was no word of exchange in the deed. *Litt. 118.* 61: *Perk.* 253.

A man grants to another lands in fee-simple, for lands in tail by way of exchange; or land in tail, for lands for life, &c. these deeds will not take effect as exchanges. *File. Exchange* 15, 61: *Co. Litt.* 62. If tenant in tail gives his land in exchange, for other land of the same estate-tail, the issue in tail may make it good if he will, or avoid the exchange. 1*Rep.* 96. A feoffment is made to A. and B. and the heirs of A. and they exchange the land for other lands; this will be good, and they shall hold the lands in the same nature that the land given in exchange was held. *Perk.* § 277.

If a lord release to the tenant his services in tail in exchange of land given to the lord in exchange in tail also, it is ill: but if lessee for life of one acre, give another acre to his lessor in tail, in exchange for a release from him of that acre, *Blackstr.* in tail in like manner, it is a good exchange. *Perk.* § 219, 276, 283. In case two persons make an exchange of land, and limit no estate, each shall have an estate for life, by implication: but if an express estate be limited to one for life, and none to the other, it will be void. 19*H.* 6. 27. And to make a good exchange, both the things must be in *esse* at the time of the exchange. *Co. Litt.* 50: 3*Ed.* 4. 10.

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But an exchange may be made to take effect in *future*, as well as presently; for if it be, that after the feast of *Easter A. B.* shall have such lands in *D.* in exchange for his lands in *S.* this is good. *Park. 4 265.*

By a special kind of agreement, an exchange may be of unequal estates. *Meor. c. 209.* The condition and warranty in exchanges run to the parties in *privy*; not to an *assignee*, &c. And if after two have exchanged lands, one of them releases to the other the warranty in law, it will not destroy the exchange. *4 Rep. 122: 1 Rel. Abr. 815.* The parties themselves, and all privies and strangers for the most part may take advantage of exchanges void by any defect or accident: *contra*, if they are voidable, &c. *1 Rep. 105: Dyer 285.*

EXCHANGE OF CHURCH LIVINGS. These exchanges are now seldom used, except that parsons sometimes exchange their churches, and resign them into the bishop's hands: and this is not a perfect exchange till the parties are inducted; for if either dies before they both are inducted, the exchange is void. *Wood's Inst. 284: 2 Comm. 323.*

By *Stat. 31 El. c. 6. § 8*, If any incumbent of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in any respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever; as well the giver as the taker, shall lose double the value of the sum; half to the Crown, and half to him that shall sue for the same. See this *Dist. titles Simony: Advowson.*

If two parsons by one instrument agree to exchange their benefices, and in order thereto resign them into the hands of the Ordinary, such exchange being executed on both parts, is good; and each may enjoy the other's living; but the patrons must present them again to each living; and if they refuse to do it, or the Ordinary will not admit them respectively, then the exchange is not executed; and in such case either clerk may return to his former living, even though one of them should be admitted, instituted and inducted to the benefice of the other; which is expressed in the exchange itself, and the *protestation* usually added to it. *2 Rep. 74: Rel. Abr. 814.*

EXCHANGEORS. Those that return money by bills of exchange. See *Excambigores. 5 R. 2. c. 2.*

EXCHEQUER.

SCACCARIUM, from the Fr. *eschiquier*, i. e. *ubacus*, *tabula lusoria*, or from the Germ. *schatz*, viz. *thesaurus*.] An ancient Court of record, wherein all causes touching the revenue and rights of the crown are heard and determined; and where the revenues of the crown are received. *Camden in his Britan. p. 113*, saith, This court took its name à *tabulâ ad quam assidebant*, the cloth which covered it being partly coloured, or chequered: we had it from the Normans, as appears by the *Grand Customary*, cap. 56; where it is described to be an assembly of high justiciars, to whom it appertained to amend that which the inferior justiciars had misdone, and unadvisedly judged, and to do right to all as from the Prince's mouth; and this seems the origin of the Court of Exchequer-Chamber.

The Court of Exchequer is inferior in rank, not only to the court of King's Bench, but to the Common Pleas also; it is a very ancient court of record, set up by *Will-*

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iam the Conqueror, as a part of the *aula regia*, though regulated and reduced to its present order by king Edward I; and intended principally to order the revenues of the crown, and to recover the king's debts and duties: *4 Inst. 103—116.* It is called the Exchequer, *scaccarium*, from the chequed cloth, resembling a chess-board, which covers the table there; and on which when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the Exchequer, which manages the royal revenue; and the court or judicial part of it; which latter is again sub-divided into a court of Equity, and a court of Common-law.

The Court of Equity is held in the Exchequer Chamber before the Lord Treasurer, the Chancellor of the Exchequer, the chief baron, and three *puisne* Barons. These Mr. *Selden* conjectures (title *Hon. 2. § 16.*) to have been anciently made out of such as were Barons of the kingdom or parliamentary barons; and thence to have derived their name; which conjecture receives great strength from *Bracton's* explanation of *Magna Carta*, c. 14, which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the Exchequer *l. 3. tr. 2. c. 1. § 3.*

The primary and original business of this court is to call the King's debtors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of Common Pleas, King's Bench, and Exchequer, was entirely separate and distinct: the Common Pleas being intended to decide all controversies between Subject and Subject; the King's Bench to correct all crimes and misdemeanors that amount to a breach of the King's peace; and the Exchequer to adjust and recover the King's revenue. See this *Dist. titles Courts: King's Bench: Common Pleas.* But as, by a fiction, almost all sorts of civil actions are now allowed to be brought in the King's Bench, in like manner, by another fiction, all kinds of personal suits may be prosecuted in the court of Exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the King's debtors and farmers, and all accountants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity, that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of Common-law actions (where the personalty only is concerned) as are prosecuted in the court of Common Pleas.

This gives origin to the *Common-law* part of their jurisdiction; which was established merely for the benefit of the King's accountants; and is exercised by the barons only of the Exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus*: in which the plaintiff suggests that he is the King's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus justiciarius tenet*, (by which he is the less able,) to pay the King his debt or rent. And these suits are expressly directed, by what is called the statute of *Rutland*, 10 E. 1. c. 11, to be confined to such matters only,

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only, as specially concern the King or his ministers of the Exchequer. And by the *articuli super cartas*, 28 Ed. 1. c. 4, it is enacted, that no Common Pleas be thenceforth holden in the Exchequer, contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the Exchequer; as well as the King's accomptant. The surmise of being debtor to the King; is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another upon a bare suggestion that he is the King's accomptant; but whether he is so, or not, is never controverted.

In this court on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes, in which case the surmise of being the King's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the Chancery has of late years obtained a large share in this business. See this Dict. titles *Chancery: Equity*.

An appeal from the equity side of this court lies immediately to the House of Peers; but from the Common-law side, in pursuance of the *Stat. 31 E. 3. c. 12*, a writ of error must be first brought into the court of Exchequer Chamber. And from the determination there had, there lies in the *dernier resort*, a writ of error to the House of Lords. 3 *Comm.* 44. See this Dict. titles *Deceit: Equity: Error*.

Some persons think there was an Exchequer under the Anglo-Saxon Kings; but our best historians are of opinion, that it was erected by King William the First, its model being taken from the transmarine Exchequer, established in Normandy long before that time. *Madox's Hist. Excheq.*

In the reign of Hen. the First, there was an Exchequer, which has continued ever since; and the judges of the court were at that time stiled *Barons Scaccarii*, and administered justice to the subjects. In ancient times the Barons of the Exchequer dealt in affairs relating to the state, or public service of the crown and realm: and were greatly concerned in the preservation of the prerogative, as well as the revenue of the crown; for at the Exchequer it was the care of the Treasurer and Barons to see that the rights of the crown were no ways invaded. *Lex Constitutionis* 198.

On account of the authority and dignity of the court of Exchequer, anciently it was held in the King's palace; and the acts thereof were not be examined or controlled in any other of the King's ordinary courts of justice: the Exchequer was the great repository of records, wherein the records of the other courts at *Westminster*, &c. were brought to be laid up in the Treasury there. And writs of the Chancery were sometimes made forth at the Exchequer; writs of summons to assemble parliaments, &c. *Ibid.*

The Exchequer has been commonly held at *Westminster*, the usual place of the King's residence; but it hath been sometimes holden at other places, as the King pleased; as at *Winchester*, &c. And in the Exchequer there are reckoned seven courts, *viz.* the court of *Pleas*; the court of *Accounts*; the court of *Receipts*; the court of the *Exchequer-Chamber* (being the assembly of all the judges of England for difficult matters in law); the court of *Exchequer-Chamber* for *Errors* in the court of Exchequer; for

Errors in the *King's Bench*; and the court of *Equity* in the *Exchequer-Chamber*. 4 *Inst.* 219.

But, according to the usual division for the dispatch of all common business, the Exchequer is divided (as has been already noticed) into two parts; one whereof is conversant especially in the judicial hearing and deciding of causes pertaining to the Prince's coffers, anciently called *Scaccarium Computorum*; the other is the *Receipts of the Exchequer*, which is properly employed in the receiving and payment of money. And it has been observed, that about the time of the Conquest there was very little money in specie in the realm; for then the tenants of knights' fees answered their lords by military services; and till the reign of King Hen. I. the rents or farms due to the King were generally rendered in provisions and necessaries for his household; but in that reign the same were changed into money; and afterwards, in succeeding times, the crown revenue was changed or paid into the Exchequer chiefly in gold and silver. *Lex Constitutionis*, p. 203.

By statute, all sheriffs, bailiffs, &c. are to account in the Exchequer before the Treasurer and Barons: and annual rolls are to be made of the profits of counties, &c. Also inquisitors shall be appointed in every county, of debts due to the King. 51 *H. 3. c. 5*: 10 *Ed. 1. Stat. Rul.* And all fines of counties for the whole year are to be sent into the Exchequer. *Stat. de Vicecom.* 14 *Ed. 2. c. 1*. Persons impeached in the Exchequer, may plead in their own discharge; and there shall be writs for discharging persons, &c. 5 *R. 2. c. 10*, &c. The officers of the receipt may receive and take for their fees 1 *d.* in the pound for sums issued out, &c. 5 *6 W. & M. cap.* 20.

Officers of the Exchequer are without delay to receive money brought thither: and the money on the receipt is to be kept in chests under three different locks and keys, kept by three several officers, &c. 8 *9 W. 3. c. 28*.

In the Court of Equity the proceedings are by *English bill* and answer, agreeable to the practice of the High Court of Chancery.

In this court the Attorney General brings bills for any matters concerning the King; and any person grieved in any cause prosecuted against him on behalf of the King, may bring his bill against the Attorney General to be relieved in equity, in which case the plaintiff must attend the King's Attorney with a copy of the bill, and procure him to answer the same; and Mr. Attorney may call any that are interested in the cause, or any officer or others, to instruct him in the making of his answer, so as the King be not prejudiced thereby; and his answer is to be put in without oath. 4 *Inst.* 209, 212, 218.

The Exchequer is now said to be the last of the four courts at *Westminster*; governed by the Chancellor of the Exchequer, the Lord Chief Baron, and three other Barons, who are the sovereign auditors of England, and the judges of the court. There also sits in this court a *Curfitor Baron*, who administers the oath of all high-sheriffs, under-sheriffs, bailiffs, auditors, receivers, collectors, controllers, surveyors, and searchers of all the customs in England.

The Chancellor or Under Treasurer hath the custody of the seal of this court. The King's Attorney General is made privy to all manner of pleas that are not ordinary and of course,

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course, which rise upon the process of the court; and he puts into court in his own name, informations of concealments of customs, seizures, &c. And also for intrusions, wastes and encroachments upon any of the King's lands; or upon penal statutes, forfeitures, &c.

The *Remembrancers* keep the records of the court betwixt the King and his subjects, and enter the rules and orders there made: one is called the King's Remembrancer, and the other the Lord Treasurer's Remembrancer: The *Remembrancer for the King* hath all manner of informations upon penal statutes used in his office only; and he calls to account, in open court, all the great Accountants of the Crown, Collectors of Customs, &c. he makes out writs of privilege, enters judgments of pleas; and all matters upon *English bill* are remaining in his office.

The *Remembrancer for the Lord Treasurer* makes out all the estreats; he sets down in his book the debts of all sheriffs, and takes their foreign accounts; and issues out writs and process in many cases, &c. And these Remembrancers have several *attornies* to do business under them; who by statute are not to issue out of the Remembrancer's office, any writs upon supposition, but upon just grounds, &c. 1 Jac. 1. c. 26.

There are two *Chamberlains* that keep the keys of the Treasury, where the records lie, with the book of Domesday, &c. They may sit in court if they please, but not intermeddle with any thing; unless it be relating to the sheriffs, in the pricking whereof they have a vote. See post Stat. 23 Geo. 3. at the end of this article. And besides the Chamberlains, there is a *Clerk of the Pipe*, in whose custody are conveyed out of the King's and Treasurer's Remembrancer, &c. as water through a pipe, all accounts and debts due to the King.

The *Controller of the Pipe*; who is said to be the Chancellor of the Exchequer. The *Clerk of the Estreats*, who receives the estreats from the Remembrancer's office, and writeth them out to be served for the King, &c. The *Foreign Opposer*, who opposes or makes a charge on all sheriffs, &c. of their green wax, i. e. fines, issues, amerciaments, recognisance, &c. certified in estreats annexed to the writ, under the seal in green wax, and delivereth the same to the Clerk of the Estreats to be put in process. The *Auditors*, that take the accounts of the King's Receivers, Collectors, &c. and perfect them. The four *Tellers*, whose business to receive and pay all money is well known. The *Clerk of the Pells*, from his parchment rolls, called *Pellis Receptorum*. The *Clerk of the Nihil*, who makes a roll of such sums as the sheriff upon process returns *Nihil*, &c. The *Clerk of the Pleas*, in whose office all officers and privileged persons are to sue and be sued; and here are divers *Under Clerks* employed in suits commenced or depending in this court. There is a *Clerk of the Summons*; *Secundaries* in the offices of the Remembrancers; *Secondaries of the Pipe*: *Marshal*, &c.

By Stat. 23 Geo. 3. c. 82, The offices of the two Chamberlains, the Tally-cutter, Usher of the Exchequer, and the second Clerks to each Teller, shall, after the death, surrender, forfeiture or removal of the persons interested in them, be abolished. § 1, 4.

Upon the death, &c. of the two Chamberlains, instead of the tally now used to denote the receipt of money, there shall be substituted an indented cheque receipt. § 2.—And upon the death, &c. of the Usher, the chief officer in each office shall supply his place. § 3.

EXCISE.

After the death, &c. of the present Auditor, Clerk of the Pells, either of the four Tellers, or two Chamberlains, the payment of all salaries, fees and emoluments to the said officers, shall cease, and in lieu thereof, certain annual salaries are made payable, viz. To the Auditor 4200*l.* his chief Clerk 1000*l.* Clerk of the Pells 3000*l.* his first Clerk 1000*l.* The four Tellers each 2700*l.* Each of their first Clerks 1000*l.* These are to appoint such other clerks and officers as they think fit, to be approved of by the Treasury. § 5.

All fees as heretofore (See Stat. 26 Geo. 3. c. 39.) to be received by the first Clerk to the Clerk of the Pells; [200*l.* of whose salary is on that account:] two thirds thereof to be applied to the sinking fund, and one-third to pay the above salaries. § 9.

The houses of the Auditor, four Tellers and Usher, shall after the death, &c. of the present possessors be vested in his Majesty, and not annexed to the offices. § 10.—And no office in the receipt of the Exchequer may be granted either in possession or reversion, in any other manner than subject to this act. § 11.

THE COURT OF EXCHEQUER-CHAMBER was first erected by Statute 31 Ed. 3. c. 12; to determine causes upon writs of error from the Common law side of the Court of Exchequer. And to that end it consists of the Lord Chancellor, and Lord Treasurer, taking unto them the justices of the King's Bench, and Common Pleas. In imitation of which, a second Court of Exchequer Chamber was erected by Stat. 27 Eliz. c. 8, consisting of the Justices of the Common Pleas, and the Barons of the Exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of King's Bench. See this Dict. title Error: § Comm. 56.

Into the court also of Exchequer-Chamber, (which then consists of all the judges of the three superior courts, and sometimes the Lord Chancellor also,) are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. 4 Inst. 119: 2 Bulstr. 146.

In the abovementioned court of Exchequer-Chamber, established under Stat. 27 Eliz. c. 8, there are no more than two return-days in every term; one is called the general *affirmance day*, being appointed by the judges, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments: the other is the adjournment day, which is usually held a day or two before the end of every term. On the first of these days, judgments are affirmed, or reversed, or writs of error non-prossed; the intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed, or reversed, or writs of error non-prossed, on paying a fee extraordinary to the clerk of the Errors, and setting down the cause for affirmance two days before the adjournment day. Impey K. B. 678.

EXCHEQUER BILLS.—See titles National Debt; Forgery.

EXCISE.

From the Belg. *accise* tributa. An inland imposition paid, sometimes on the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.

This

EXCISE.

This is doubtless, (says *Blackstone*, 1 *Comm.* 318,) in- partially speaking, "the most economical way of taxing the subject; the charges of levying collecting and man- aging the excise duties being considerably less in proportion than in other branches of the revenue. It also renders the commodity cheaper to the consumer than charging it with customs to the same amount would do. But at the same time the rigour and arbitrary proceedings of excise laws, seem hardly compatible with the temper of a free nation. For the frauds that might be com- mitted in this branch of the revenue, unless a strict watch is kept, make it necessary wherever it is established, to give the officers a power of entering and searching the houses of such as deal in excisable commodities, at any hour of the day; and in many cases, of the night likewise. And (for the same reasons) the proceedings in case of transgressions are summary and sudden, to the exclusion of the trial by jury.

Its original establishment was in 1643, when it was introduced by the Parliament then in rebellion against King Charles I. Its progress was gradual, being at first laid upon those persons and commodities where it was supposed the hardship would be least perceivable *wine*. The makers and venders of beer, *ale*, *cyder* and *perry*; and was afterwards imposed on such a multitude of commodities that it might fairly be denominated general.

Upon the restoration of Charles II, it having then been long established, and its produce well known, some part of it was given to the crown by way of purchase for the feudal tenures and other oppressive parts of the hereditary revenue. And notwithstanding the objections eternally raised against it, by the interested or the patriotic, it has from time to time been imposed on a vast variety of articles.

Brandies and other *spirits* are now excised at the dis- tillery: *Printed silks* and *linens* at the printer's.—*Starch* and *hair-powder* at the maker's.—Gold and silver *wire*, at the wire drawer's.—*Plate* in the hands of the vendor, who pays yearly for a licence to sell it.—Lands and goods sold by *auction*, for which a pound rate is pay- able by the auctioneer who is also charged with an an- nual duty for his licence; *coaches* and other wheel car- riages, for which the occupier is excised; though not with the same circumstances of arbitrary strictness, as in most other instances.—To these we may add *coffee* and *tea*, *chocolate* and *cocoa paste*, for which the duty is paid by the retailer.—All artificial (home-made) wines commonly called *Sweets*.—*Paper* and *pasteboards* first when made, and again if stained or printed. *Malt*.—*Vinagers*.—And the manufacture of *glass*; for all which the duty is paid by the manufacturer.—*Hops*, for which the person that gathers them is answerable.—*Candles* and *Soap*, which are paid for at the maker's.—*Malt liquors* brewed for sale, which are excised at the brewery.—*Cyder* and *Perry* at the vendor's.—And *leather* and *Skins* at the tanner's.—A list which no friend to his country would wish to see further increased.—1 *Comm.* c. 8. p. 320.

To the above list however are now to be added.—*Foreign Wines*; in the hands of the importer, merchant or consignee.—*Coaches*, on being built, at the coach maker's, who must also have a licence.—*Tobacco* and *Sauces* at the manufacturer's.—And *bricks* and *tiles*; See title *Bricks*.

It has been very judiciously observed, that the grie- vances of the excise exist more, perhaps, in apprehension

than in reality.—Actions and prosecutions against officers, commissioners and justices for misconduct in excise cases are very rarely heard of in courts of law. It is certainly an evil, that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet it seems more than equivalent to the Public at large, that by the survey of the excise, the commodity is preserved from many shameful adulterations; as experience has fully proved since *wine* was made sub- ject to the excise laws.

The excise, like the customs, is necessarily regulated by a multiplicity of statutes; the abridgement of which would form no small volume; See title *Customs*.—The following short extracts from *Burn's Justice* title *Excise*, where this subject is more fully stated, will convey the information most useful to the student.

One principal head office of Excise is to be kept in *London*; or within ten miles thereof, to which all other offices in the kingdom shall be subordinate and account- able; which said office shall be managed by such com- missioners as the King shall appoint. *Stat. 12 Car. 2. c. 24. § 46*; 5 *W. c. 20. § 16*.

And all the places within the bills of Mortality shall be under the immediate care and management of the said head-office; and such and so many subordinate commissioners and sub-commissioners, and other officers shall be appointed by the King in other places, as he shall think fit. *Stat. 12 Car. 2. c. 24. § 48*.

The excise office in all places where it shall be ap- pointed, shall be kept open from 8 in the morning, till 2 in the afternoon. *Stat. 23 Geo. 2. c. 26. § 12*.

The commissioners or sub-commissioners shall appoint under their hands and seals, such persons as they shall think needful in each market town, to be there upon every market day, in some known and public place; for receiving entries and duties, and performing all other things touching the revenue of excise; and if such office be not so kept in each market town, the commissioners or others neglecting or refusing, shall for every market day forfeit 10*l*. And such person as shall come to such market town to make his entry or payment, and tender the same accordingly, and be able to prove such tender by oath of one witness, shall not be liable to any penalty for such weekly or monthly entries or payments, as should have been made or paid on such market day. *Stat. 15 Car. 2. c. 11. § 10*.

The kingdom of *England* and *Wales* (exclusive of the bills of Mortality) is divided into about 50 *collections*; some called by names of particular counties; others by the names of great towns; where one county is divided into several collections, or where a collection compre- hends the contiguous parts of several counties, every collection is subdivided into several *districts*, within which there is a *Supervisor*; and each district is parcelled into *out rides* and *foot walks*, within each of which there is a *Gauger* or surveying officer. *Glb. Exrb. Append.*

The commissioners or sub-commissioners, in their re- spective circuits and divisions, shall constitute under their hands and seals, such and so many gaugers as they shall find needful. *Stat. 12 Car. 2. c. 24. § 33*.

In order to which, he who would be made a gauger, must procure a certificate, that he is above 21, and under 30 years of age; that he understands the four first rules of arithmetick; that he is of the communion of the church

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church of England; how he has been employed, or what business he hath followed; that he is not incumbered with debts; whether single or married; and if married how many children he has, for if he has above two, he cannot (by the rules of the office) be admitted. *Gibb. Exch. App.*

He must also nominate two persons to be his sureties, and it must be certified that they are of sufficient ability; and that the said certificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor of excise where the party applying lives. *id.*

At the bottom of his certificate must be his affidavit, that neither he nor any else to his knowledge, hath, directly, or indirectly, given or promised to give any treat, fee, gratuity, or reward, for his obtaining or endeavouring to obtain an order for his being instructed. *id.*

When an order for instruction is granted, it is directed to an experienced officer, who receives such person as his pupil: and the like books, as officers have, being delivered to such pupil, he goes with and attends the officer, who instructs him, and he takes surveys, and in his own book makes the like entries as if he was an officer, until the instructor certifies that he is fully instructed. *id.*

After he is thus certified for, and until he is employed, he is called an *expectant*, being to wait till a vacancy happens. *id.*

No person shall be capable of intermeddling with any office relating to the Excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the Exchequer, take the oaths of allegiance and supremacy, together with an oath of office which is to be certified to and recorded by the next Quarter-Sessions. *Stat. 12 C. 2. c. 24. § 47, 48. and see Stat. 15 C. 2. c. 11 § 57.*

The business of the *Supervisor* is to be continually surveying the houses and places of the persons within his district liable to duties: and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen-papers; and every supervisor is in his own book to enter what he himself does each day and part thereof; and also set down the behaviour, good and bad, the diligence or negligence, of the several officers of his district: and at the end of every six weeks to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district, and to transmit such diary at the end of every six weeks to the chief office. *Gibb. Exch. Append.*

Each commissioner takes and peruses a proportion of these diaries; and when he meets with any remarkable complaint against any officer, he communicates it to the rest, who thereupon come to an agreement, either to *admonish*, *reprimand*, *reduce*, or *discharge*. For small faults, officers are admonished; for great ones reprimanded; for greater, reduced; but for the greatest discharged. The commissioner who peruses the diary writes in the margin, *admonish*, *reprimand*, or as the case is. *id.*

These diaries, after having been thus written upon are delivered to the clerk of the diaries, who in a book, called the reprimand book, places the admonitions, reprimands and the like, to each officer's account, and writes every offender word thereof. Which reprimand book is referred to upon discovering new faults; and if it is

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there found that the officer has before been admonished and reprimanded so often, that there are no hopes of his amending, he is then discharged. The said book is likewise referred to, when application is made for advancing, or preferring an officer into a better post. Frequent admonitions or reprimands, are a bar to preferment, unless they are of old standing; but if for three years last he stands pretty clear of admonitions and reprimands, those of elder date are not much regarded. *id.*

The *Collector's* business is, every six weeks to go his rounds, and in the intervals of rounds, he is to be assisting in prosecuting offenders before the justices; he is also to peruse the supervisor's diaries, and where he finds an officer complained of, is to examine him and the supervisor, and having heard both, is in the margin to write his opinion of each fact; he is also to have an eye how the supervisors and officers of his collection perform their duties, and from the vouchers he transcribes into his book, the charge on each particular person in his collection. *id.*

For faults, gaugers are reduced, either to be only assistants, or from foot walks to out rides; supervisors are reduced to be again only gaugers: and collectors are reduced to be supervisors. *id.*

In some instances, discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged are never again restored, unless one of the discharges appears to have been occasioned by a misrepresentation of the case. *Id.*

EXCLUSA, EXCLUSAGIUM, A sluice for the carrying off water; and the payment to the lord for the benefit of such a sluice. *Et duo molendina in eodem manerio cum aquis exclusagiis, &c. Mon. Ang. tom. 1. p. 398, 587.*

EXCOMMENGEMENT, *Law French.*] Excommunication. *Stat. 23 Hen. 8. c. 3.*

EXCOMMUNICATION, *Excommunicatio.*] An ecclesiastical censure, divided into the greater and the lesser; by the latter a person is excluded from the communion of the church only; by the former from that communion, and also from the company of the faithful; and incapacitated from performing any legal act.

The sentence of excommunication was instituted originally for preserving the purity of the church; but ecclesiastics did not scruple to convert it into an engine for promoting their own power, and inflicted it on the most frivolous occasions. *Robert's. Hist. Emp. Charles V. 2 vol. 109, &c.*

If the judge of any spiritual court excommunicates a man for a cause, of which he hath not the legal cognizance, the party may have an action against him at common law; and he is also liable to be indicted at the suit of the King. *1 Inst. 134: 2 Inst. 527, 623.*

An excommunicated person is disabled to do any act that is required to be done by one that is *probus* and *legalis homo*. He cannot serve upon juries, cannot be a witness in any court, and which is the worst of all, cannot bring an action either real or personal to recover lands or money due to him. *Litt. §. 201.* And on forty days' contumacy, the defendant is liable to be taken on a writ of *Excommunicato capiendo* and imprisoned till he is reconciled to the church, when he may be freed by a writ of *Excommunicato delibendo*. *2 Inst. 189: 8 Rep. 68.* See more fully those titles *Post*. In case of subtraction of tithes a more summary and expeditious assistance is given by

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by the statutes 27 H. 8. c. 20; 3 H. 8. c. 7, which enact that on complaint by the ecclesiastical judge of any contempt or misbehaviour of a defendant, in any suit for tithes, any privy councillor or any two justices of the peace, (or in case of disobedience to a definitive sentence any two justices of the peace,) may commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give a due obedience to the process and sentence of the court.

As to pleading excommunication in a plaintiff, see title *Abatement*, I. 2. 6.

We may next proceed to consider more particularly,

I. In what Cases, and by whom, Persons may be Excommunicated.

II Of the Proceedings in Excommunications; and how the Excommunicated are absolved.

Excommunication is generally for contempt in not appearing, or not obeying a decree, &c. And in other respects the causes of it are many; as for matters of heresy, refusing to receive the sacrament, or to come to church; incontinency, adultery, simony, &c. A man may not be excommunicated for matter of defamation, &c.

In some cases persons incur excommunication *ipso facto* by act of parliament; but they are to be first convicted of the offence by law, and the conviction is transmitted to the Ordinary. *Dyer* 275: 1 *Ventr.* 146.

By Stat. 5 and 6 Ed. 6. c. 4, "If any person shall smite, or lay violent hands upon any other, either in any church or church-yard, then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon, in any church or church-yard, or shall draw any weapon in any church or church-yard, to the intent to strike another with the same weapon, then every person so offending shall stand *ipso facto* excommunicated as aforesaid." See title *Church*.

By the Stat. 3 Jac. 1 cap. 5. §§ 11 & 12, it is enacted, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated." See this Dict. title *Papist*.

None but the bishop is to certify excommunication, unless the bishop be beyond sea, or in *remotis*; or except the certificate be by one that hath ordinary jurisdiction, &c.

Anno 38 H. 3, Boniface archbishop of Canterbury, and the other bishops, with burning tapers in their hands, in *Westminster-Hall* before the King, and the other Estates of the realm, denounced a curse and excommunication against the breakers of the liberty of the church: and by Stat. 9 E. 3, Bishops may excommunicate, not only all perturbors of the peace of the church, but also felons, and other offenders, &c. And by the ecclesiastical laws, excommunicated persons are not permitted to have Christian burial.

The bishop's certificate, if he die before the return of the writ, shall not be received, for his successor shall certify; the *significavit* must mention that the party lived within the diocese where he was excommunicated, and by what bishop; if it be pleaded, the time when it is to be shewn; and excommunication must be declared in the ecclesiastical court before they proceed, &c. 8 *Rep.* 68.

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Cro. Jac. 83: *Moor, Ca.* 667: *Lutb.* 174: *Hesley* 86. See this Dict. title *Abatement*, I. 2. 6.

It hath been adjudged, that the spiritual court hath not power to meddle with the body of any persons whatsoever, or to send process to take them; for if a person is excommunicated for contempt, &c. they ought to certify it into the Chancery, whence it is sent into B. R. and thence issues process. *Cro. Elm.* 741. See *post* title *Excommunicato Capiendo*.

If a person be unjustly excommunicated for a matter of which the spiritual court hath not cognizance, and he is taken on a writ of *excommunicato capiendo*, the party grieved shall have a writ out of Chancery to the sheriff, to deliver him out of prison. 2 *Inst.* 623: 12 *Co.* 76: *F. N. B.* 141.

So if the spiritual court proceeds *inversis ordine*; as if they refuse a copy of the libel, &c. a prohibition shall go, with a clause to absolve and deliver the party injured. 1 *Sid.* 232.

Also if a man be excommunicated, and offers to obey and perform the sentence, and the bishop refuseth to accept it, and to *assail* him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to *assail* him; and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate; and also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to the ecclesiastical cognizance; also the bishop, in those cases, may be indicted at the suit of the King. 2 *Inst.* 623.

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the Civil law, is of three sorts. 1. *Fidejussoria*, as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratitia*, or *realis cautio*, as when a man engageth goods or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing, taketh a corporal oath to do it; which last is now the most frequent method.

This method of taking caution was held to be against law. 1 *Bull.* 122.——But was afterwards on great debate held to be good; and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation as by either of the two other methods. 2 *Law* 36: *Raym.* 225.

If after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c. it seems that this offence is taken away without any formal absolution. See *Cro. Car.* 199: *Cro. Jac.* 212: 8 *Co.* 68: 1 *Jon.* 227: 2 *Lew.* 30: *Gr. J. Cal.* 1170.

EXCOMMUNICATIO CAPIENDO. A writ directed to the sheriff for apprehending him who stands obstinately excommunicated. If within forty days after sentence of excommunication has been published in the Church, the offender does not submit and abide by the sentence of the Spiritual Court, the bishop may *signify*, i. e. certify, such contempt to the King in Chancery. Upon which there issues out this writ to the sheriff of the county, called, from the bishop's certificate, a *significavit*; or, from

in effect, a writ *de excommunicato capiendo*. And the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop. *F. N. B.* 62. By the *Stat. 5 Edw. c. 23*, Writs *de excommunicato capiendo* shall issue out of the court of Chancery in term-time, and be returnable in *B. R.* &c. They shall be brought sealed into the *King's Bench*, and there opened and delivered of record to the sheriff, and there must be twenty days between the *teste* and the return: and if the sheriff return a *non est inventus* on the writ, a *capias* with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10*l.* And if he do not appear on the first *capias* and proclamation, a second is to go forth, and he is to forfeit 20*l.* &c.

But, by this statute, if in the *excommunicato capiendo*, the party excommunicated hath not a sufficient addition, as to his place of dwelling, &c. according to *1 H. 5. c. 5*; or if in the *significavit* it is contained, that the excommunication proceeds upon a cause of contempt, or some original matter of heresy; for refusing to have a child baptized, to receive the sacrament, to come to divine service, or for error in matters of religion and doctrine, for incontinency, usury, simony, perjury in the ecclesiastical courts, or idolatry; he shall not incur the penalties in this act, for his contempt in not rendering himself prisoner upon the *capias*, &c. So that the statute doth not require the *capias* with proclamations, and the penalties in other cases, besides the ten cases mentioned. *2 Inst.* 661.

And it has been adjudged, where a person has been excommunicated, and none of those causes were contained in the *significavit*, that the person excommunicated should be discharged of the penalties; but not of the excommunication. *3 Mod.* 89. It has also been held, that for any of the causes expressed in the statute there ought to go a *capias* with a penalty, and be an addition to the writ: in other cases it is not necessary; and if then the *capias* be with a penalty, the court will not discharge the party, but the penalty only: but for want of addition, in cases where that is required, the party shall be discharged upon motion. *1 Salk.* 294, 295.

EXCOMMUNICATO DELIBERANDO, A writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. *F. N. B.* 63: *Reg. Orig.* 67. And where a man is unduly excommunicated, he may be delivered in some cases by an *habeas corpus*; and sometimes by pleading, as well as by an *excommunicato deliberando*: also sometimes by prohibition, &c. And on a general pardon, the party may have a writ to the bishop to absolve him. *12 Rep.* 76: *Latch.* 205: *Godb.* 272. If a plaintiff in an action be excommunicate, and after he gets letters of absolution; on shewing them in court, he may have a re-*summons*, &c. upon his original. *1 Inst.* 133.

EXCOMMUNICATO RECIPIENDO, or rather *Re-capiendo*.] A writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given caution to obey the authority of the church, are commanded to be sought after, retaken, and imprisoned again. *Reg. Orig.* 67.—If a person after his commitment escapes, and the sheriff has not returned his writ, a *capias excommunicatum de nouo* shall go, otherwise if the writ be returned. *Mod. Ca.* 78.

EXECUTION. *Executio*.] Signifies the last performance of an act, as of a judgment, &c. It is the obtaining possession of any thing recovered by judgment of law. *1 Inst.* 289.

Sir Edw. Coke, in his Reports, makes two sorts of executions; one *final*, another with a *quousque*, tending to an end: an execution *final* is that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the king's writ requires to be done; the other writ with a *quousque*, though it tendeth to an end, is not final: as in case of a *capias ad satisfaciendum*, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, &c. and the imprisonment of the defendant not being absolute, but until he do satisfy the same. *6 Rep.* 87.

EXECUTION, in the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from whence it issues: and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on the judgment which he hath obtained: and therefore an execution cannot be sued out in one court, upon a judgment obtained in another. *Impey. K. B.*

This Execution, or putting the law in force, is performed in different manners according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *Habere facias seisinam*, or writ of seisin of a freehold; or an *Habere facias possessionem*, or writ of possession of a chattel interest. *Finch L.* 470. See this *Dist.* those titles. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. See *post.* III. 3. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin, is sufficient execution of the writ. *3 Comm.* 412.

Upon a presentation to a benefice recovered in a *quare impedit*, or assize of *darrein presentment* the execution is by a writ *de clerico admittendo*; directed not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. See titles *Admittendo clerico*: *Advowson*.

In other actions, where the judgment is that something special be done or rendered by the defendant, then in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assize of nuisance or *quod permittat proferre*, where one part of the judgment is that the nuisance be removed, a writ goes to the sheriff to abate it at the charge of the party; which likewise issues in case of an indictment. *Comb.* 10. See title *Nuisance*.

Upon a replevin the writ of execution is the writ *de replevo habendo*; to have a return of the cattle distrained; and if the distress be cloigned, the defendant shall have a *Capias*

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a *Capias* in *Witbernem*; but on the plaintiff's tendering the damages and submitting to a fine, the process in *Witbernem* shall be stayed: 2 *Leon.* 174. See title *Replevin*: *Distress*: *Witbernem*. In default, after judgment the plaintiff shall have a *distingas* to compel the defendant to deliver the goods by repeated distress of his chattels: (1 *Ro. Ab.* 737: *Rast. Eas.* 215!) or else a *fiere facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment be by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods and the plaintiff's damages: which (being either so assessed, or by the verdict in case of an issue; *Bro. Ab. tit. Damages*, 29,) shall be levied on the person or goods of the defendant. See title *Distress*. So that after all, in *Replevin* and *Distress*, the only actions for recovering the specific possession of personal chattels, if the wrong-doer be very perverse, he cannot be compelled to the restitution of the identical thing taken or detained; but he has still his election to deliver the goods or their value. *Keilw.* 64.

Executions, in actions where money only is recovered, as a *debt* or *damages*, are of five sorts. 1. Against the body of the defendant. 2. Against his goods and chattels.— 3. Against his goods and the *profits* of his lands. 4. Against his goods and the *possession* of his lands. 5. Against all three, his body, lands, and goods.

1. The first of these species of execution is by writ of *capias ad satisfaciendum*; (shortly called a *Ca. Sa.*) to take and imprison the body of the debtor till satisfaction be made for the debt, costs and damages. See this Dict. title *Capias*. Sir *Edward Coke* gives a singular instance where a defendant in 14 *E.* 3, was discharged from a *capias* because he was of so advanced an age that he could not undergo the pain of imprisonment. *Inst.* 289. This writ is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by *Stat.* 21 *Jac.* 1. c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may after his death sue out a new execution against his lands, goods, or chattels.

If a *Ca. Sa.* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given; who stipulate in this triple alternative, that the defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs; or surrender himself a prisoner; or that they will pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. *Lutw.* 1269, 1273. In order to which a writ of *seize facias* may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages: and on such writ if they shew no sufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing cause, the plaintiff may have judgment against the bail; and take out a writ of *Ca. Sa.* or other process of execution against them. See titles *Bail*; *Seize Facias*.—post. II.

2. The next species of execution is against the goods and chattels of the defendant; and is called a writ of

1 *Facijs*; from the words in it where the sheriff is commanded that he *cause to be made* of the goods and chattels of the defendant, the sum or debt recovered. This lies as well against privileged persons, peers, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors to execute either this writ or the writ of *Ca. Sa.*; but must enter peaceably; and may then break open any inner door belonging to the defendant in order to take the goods. 5 *Rep.* 92: *Palm.* 54. See post. III. 3. And the sheriff may sell the goods and chattels of the defendant, even an estate for years which is a chattel real, (8 *Rep.* 171,) till he has raised enough to satisfy the judgment and costs: first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. *Stat.* 8 *Ann.* c. 14. See titles *Distress*: *Rent*. If part only of the debt be levied on a *Fieri Facias*, the plaintiff may have a *Ca. Sa.* for the residue. 1 *Ro. Ab.* 904: *Cro. Eliz.* 344. See further this Dict. title *Fieri Facias*.

3. A third species of execution is by writ of *Levari facias*; which affects a man's goods and the *profits* of his lands by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. *Finch L.* 471. Little use is now made of this writ; the remedy by *elegit* which takes possession of the lands themselves, being much more effectual. But, as a species of this *levari facias*, may be considered a writ of execution proper only to ecclesiastics: which is given when the sheriff upon a common writ of execution sued, returns that the defendant is a beneficed clerk, having no lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis ecclesiasticis* which are not to be touched by lay hands; and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens to collect the same, and pay them to the plaintiff till the full sum be raised. *Reg. Orig.* 300: *Burn. E. L.* 329: 2 *Inst.* 473: *Jenk.* 207. See further title *Levari Facias*.

4. The fourth species of execution is by the writ of *Elegit*, which is a judicial writ given by *Stat. W.* 2. 13 *E.* 1. c. 18, either upon judgment for a debt or damages; or upon the forfeiture of a recognizance taken in the King's court. By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands by the two writs of execution last mentioned, (2 and 3.); but not the possession of the lands themselves; which was a natural consequence of the feudal principles prohibiting alienation of lands. See this Dict. title *Tenure*.

By this writ of *Elegit*, the defendant's goods and chattels are not sold, but only appraised; and all of them, except oxen and beasts of the plough, are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or any other in trust for him are also to be delivered to the plaintiff: to hold till out of the rents and profits thereof the debt be levied, or till

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the defendant's interest be expired; as till the death of the defendant, if he be tenant for life, or in tail. 2 *Inst.* 395: *Stat.* 29 *Car.* 2. c. 3.

It is upon feodal principles also, that copyhold lands are not liable to be taken in execution upon a judgment. 1 *Ro. Ab.* 888. But in case of a debt to the King, it appears by *Magna Charta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid.

This execution or seizing of lands by *elegit* is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a *Ca. Sa.* may then be had after the *elegit*; for such *elegit* is in this case no more in effect than a *fi. fa.* *Hob.* 58.

Thus it appears that *body* and *goods* may be taken in execution; or *land* and *goods*; but not *body* and *land* too upon any judgment between subject and subject, in the course of the common law; But

5 Upon some prosecutions given by statute; as in the case of recognizances or debts acknowledged on *Statute Merchant*, or *Statute Staple*; (p. *ruant* to *Stat.* 13 *E.* 1. *de Mercatoribus*: 27 *E.* 3. c. 9; see this *Dict.* those titles;) upon forfeiture of these the body lands and goods may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an *Extent* or *extenra facias*; because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. *F. N. B.* 131. See this *Dict.* title *Extent*.

By *Stat.* 33 *H.* 8. c. 39, all obligations made to the King shall have the same force, and of consequence the same remedy to recover them, as a statute staple: though indeed before this statute, the King was entitled to sue out execution against the body lands and goods of his accountant or debtor. 3 *Pep.* 12. And his debt shall in suing out execution be preferred to that of every other creditor who hath not obtained judgment before the King commenced his suit. *Stat.* 33 *H.* 8. c. 39. § 74.

The King's judgment also affects lands which the King's debtor hath at, or after the time of contracting his debt, or which any of his officers mentioned in *Stat.* 13 *Eliz.* c. 4, hath at or after the time of his entering on the office: so that if such officer of the Crown aliens for a valuable consideration, the land shall be liable to the King's debt, even in the hands of a *bonâ fide* purchaser: though the debt due to the King was contracted by the vendor many years after the alienation. 10 *Rep.* 57, 6: 8 *Rep.* 171. And see *Stat.* 25 *Geo.* 3. c. 35; which enables the court of Exchequer on application by the Attorney General, by writ, to order the estate of any debtor to the King, and of the heirs and assigns of such debtor, in any lands extended, to be sold as the court shall direct; the conveyance to be made by the remembrancer of the court, by Bargain and Sale, to be inrolled in that court.

Judgments between subject and subject related, even at common law, no farther back than the first day of the Term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels but from the date of the writ of execution: and now by the statute of frauds 29 *Car.* 2. c. 3, the judgment shall not bind the land in the hands of a *bonâ fide* purchaser,

but only from the day of actually signing the same, which is directed by the statute to be punctually entered on the record: nor shall the writ of execution bind the goods in the hands of a stranger or a purchaser, (*Stat.* 257,) but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to indorse on the back of it the day of his receiving the same. See further this *Dict.* title *Judgment*: and as to the prerogative of the crown, *Post.* IV. 2; and on the subject in general, 3 *Comm.* c. 26.

The reader may now pursue his enquiries under the following divisions:

- I. *Of the Nature and several Kinds of Executions, and what Things were liable thereto at Common-law, &c.*
- II. *Of the Judgments on which the several Executions may be taken out, and where the Party shall be concluded by the Election of one of them, &c.*
- III. 1. *By whom, against whom.* 2. *At what Time, Executions may be sued.* 3. *By whom, and how they shall be Executed.* 4. *How they are to be released and discharged.*
- IV. 1. *To what Time Executions shall relate, so as to avoid Alienation;* 2. *Of the King's Prerogative in respect of Executions.*
- V. 1. *Of the Party's Remedy against irregular Executions;* 2. *Of the Offence of obstructing Execution.*

I. The writs of execution at Common-law were only a *fi. fa.* on the goods and chattels, and a *levari facias* to levy the debt or damages upon the land and chattels: The *ca. fa.* was given by construction of the *Stat.* 25 *Ed.* 3. c. 17; And the *elegit* by *Stat.* *Westm.* 2. c. 18. which makes the body liable, and the future profits of lands &c. 1 *Inst.* 154: 2 *Inst.* 394.

The reason why by the Common-law, where a subject had execution for debt or damages, he could not have the body of the defendant, or his lands in execution, (unless it were in special cases) was, that the defendant's body might be at liberty, not only to follow his own affairs and business, but also to serve his King and country; and taking away the possession of his lands would hinder the following of his husbandry and tillage. 2 *Inst.* 394.

Though neither the body nor lands of the debtor on a judgment could be taken in execution at Common law, but only his goods; yet in action of debt against an heir, upon the bond of his ancestor, his land which he had by descent was subject to be taken in execution. 3 *Rep.* 11. In action of debt against the heir upon his ancestor's bond, there was judgment by *nihil dicit*: and it was held that the plaintiff should have execution against the heir, of any of his own lands or goods. *Dyer* 89, 149. Judgment was had against the heir by *nil dicit*, and a *fi. fa.* being brought against him to have execution, he pleaded *nil per descensum*; it was adjudged that this plea was too late after the judgment by *nil dicit*, and the execution shall be on his own lands. *Dyer* 344.

But there is a difference between a *fi. fa.* and an action of debt brought against an heir upon a bond of his ancestor, in which the heir is named. *Poph.* 193. On a judgment for the debt of an ancestor, where the heir hath made over lands descended to him, execution may be taken against such heir to the value of the land, &c. for the debt of his ancestor, as if it were his own debt. *Stat.* 3 & 4 *W. & M.* c. 14. § 5. See title *Fraud*.

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If a person have judgment given against him for debt or damages, or be bound in a recognizance and dieth, and his heir be within age, no execution shall be sued of the lands during the minority; and against an heir with-
in age, no execution shall be sued upon a statute merchant or staple, &c. 1 Inst. 290.

No execution for damages recovered in a real action, shall be had by *capias ad satisfaciendum*: but where a man hath judgment to recover lands and damages, he may have execution of both together. 8 Rep. 141.

Whatever may be assigned or granted may be taken on an execution. Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. Bank-notes, &c. cannot be taken in execution; as they remain, in some measure, choses in action. Hardw. 53.

If there are chattels sufficient, the sheriff ought not to take the lands; nor may things fixed to the freehold, goods bought *bonâ fide*, goods pawned, &c. be taken in execution. 8 Rep. 141. And if a defendant hides his goods in secret places, so that the plaintiff cannot take them in execution, it is said no action will lie against him. 5 Rep. 92, 93.

The sheriff cannot take the goods of a stranger, for he is to take the goods of the party only at his peril. And if a bailiff on a *fi fa*. against the goods of A. take those of B. an action of trespass lies against the sheriff. Doug. 40. If on execution against one of two partners, the partnership effects be taken and sold, the court will order the sheriff to pay over to the other, a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. Doug. 650. *Eddie v. Davidson*.

If the plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use money which he has levied in an action at the suit of the defendant. Doug. 231—See further *Com. Dig.* title *Executions*, (C.) 4.

II. When a judgment is signed, execution may be taken out immediately upon it, and need not be delayed till it is entered: it being a perfect judgment of the court before entered. Co. Lit. 505. And if the judges of the court of B. R. see it against whom there is a judgment of that court walk in Westminster hall, they may send an officer to take him up, if the plaintiff desire it, without a writ of execution. Mo. 52. If execution be not sued within a year and a day after judgment, where there is no fault in the defendant, as if writ of error be not brought, &c. there must be a *scire facias* to revive the judgment, which in that time may be had without moving the court, but if it be a longer standing, the court is to be moved for it. 1 Inst. 290. 2 Inst. 771. But if the defendant be outlawed after judgment (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the suit is commenced by original,) the plaintiff need not renew the judgment by *scire facias* to obtain execution after a year. 1 Inst. 290.

It hath been adjudged, that by the Common-law, if a man was outlawed after judgment in debt, the plaintiff was at the end of his suit, and he could have no other process after that personally, but was put to his new original. 2 Nels. Abi. 772. If one be arrested upon a writ in B. R. and puts in bail, and afterwards the

plaintiff recovers, and the defendant renders not himself according to law, in safe-guard of his bail, the plaintiff may at his election take execution against the principal, or his bail after judgment against them; but if he takes the bail, he shall never afterwards meddle with the principal. Cro. Jac. 320.

If one recovers jointly against two in debt, the execution must be joint against them: the court cannot divide an execution, which is intire, and grounded on the judgment. Mich. 24 Car. B. R.

A man and his wife recovered in an action of debt against the defendant 100*l.* and damages; then the wife died, and the husband prayed to have execution upon this judgment: the court at first inclined, that it should not survive to the husband, but that administration ought to be committed of it, as a thing in action; but at last they agreed that the husband might take out execution, for that by the judgment it became his debt due to him in his own right. Cro. Car. 608: 1 Mod. Rep. 179, 180. See titles *Baron and Feme*.

If judgment be against two, on the death of one, the plaintiff shall have execution by *fi. re. facias* against the survivor; and though he pleads, that the other defendant has an heir alive, &c. it will not prevent it. Raym. 26. And where two persons recover in debt, and before execution one of them dies, it has been held that execution may be sued in both their names by the survivor, and it will be no error; which may be done without a *scire facias*. Nov. 150. An execution may be executed after the death of the defendant; for his executor being privy, is bound as well as the testator: and where execution is once begun, it cannot be delayed, unless there appears irregularity, and *audita querela* is no *superseatas* to it, nor shall any thing stop the sheriff from selling, &c. Cro. Eliz. 73. *Comberb* 33, 389.

Though a man can have but one execution; yet it must be intended an execution with satisfaction, and the body of the defendant is no satisfaction, only a pledge for the debt. 5 Rep. 486. When therefore a person dies in execution, it is without satisfaction, so that the plaintiff may have a *scire facias* against the goods, or *elegit* against the lands. This was not so at Common-law. Hob. 57; but it is given by Stat. 21 Jac. 1 c. 24. Where a person however was taken on a *capias utlagatum*, and died in prison, the plaintiff having chosen this execution, which is the highest in law, it has been held that the defendant dying the law will adjudge it a satisfaction. Cro. Eliz. 850.

If an execution be executed and filed, the party can have no other execution upon that judgment; because there can be but one execution with satisfaction upon one judgment. But if the execution be not returned and filed, another execution may be had: and if only part of the debt be levied on a *scire facias*, another writ of execution may be sued out for the residue thereof. 1 Lill. Abi. 565. If one take out any writ of execution, and they have no effect, he may have other writs on then future. Hob. 57.

In case any prisoner committed in execution shall escape, any creditor, whose suit he stands charged on, may retake him by new *capias ad satisfaciendum*, or sue forth any other kind of execution, as if the body of such prisoner had never been taken in execution. Stat. 8 & 9 W. 3. c. 27. See title *Escape*. Where two are bound jointly

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and severally, and judgment is had against both of them, if one in execution escapes, the creditor may take out execution against the other; but if he go by licence of the creditor, then the other will be discharged. *Co. Car.* 53. If one in execution be delivered by privilege of parliament, when the privilege ceases, the plaintiff may sue out a new execution against him. *Str. 1 Jac. 1. c. 13.*

III. 1. No person is intitled to, or can sue out execution, who is not privy to the judgment, or intitled to the thing recovered, as heir, executor, or administrator to him who has judgment. *1 Rol. Abr.* 889.

If one have judgment to recover lands, and die before execution, his heir shall have it; and where tenant in tail recovers and dies before the execution without issue, he in remainder may sue out execution: an heir is to have execution for lands, and the executor or administrator for damages. *Co. Litt.* 251: *Dyer* 26. The executors of executors may sue out execution of a judgment; but an administrator getting judgment in behalf of the intestate, and then dying, neither his executor, or administrator shall take out the execution, but the administrator *de bonis non administratis* of the first intestate. *5 Rep.* 9. And see *Stat. 17 Car. 2. c. 8.*

But if an administrator, *durante minori etate* of an executor, recovers in debt, and before execution the executor comes of age, he shall have a *scire facias* on this judgment; for carrying on the suit in right of the executor, made the executor privy thereto. *1 Rol. Abr.* 888-9.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is intitled. *1 Rol. Abr.* 880.

If a statute be entered into, to husband and wife, and the husband dies, the wife shall take out execution. *1 Rol. Abr.* 889. So if husband and wife recover lands and damages, and the husband dies, the wife shall have execution of the damages, and not the executors of the husband. *1 Rol. Abr.* 342, 889, 890. See tit. *Baron and Feme.*

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assents by descent, and demand judgment, if he ought to be charged alone; for at Common-law, the charge upon a judgment, being personal, survived, and the statute of *Westm. 2.* that gives the *elegit*, does not take away the remedy of the plaintiff at Common-law; and therefore the party may take out his execution which way he pleases; for the words of the statute are, *fit in electione*; but if he should, alter the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. *Raym.* 26: *1 Lev.* 30: *1 Keb.* 92, 123. *S. C.*

By the Common-law, if judgment be given against a man for debt, or damages, and the defendant dies before execution sued, his heir within age is not liable to execution during his minority; but *the parol must demur* (i.e. the plea must stand still) in such case till he comes of age. *Co. Litt.* 290a: *1 Rol. Abr.* 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment

be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. *Co. Litt.* 290a.

There can be no execution taken out against a member of parliament during privilege of parliament: also no *capias* can issue against a peer; for even in the case of a private person at Common-law, the body was not liable to creditors; and the statute of *Ed. 3.* which subjects the body, does not extend to peers, because their persons are sacred: the law also supposes, that persons thus distinguished by the King, have wherewithal otherwise to satisfy their creditors. *6 Co.* 52: *Hob.* 61: *Cro. Car.* 205.

A *capias ad satisfaciendum* may be executed upon a prisoner in prison for felony; and if he be acquitted of the felony, the sheriff is to keep him. *1 Lil. Nbr.* 567. But where a person is in prison for criminal matters, he ought not to be charged with a civil action without leave of the court; yet if he be charged, he shall not be discharged. *Raym.* 58. See *7 Mod.* 153; and this Dict. title *Prisoner*.

A *ca. sa.* will lie against a man who is outlawed for felony, and he may be taken in execution at the suit of a common person. *Owen* 69. And if he was taken upon a *capias utlagat.* which was at the King's suit, he shall be in execution at the suit of the party, if he will. *Moor* 566. But this is not without prayer of the party; and if after a judgment given, the judges of their own heads, or at the request of any person, without prayer of the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. *Dyer* 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a *latitat* or *capias*, he shall not be in execution upon the judgment, unless the plaintiff prays it of record; or sues a *capias ad satisfaciendum*, and delivers it to the sheriff. *Dyer* 197, 306: *Jenk. Cent.* 165.

2. At Common-law, in *real* actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment; because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given: a *scire facias* issued to shew cause, why execution should not be. *2 Inst.* 471: *5 Co.* 88: *Cro. Eliz.* 416: *6 Mod.* 288.

But if the plaintiff, after he had obtained judgment in any *personal* action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable at law on the judgment, because there was not a judgment for any particular thing in the *personal* action, with which the execution could be compared; therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no *scire facias* to shew cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt, of which the judgment was an evidence, was discharged. *2 Inst.* 469: *Cartb.* 30, 31: *1 Sid.* 351.

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To remedy this, and to make the forms of proceeding more uniform in both actions, the statute of *Westm. 2. cap. 45*, gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment obtained.

A *scire facias* lies on a judgment in ejectment; for the words of the act are, *Sive servitia, sive consuetudines, sive alia quaecunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at Common law. 1 *Sid* 351: 2 *Salk*. 600.

But though the general rule be, that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet the rule must be understood with some restrictions.

If a *Fi. fa*; *Ca. fa*; or *Elegit*, be taken out within the year and returned and awarded on the roll, the same may be continued from term to term to the time of the execution thereof, although after the year: and be as effectual as if the judgment had been revived by *scire facias*. *N. on R. E.* 5 *Geo. 2.* But a *Fi. fa*. must be left with the proper officer before he will make the entry on the roll returned by the sheriff. *Imp. K. B.*

If the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *superseas* to the execution, and the plaintiff must acquiesce till he hears the judgment above; besides while the cause is still *sub-judice*, it is not known whether the plaintiff shall recover, or not, and the year for the execution ought to be accounted from the final judgment given. *Cro. Jac.* 364: *Yelv.* 7: 1 *Rel. Abr.* 899: 4 *Leon.* 197: 5 *Co.* 88: *Carth.* 236-7: 6 *Mod.* 288.

So if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance. 6 *Mod.* 288: 1 *Rel. Rep.* 104.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *scire facias*, because the courts of law do not take notice of Chancery injunctions, as they do of writs of error; besides, in that case it had been no breach of the injunction to have taken out the execution within the year, and continued it down by *vic' non misit breve*, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 *Salk*. 322: 6 *Mod.* 288 *S. C.*

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to issue, and the plaintiff hath judgment for that he confesseth; here he may not have execution till the issue is tried for that which he is to recover damages: though if he releases the damages, he may have execution presently for the rest. *Rel.* 897.

3. All judgments of inferior courts in debt are to be executed in the peculiar jurisdictions where given, and cannot be removed to be executed by the superior courts. *Cro. Car.* 34.

Now by *Stat. 19 Geo. 3. c. 70. § 4*, where final judgment shall be obtained in any suit in any inferior court of record, any of the courts at *Westminster* on affidavit thereof, and that execution has issued against the defendant's person or effects, and that they are not to be found within the jurisdiction of such inferior court, may cause the record of the judgment to be removed into such superior court, to issue execution thereon, in the same manner as in judgment obtained in the said superior courts.

If a judgment given in another court be affirmed, or reversed for error in *B. R.* because the proceedings in the court below are entered upon record in the *King's Bench*, the party shall have execution in that court: And so if a judgment of debt, &c. in the *Common Pleas* be affirmed in *B. R.* on a writ of error. 5 *Rep.* 88. Though where the record of a judgment given in *C. B.* is removed into *B. R.* the party cannot take out execution upon it, without a *scire facias quare executionem habere non debeat*. 1 *Lill. Ab.* 562. And where a writ of error is brought in the *Exchequer Chamber*, to reverse a judgment in *B. R.* if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record must be transmitted back to the court of *King's Bench*, where execution must be done. 1 *Lill.* 565. See title *Error*.

As an execution is an entire thing, he who begins must end it; a new sheriff may distrain an old one to sell the goods on a *disfringas nuper vicecom'* and to bring the money into court, or sell and deliver the money to the new sheriff; and the authority of the old sheriff continues by virtue of the first writ, so that when he hath seized, he is compellable to return the writ, and liable to answer the value according to the return; likewise by the seizure the property of the goods, &c. is divested out of the defendant, and he is discharged, whereby no further remedy can be had against him. 1 *Salk*. 322: 3 *Salk*. 159.

A sheriff shall have his fees for executions, upon a writ of *capias ad satisfaciendum* for the whole debt; upon a *scire fac.* according to the sum levied; and on an *elegit* it is held by some, that he shall have fees according to what is levied, and by others for the whole debt recovered, because the plaintiff may keep the land till he is satisfied the intire debt. 1 *Salk*. 333. Where the sheriff hath a *scire facias* or *ca. fa.* against a man, and before execution, he pays him the money, execution may not be done afterwards; if it be, trespass or false imprisonment lies. 5 *Rep.* 93: 12 *Car. B. R.* See title *Sheriff*.

It is laid down as a general rule in our books, that the sheriff in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; hence, every man's house is called his castle. 5 *Co.* 91, *Br.* 3 *Inst.* 162: *Mou.* 608: *Yelv.* 28: *Cro. Eliz.* 908: *Dart. Sher.* 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where:

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where the safety of the King and Commonwealth are concerned, this general case hath the following exceptions.

1st. That whenever the process is at the suit of the King, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co. 91 b.

2^{ly}. So in a writ of *seisin* or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if denied entrance by the tenant: for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end; besides, in this case the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered. 5 Co. 91.

3^{dly}. Also this privilege of a man's house relates only to such execution as affects himself; and therefore if a *fi. fa.* is directed to the sheriff to levy the goods of A. and it happens that A's goods are in the house of B. if after request made by the sheriff to B. to deliver these goods, he refuses, the sheriff may well justify the breaking and entering his house. 1 Sid. 186.

4^{thly}. It hath been adjudged that the sheriff, on a *fi. fa.* may break open the door of a barn, standing at a distance from the dwelling house, without requesting the owner to open the door; in the same manner as he may enter a close, &c. 1 Sid. 186: 1 Keb. 638. S. C.

5^{thly}. So on a *fi. fa.*, when the sheriff or his officers are once in the house, they may break open any chamber-door or trunks for the completing execution. 2 Skew. 87.

6^{thly}. So if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door, for the setting at liberty the bailiffs; for if, in this case, he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient; also it seems, that in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it. Palm. 52. Cro. Jac. p. 555. S. C.: 2 Roll. Rep. 132: S. C.

7^{thly}. That if the sheriff in executing a writ, breaks open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff. 5 Co. 93 a.

If the sheriff refuses to execute any judicial writ; this is a contempt of the court, for which an attachment will be granted. 1 Salk. 323.

So if he executes the writ, and makes a false return, the party injured may have an action on the case against him. 1 Salk. 323.

4 By a release of all suits, execution is gone; for no one can have execution without prayer and suit, but the King only, in whose case the judges ought to award execution *ex officio*, without any suit: And a release of all executions bars the King. By release of all debts or duties, the defendant is discharged of the execution, because the debt or duty on which it is founded is discharged: But if the body of a man be taken in execution, and the plaintiff release all actions, yet he shall remain in execution. Co. Lit. 291. If a judgment is given in action of debt, and the

defendant taken in execution, the plaintiff releaseth the judgment, the body shall be discharged of the execution. And if the plaintiff after judgment releaseth all demands, the execution is discharged. *Ibid.* where one is in execution at my suit, and I bid the sheriff let him go; this is a good discharge and release both to the party and sheriff. Poph. 207.

But if the plaintiff make a release to the defendant being in execution, or other act amounting to a discharge; it will not be a discharge *ipso facto*, but by this means he may have the same. 5 Rep. 86: Dyer 152.

By Stat. 32 Geo. 2. c. 28, if a defendant charged in execution for any debt not exceeding 100*l.* (extended by Stat. 26 Geo. 3. c. 44, for five years to 200*l.* will, surrender all his effects to his creditors (except his apparel, bedding and tools of his trade not amounting in the whole to the value of 10*l.*) and will make oath of his punctual compliance with the statute, such prisoner may be discharged unless the creditor insists on detaining him; in which case he shall allow him 2*s.* 4*d.* per week to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant though never more against his person. And on the other hand the creditors may as in case of bankruptcy, compel under pain of transportation for seven years, such debtor to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person. See further tit. Prisoner: Insolvent.

Persons thus charged in execution in order to take the benefit of these acts are to exhibit a petition to the court whence the process issued, with an account of their whole estate upon oath, praying to be discharged, &c. And thereupon the court shall order the prisoner to be brought up, and his creditors summoned at a certain day, when the court in a summary way is to examine into the same, &c. and order the estate and effects of the prisoner to be assigned to the creditors by indorsement on the back of the petition. § 13.

The prisoners (except in London and Westminster) before they petition any of the courts, from whence the process issued, for a rule to be brought up, are to give notice to their creditors in writing, that they design to petition, and also a true copy of the account or schedule of their whole estates which they intend to deliver into the court, &c. And then, upon such petition, the prisoners shall have a rule of court to be brought to the next assizes for the county, at an expence not exceeding 12*d.* a mile, to be paid to the officer out of the effects of the prisoners, &c. And the creditors must be summoned to appear at the said assizes by order served on them, or left at their houses thirty days before; and at the assizes, the judges on examination shall determine the matter, and give judgment and relief; a record of which judgment is to be returned and certified to the court whence the process issued, on which the prisoners were taken in execution. No person charged in execution, shall be allowed to exhibit a petition to any court at law to be discharged, pursuant to the above acts, unless it be done before the end of the next term after he is charged; and those statutes shall not relate to any one taken on a *capias* for running customable goods, &c. § 14, 15.

EXECUTION, IV. V.

IV. 1. Writs of execution bind the property of goods only from the time of the delivery of the writs to the sheriff; who upon receipt thereof indorses the day of the month when received: But land is bound from the day of the judgment. *Stat. 29 Car. 2. c. 3: Cro. Car. 149.* But the judgment must be docketed according to the directions of *Stat. 4 & 5 W. & M. c. 20*; by which for the greater security of purchasers, it is enacted, that the clerk of the effoins of the court of *C. B.* the clerk of the doggets of the court of King's Bench, and the master of the office of pleas in the court of Exchequer, shall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments by confession, *non sum informatus, nihil dicit, &c.* entered in their several courts, &c. and that no judgment not doggetted, and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestors, testators, or intestate's estates. See title *Judgment*.

Notwithstanding this statute, if after the writ delivered to the sheriff, and before execution is executed, the defendant becomes bankrupt, that will hinder execution. *3 Salk. 159.* See title *Bankrupt*.

The plaintiff takes out execution by *heri facias* against the defendant; all the goods and chattels that he had at the time of the execution, will be liable to it: And where debt or damages are recovered, the plaintiff shall have execution of any land the defendant had at the time of the judgment; not of the lands he had the day when the first writ was purchased. *Roll. Abr. 892.* By *Stat. 29 C. 2. c. 3*, Sheriffs may deliver in execution all lands whereof others shall be seised in trust for him against whom execution is had, on a judgment, &c.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good: And if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned *bonâ fide* is not liable; also if he assign it by fraud, and the assignee sells it to another for a valuable consideration, it is not liable to execution in the hands of the second assignee. *Godb. 161: 2 Nels. Abr. 783.* If a person has a bill of sale of any goods, in nature of a security for money, he shall be preferred for his debt to one who hath obtained a judgment against the debtor before those goods are sold; for till execution lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. *Pet. Lib. 286.* But where a man generally keeps possession of goods after sale, it will make the same void against others, by the statute of fraudulent conveyances. And where on an execution, the owner of the goods by agreement was to have the possession of them upon certain terms; afterwards another got judgment against the same person, and took those goods in execution: It was adjudged they were liable, and that the first execution was by fraud, and void against any subsequent creditor; because there was no change of the possession, and so no alteration of property. *Ibid. 287.* See title *Fraud*.

A *heri facias* being executed fraudulently, a *heri facias* at the suit of another person afterwards shall stand good, and be preferred; and on trial, it is a matter proper to be left to a jury. *1 Wylf. 44.*

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Where two writs of *heri facias* against the same defendant are delivered to the sheriff on different days; and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. *1 Term Rep. 729*—But where the sheriff has given a bill of sale to the person claiming under the second execution, this entitles the latter to secure his debt, and the sheriff is liable to the plaintiff who delivered the first writ. *Id. 731.*

Execution may be made of lands that the defendant hath by purchase after the judgment; although he sell the same before execution. *Roll. 892.*

The *Stat. 8 An. c. 14*, directs that where there is an execution against goods or chattels, of a tenant for life, or years, the plaintiff before removal of the goods by the execution is to pay the landlord the rent of the land, &c. so as there be not above a year due; and if more be due, paying a year's rent, the plaintiff may proceed in his execution, and the sheriff shall levy the rent paid, as well as the execution money.

But a ground-landlord cannot come in for a year's rent in the case of an execution against an under-lessee: for the statute only extends to the immediate landlord. *Str. 787.* And the landlord must give the sheriff notice, or he is not bound. *1 Str. 97.* Vide *2 Wylf. 140.*

2. The King by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. *Hob. 60: 2 Inst. 19: 2 Roll. Abr. 472.*

As to the King's execution of goods, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at law; for though by the *29 Car. 2. cap. 3*, no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; yet as this act does not extend to the King, an extent of a later date supercedes an execution of the goods by a former writ; because by the King's prerogative at Common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the Public ought to be preferred to private property. *2 New. Abr. 364.*

If the King's debt be *pro et record*, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were aliened in whole, or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject. See *2 Roll. Abr. 156 7: Moon 126: 3 Leon. 259, 240: 4 Leon 10.*

Execution for the King's debt, or prerogative execution, is always preferred before any other executions. *7 R.p. 20.* And if a defendant is taken by *capias ad sat faciendum*, and before the return thereof a prerogative writ issues from the Exchequer, for the debt of the King, dated a day before he was taken, here he shall be held in execution for the King's debt and that of the subject. *Doct. 197.* Lands mortgaged in the hands of the issue in tail, when subject to the King's extent, and where not, see *7 R.p. 21.* See also this Dict. titles *King; Extent*.

V. 1. An execution may be set aside as irregular, by *superfetas*; and the party have restitution, &c. *Car. 2. 460, 461, 468.* It hath been resolved, that a writ of

EXECUTION,—OF CRIMINALS.

error is a *superfluous* from the time of the allowance: though if a writ of execution be executed before the writ of error is allowed, it may be returned afterwards. 1 *Salk.* 321. No writ of execution shall be stayed by any writ of error or *superfluous*, *and verdict and judgment*, in any action upon the case for payment of money, covenant, detinue, trespass, &c. until recognizance be entered into as directed by 3 *Wm. 1. cap. 8*. Judgment was had against a person at *Bristol*, and his goods attached there; and the court of *B. R.* being moved to stay the execution until a writ of error brought should be determined, they granted a *habeas corpus*, but nothing to stay the execution. 1 *Bull.* 268. See title *Error*.

A defendant cannot plead to any writ of execution, (tho' he may in bar of execution to a *scire facias* brought;) but if he hath any matter after judgment to discharge him of the execution, he is to have *audita querela*. *Co. Lit.* 270. O, move the court for relief, which is now the usual method.

If husband and wife are taken in execution for the debt of the wife, the wife shall be discharged; for the husband being in execution, the wife shall not be so also, and because the wife hath nothing liable to the execution. 1 *Lev.* 51.

The execution of a *liberate* is good without being returned; and where a man is taken upon a *ca. sa.* the execution is good, though the writ is not returned. And in all cases where no inquest is to be taken, but only lands delivered, or seisin had, &c. which are only matters of fact. 4 *Rep.* 67: 5 *Rep.* 89.

2. There were anciently castles, fortresses and liberties, where they resisted the sheriff in executing the King's writs, which creating great inconvenience, the statute of *Welm. 2. cap. 39.* (13 *Ed. 1.*) hindered the sheriff from returning rescuers to the King's writ of execution, and directed him to take the *posse comitatus*. See the *Stat.* and 2 *New Abr.* 368.

The judges construed the words of the statute to extend only to *executions*, and not to writs on *mesne process*; that the sheriff was not obliged to carry the *posse comitatus* where the man was bailable, for they did not presume, that in such cases the King's writ would be disobeyed. 2 *New Abr.* 368.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, *viz. from whence they shall not be delivered without the King's special commandment*; 2 *New Abr.* 308. See titles *Debt*; *Error*.

See further on *Executions* in civil cases, in general *Com. Dg.* that title, &c.

EXECUTION OF CRIMINALS, Must in all cases as well capital as otherwise, be performed by the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as is still practised in the court of the Lord High Steward upon the execution of a peer. 2 *Hale* 409. Though in the court of the peers in parliament it is done by writ from the King; afterwards it was established, that in case of life the judges may command execution to be done without any writ. *Finch* 478. And now the usage is for the judge to sign the calendar, a list of all the prisoners' names

with the separate judgments in the margin which is left with the sheriff: the sheriff on receipt of this warrant is to do execution within a convenient time which in the country is left at large: in *London*, the Recorder, after reporting to the King in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs directing them to do execution at the day and place assigned. See 4 *State Trials* 332: *Foll.* 43: 4 *Comm.* 403.

It is held by *Coke* (3 *Inst.* 52,) and *Hale* (2 *H. P. C.* 272, 412,) that even the King cannot change the punishment of the law by altering hanging (or burning when used) into beheading; tho' when beheading is part of the sentence, the King may remit the rest. And notwithstanding some examples to the contrary, *Coke* maintains that *judicandum est legibus, non exemplis*. But others have thought, and more justly, that this prerogative being founded in mercy, and immemorially exercised by the crown, is part of the Common law. *Foll.* 270: *F. N. B.* 241 b: 19 *Rym. Fœd.* 284. For hitherto, in every instance all these exchanges have been for more merciful kinds of death; and how far this may also fall within the King's power of granting conditional pardons, (*viz.* by remitting a severer kind of death, on condition that the criminal submits to a miller,) is a matter that may bear consideration. 4 *Comm.* 404.—There are ancient precedents where men condemned to be hanged for felony have been beheaded by force of a special warrant from the King. *B. Act.* 104: *Stamdf.* 13.

Subsequent justices have no power by the *Stat.* 1 *Ed. 6. c. 7.* to award execution of persons condemned by former judges; but if judgment has not been passed on the offenders, the other justices may give judgment and award execution, &c. 2 *Hawt. P. C.* Execution ought to be in the same county where the criminal was tried and convicted; except the record of the attainder be removed into *B. R.* which may award execution in the county where it sits. 3 *Inst.* 31, 211, 217.

If, upon a record removed, an outlawed person confess himself to be the same person, execution shall be had; but if he deny it, and the King's Attorney confesses he is not, he shall be discharged; though if the Attorney-General take issue upon it, the same shall be tried. 2 *Hale's Hist. P. C.* 402, 463. If a person, when attainted, stands mute to a demand why execution shall not go against him, the ordinary execution shall be awarded. 2 *Hawt. P. C.* In case a man condemned to die, come to life after he is hanged, as the judgment is not executed till he is dead, he must be hung again. *Foll.* 389: 2 *Hale's P. C.* 412: 2 *Hawt. P. C.* 4 *Comm.* 406. And so was the law of old; for if a criminal thus escaped and fled to sanctuary he was not permitted to abjure the realm. *Fitz. Ab.* title *Corone* 335.

The body of a traitor or felon is forfeited to the King by the execution; and he may dispose of it as he pleases. The execution of persons under the age of discretion is usually respited, in order to obtain a pardon. 1 *Hawt. P. C. c. 1. § 3.*

By the *Stat.* 25 *Geo. 2. c. 37.* persons convicted of murder are to be executed the day next but one after sentence; [unless that happens to be *Sunday*; for which reason murderers are generally tried on a *Friday* to afford them a merciful respite of one day more to prepare for eternity;] and their bodies delivered to surgeons to be anatomised. The judge may stay the sentence, and appoint the body

EXECUTION—AND REPRIEVE.

to be hung in chains or anatomised, but not buried.—And, by the said statute, to rescue the body of any such malefactor from the custody of the sheriff after execution, is made felony, punishable by transportation for seven years.—And to rescue such criminal going to, or during execution, is felony without benefit of clergy. See this Dict. title *Rescue*. Under this act the time and place of the execution are part of the judgment, but in no other case whatever. 4 *Comm.* 404. See further title *Murder*; and as to these executions in general, titles *Treason*, *Felony* and other proper titles.

Execution may be avoided by a *reprieve* or a *pardon*; whereof the former is only temporary, the latter (as to which, see this Dict. title *Pardon*) is permanent.

A **REPRIEVE**, from *reprendre* to take back, or more immediately from the participle *repris*;] Is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be *ex arbitrio judicis*, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished and their commissions expired; but this rather by common usage than of strict right. 2 *Hal. P. C.* 412.

Reprieves may also be *ex necessitate legis*.

If a woman quick with child be condemned either for treason, or felony, she may alledge her being with child in order to get the execution respited; and thereupon the sheriff, or marshal shall be commanded to take her into a private room, and to impanel a jury of matrons to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. But it is agreed, that a woman cannot demand such respite of execution by reason of her being quick with child more than once; and that she can neither save herself by this means from pleading upon her arraignment, nor from having judgment pronounced against her upon her conviction. Also it is said, both by *Stamford* and *Coke*, that a woman can have no advantage from being found with child, unless she be also found quick with child. 2 *Hawk. P. C.* c. 51. § 9, 10.

Another cause of regular reprieve is if the offender become *non compos* between the judgment and the award of execution. 1 *Hal. P. C.* 370. For regularly though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to alledge why execution should not be awarded against him; and if he appears to be insane, the Judge, in his discretion, may and ought to reprieve him.

The party may also plead in bar of execution; which plea may be either pregnancy; (of which above;) the

King's pardon, an act of grace; (See title *Pardon*;) or lastly diversity of person *viz.* that he is not the same that was attainted and the like. In this last case a jury shall be impanelled to try this collateral issue, namely the identity of his person; and not whether guilty or innocent; for that has been decided before; and in these collateral issues the trial shall be *instantis*, and no time allowed the prisoner to make his defence or produce his witnesses unless he will make oath that he is not the person attainted. 1 *Std.* 72: *Fost.* 42. Neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable whenever a man's life was in question. 1 *Lev.* 61: *Fost.* 42, 6.—*Stamf. P. C.* 163: *Co. Litt.* 157: *Hal. Sum.* 259.

Every Judge who hath power to order execution, hath power to grant a reprieve; and execution is often staid on condition of transportation. See *Stat.* 8 *Geo.* 3. c. 15, for a power given to judges of assize to reprieve for the purpose of obtaining a conditional pardon. See also this Dict. titles *Transportation: Felony: Clergy.* 2 *Hawk. P. C.* c. 51.—But no prisoner convicted of any felony, for which he cannot have his clergy, at the Sessions at the *Old Bailey* for *London* and *Middlesex*, &c. ought to be reprieved but in open Sessions; and reprieves are not to be granted otherwise but by the King's express warrant. *Kel.* 4.

EXECUTION OF STATUTES. The court of *Star-Chamber* erected in the reign of King *Hen.* 7. was said to be for the execution of statutes, &c. *Stat.* 3 *Hen.* 7. c. 1.

EXECUTIONE FACIENDA. A writ commanding execution of a judgment, and diversly used. *Reg. Orig.*

EXECUTIONE FACIENDA IN WIERHAMUM. A writ that lies for taking his cattle, who hath conveyed the cattle of another out of the county, so that the sheriff cannot replevy them. *Reg. Orig.* 82. See title *Replevin*.

EXECUTIONE JUDICII. Is a writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return some reasonable cause wherefore he delays the execution. *F. N. B.* 20. If execution be not done on the first writ, an *alias* shall issue, and a *pluries* with this clause, *vel causam nobis significes quare*, &c. And if upon this writ execution is not done, or some reasonable cause returned why it is delayed, the party shall have an attachment against him who ought to have done the execution, returnable in *B. R.* or *C. B.* *New Nat. Br.* 43. If the judgment be in a court of record, this writ shall be directed to the justices of the court where the judgment was given, and not unto the officer of the court; for if the officer will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. *Ibid.* See title *Execution* III. 3, and the *Stat.* 19 *Geo.* 3. c. 70. there mentioned.

One may have a writ *de executione judicii* out of the Chancery to execute a judgment, in an inferior court, although a writ of error be brought to remove the record, and reverse the judgment: if he that brings the writ of error do not take care to have the record transcribed, and the writ of error returned up in due time. 1 *Lit. Ab.* 562.

EXECUTIVE POWER. The supreme executive power of these kingdoms is vested by our laws in a single person, the King, or Queen, for the time being. 1 *Comm.* 190, &c. See title *King*.

EXECUTOR. *Lat.*] One appointed by a man's last will and testament, to perform or execute the contents thereof after the testator's decease; and to have the disposing of all the testator's substance according to the tenor of the will: he answers to the *heres designatus* or *testamentarius* in the *Civil Law*, as to debts, goods and chattels of his testator. *Terms de Ley*.

The rights powers and duties of EXECUTORS and ADMINISTRATORS, being in many respects similar, and the several determinations in the books, being generally applicable to both, it seems most methodical and useful to consider them together; for which purpose, reference is made from title *Administrator* to this place. The present summary is founded on the *Commentaries*; having various points and heads from other sources interwoven on that excellent ground work. See 2 *Comm. c. 32*. For particular information at large on these subjects, see also *Com. Dig.* titles *Administration* and *Administrator*; and also *Fine's Abridg.* at title *Executor*.

- I. 1. Of the Appointment of Administrators in Cases of Intestacy.
2. How Administrations may be revoked.
- II. Of the Appointment of Executors, and particular Administrators; and see IV.
- III. Of Administrations to Next of Kin, or on Failure of them; and see V. 8.
- IV. Of the Distinction in Interest between Executors and Administrators.
- V. Of the Duty of Executors and Administrators.
 1. Of Executors de son tort.
 2. Of having the deceased.
 3. Proving the Will.
 4. Making Inventories.
 5. Collecting the Goods.
 6. Paying the Debts in the order of Priority.
 7. ——— Legacies; and see title *Legacy*.
 8. Distribution of the Residue, to the Executor himself or next of kin; and herein.
 9. ——— Of the Customs of London and York, as to Intestates.
- VI. 1. Of Actions by and against Administrators.
2. ——— Executors.—And herein of Devassavit.

I. 1. In case a person makes no disposition of his effects by will, he is said to die *intestate*; and in such cases, it is said, that by the old law, the king was entitled to seize upon his goods, as the general trustee of the kingdom. 9 *Rep. 38*.—This prerogative the king continued to exercise for some time, by his own ministers of justice; and probably in the county court were matters of all kinds were determined; and it was granted as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own Courts-baron, and other courts, or to have their wills there proved, in case they make any. 9 *Rep. 37*. Afterwards the crown, in favour of the church, vested the prelates with this branch of the prerogative; and then the Ordinary might seize the goods and keep them without waiting; and also might give, when or sell them at his will, and dispose of the money in *pro us*; being thus, probably,

merely the king's almoner in his diocese. *Finch Law* 173, 4: *Plowd.* 277.

As the Ordinary had thus the disposition of intestates' effects, the probate of wills of course followed; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his goods was superseded thereby.

By degrees, through an abuse of this power of the Ordinary, often complained of before it was redressed, the Popish clergy secured the intestate's estate to themselves, without paying even his lawful debts; for which reason it was enacted by *Stat. Westm. 2.* (13 *E. 1.* A. D. 1285.) c. 19, that the Ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors were bound in case of a will.—But still the residue remained in the hands of the Ordinary, and the continued abuse of this power at length produced the *Stat. 31 E. 4. c. 11*; (A. D. 1357;) which provides, that in case of intestacy, the Ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, which administrators are put upon the same footing, with regard to suits, and to accounting, as executors.—The next and most lawful friend is interpreted to be the next of blood, who is under no legal disabilities. 9 *Rep. 39*.—The *Stat. 21 H. 8. c. 5*, enlarges the power of the ecclesiastical judge a little more; permitting him to grant administration either to the widow or the next of kin, or to both of them, at his discretion; and where two or more persons are in the same degree of kindred, gives the Ordinary his election to accept which he pleases. 1 *Sid. 179*: *Raym. 93*: 1 *Shorr. 351*: 1 *Salk. 36*.

On this footing now stands the general law relative to the appointment of administrators—Who are the next of blood, or as it is usually called next of kin, is stated *post. III. & V. 8*.

2. The Ordinary ought not to repeal letters of administration which he hath duly granted; but if they are granted to such persons who ought not by law to have them, he may revoke them. 1 *Lill. 38*. For just cause they may be revoked, as where a person is a lunatick, &c. And if granted where not grantable, they may be repealed by the delegates. 1 *Lev. 157, 186*. If administration is granted, and afterwards a will is produced and proved, the administration shall be revoked; and all acts done by the administrator are void. 2 *Rel. Abr. 907*. If a citation is granted against a stranger administrator, and his administration is revoked by sentence, yet all acts done by him bona fide as administrator are good till the revocation; the administration being only voidable. 6 *Rep. 18*: 8 *Rep. 135*. But if there is any fraud, a creditor may have relief upon the *Stat. 13 Eliz. cap. 5*. And when the first administration is merely void, as granted by a wrong person, &c. it is otherwise: so when there is an appeal from the grant of the administration, to suspend the former decree. 5 *Rep. 30*. Administration was granted to *J. S.* and he released all actions; and afterwards the administration was revoked, and declared void; this release was held good. 1 *Brownl. 51*. *2u*. If it had been without consideration? If an administrator gives goods away, and then administration is revoked or repealed, 'tis said the gift is good; except it be by covin, when it shall be void only against a creditor by statute: and where the administrator after many goods administered, had his administration revoked, and it was committed

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committed to *B.* who sued the first administrator for goods unduly administered, it was held that there was no remedy but in Chancery. 6 *Rep.* 19: *Clayt.* 44: 4 *Shep. Ab.* 89: See *Hob.* 266.—But in such a case as this it seems that the second administrator might maintain an action at law against the first, for money had and received, &c. or trover for any goods remaining in his possession, or by him converted and not duly administered.

In 2 *Leon* 155, it is said, where the first administration is void, the administrator who under that administration takes the goods is a trespasser. Letters of administration obtained by fraud are void. 3 *Rep.* 78: 6 *Rep.* 18, 19: 8 *Rep.* 143.

See the several cases on this part of the subject collected in 1 *Com. Dig.* title *Administrator* (B. 8.); the result of which (as given in 4 *Burn's Ecclesiastical Law* 236,) is, that an administration may be repealed, although not arbitrarily, yet where there shall be a just cause for so doing; of which the temporal courts are to judge.

II. All persons are capable of being Executors, that are capable of making wills, and many others besides; as feme-coverts and infants: nay even infants unborn, or *in ventre s'es meres* may be made Executors. *Wesl. Symb.* p. 1. § 635.

A popish recusant convict cannot be an executor. 9 *Rep.* 37. A mayor and commonalty may be executors. 1 *Rel. Abr.* 915. And if the King is made executor, he appoints others to take the execution of the will upon them, and to take account. 5 *Rep.* 29.

It seems agreed, that by our law, an alien, or one born out of the allegiance of our King, may be an executor or administrator; also it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them *in auter droit*, and not to his own use. *Off. of Ex.* 17.

But it has been long doubted, whether an alien enemy should maintain an action as executor; for on the one hand it is said, that by the policy of the law, alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, therefore public utility must be preferred to private convenience; but on the other hand it is said, that those effects of the testator are not forfeited to the King by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if he allows such alien enemies to possess the effects as well as an alien friend, he must allow them power to recover, since in that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the King's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. *Co. Eliz.* 683: *M. v.* 431: *Car.* 49, 191: *Skil.* 370.

But an excommunicated person cannot be an executor or administrator, for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. *Co. Lit.* 331: *Swinb.* 349: *Goldb.* 85.

No infant can act as executor till the age of 17 years; till which time administration must be granted to some other *durante minore etate*. *Went. Off. of Ex.* c. 18: 6 *Rep.* 67: 4 *Ibist.* 335.

And if the right of administration devolves on an infant, administration *durante minore etate* is to be granted till he arrives at 21. *Godolph.* 102: 5 *Co.* 29: *Hob.* 250: *Yelv.* 128.

And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the testator or intestate's estate, but in right of the infant, it has been always held discretionary in the Ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the *Stat.* 21 H. 8. c. 5, to grant it to the next of kin either of the deceased, or the infant. *Hob.* 250: 1 *Vent.* 219: 1 *Keb.* 549: 3 *Mod.* 24: 1 *New. Abr.* 381.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minori etate* of the infant, and may declare as executor or administrator *durante minori etate*; and there is no absurdity in this case, that there should be an executor and administrator to the same party. 1 *New. Abr.* 381.

In like manner it may be granted *durante absentia* or *pendente lite*; when the executor is out of the realm; 1 *Lutw.* 342; or when a suit is commenced in the Ecclesiastical court, touching the validity of the will. 2 *P. Wms.* 589, 590.

The appointment of an executor is essential to the making of a will; (*Went. c.* 1: *Plowd.* 281;) and it may be performed either by express words, or such as strongly imply the same: but if the testator makes an incomplete will without naming any executors, or if he names incapable persons, or if the executors named refuse to act (See 9 *Rep.* 37: *Went. Off. Ex.* 38,) in any of these cases administration must be granted *cum testamento annexo* to some other persons; (1 *Rel. Abr.* 907: *Comb.* 20,) and then the duty of the administrator, as also when he is constituted only *durante minore etate*, &c. is very little different from that of an Executor, See *Glanvil.* l. 7. c. 6.

A man may appoint two or more persons to be joint Executors, and they are accounted in law but as one person. See post. V. 3, 5.—Such joint executors shall not be charged by the acts of their companions, any further than for effects actually come to their hands. *Mom.* 620: *Co.* *Eliz.* 318: 2 *Leon.* 209.—But if two or more executors join in a receipt [in writing] and one of them only actually receives the money, each is liable for the whole, as to creditors at law; but not as to legatees, or next of kin. 1 *Salk.* 318.—If joint executors by agreement among themselves, agree that each shall intermeddle with a certain part of the testator's estate, yet each shall be chargeable for the whole (to creditors) by agreeing to the others' receipts. *Hurd.* 314.

III. If the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted to such administrator as the *Stat.* 31 E. 3. c. 11, and 29 H. 8. c. 4, (See ante 1,) direct; in consequence of which it is to be observed; 1st. That the Ordinary is compellable to grant administration of the goods of the wife to the husband, or his representatives: (*Co. Cur.* 106, *Stat.* 20 Geo. 2. c. 3. 1 *P. Wms.* 381;) and of the husband's estate to the widow, or next of kin. *Salk.* 30: *Str.* 552.—2dly. That among the kindred, those are to be preferred that are the nearest in degree to the intestate.—3dly. That this nearness of degree shall be reckoned according to the computation of the civilians: (*P. Wms.* 381,) and not of the canonists.

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canonists, which the law of England adopts in the descent of real estates; (See title *Descent*).—And therefore in the first place the *children*, or on failure of children, the *parents* of the deceased are entitled to administration; both which are indeed in the first degree, but the children are allowed the preference. *Godolph. p. 2. c. 34. § 1: 2 Fern. 125.*—Then follow *brothers*; *grandfathers*; (*Pier. Ch. 527: 1 P. Wms 41;*) *uncles*, or *nephews*; (*Atk. 455;*) and the females of each class respectively; and lastly, *Cousins*.—4th. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land, upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; (*1 Vent. 425;*) And the Ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion. *Allyn, 36: Sty. 74.* See post. V. 8.—5. If none of the kindred will take out administration, a *creditor* may by custom do it. *Salk. 38.*—6thly. If the Executor refuses, or dies intestate, the administration may be granted to the *residuary legatee*, in exclusion of the next of kin. *1 Sid. 281: 1 Vent. 219.* And lastly the Ordinary may, in defect of all these, commit administration, (as he might have done before the *Stat. 31 E. 3. c. 11: Plead. 278;*) to such discrete person as he approves of: or (in these cases as well as in that of an Executor's refusal, *Cro. El. 92.*) may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody; (*Went. ch. 14;*) and to do other acts for the benefit of such as are entitled to the property of the deceased. *2 Inst. 398.* If a bastard who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held, (*Salk. 37.*) that the Ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is, for some one to procure letters patent, or other authority from the King; and then the Ordinary of course grants administration to such appointee of the crown. *3 P. Wms 33.*

IV. The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of *A.*'s executor, is to all intents and purposes the executor and representative of *A.* himself; See *25 Ed. 3. ff. 5. c. 5: 1 Lem. 275;* but the executor of *A.*'s administrator, or the administrator of *A.*'s executor, is not the representative of *A.* Bro. *Abn.* title *Administrator* 7. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he hath equal confidence: but the administrator of *A.* is merely the officer of the Ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it reverts back to the Ordinary to appoint another. And, with regard to the administrator of *A.*'s executor, he has clearly no privity or relation to *A.* being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one

administration, it is necessary for the Ordinary to commit administration afresh, of the goods of the deceased not administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property. *Sty. 225.* But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others. *1 Roll. Abr. 908: Godolph. p. 2. c. 30: Salk. 36: 1 New Abr. 385.* See also the *Stat. 43 Eliz. c. 8: 30 Car. 2. c. 7.*

If an executor dies *before probate*, such an executor's executor cannot prove the will, because he is not named therein, and no one can prove a will but he who is named executor in it; but if the first executor had proved the will, then his executor might have been executor to the first testator, there requiring no new probate. *1 Salk. 299.*

Though an executor of an executor may thus be executor to the first testator; yet he may take upon him the executorship of his own testator, and refuse to intermeddle with the estate of the other: and if the first executor refuses, (as if he dies before probate,) his executor shall not administer to the first testator. *Dyer 372.*

V. 1. The duty and office of Executors and Administrators in general are very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will; *Wentw. ch. 3;* but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate; the latter owes his entirely to the appointment of the Ordinary. *Com. 51.*

If a stranger takes upon him to act as executor, without any just authority; (as by intermeddling with the goods of the deceased, *5 Rep. 33, 34;* and many other transactions, *Wentw. ch. 14: Stat. 43 Eliz. c. 8;* he is called in law an *Executor of his own wrong*, [*de son tort*,] and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corps of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. *Dyer 166.* Such a one cannot bring any action himself in right of the deceased, (*Bro. Abr. title Administrator* 8,) but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally; (*5 Rep. 31;*) for the most obvious conclusion, which strangers can form, from his conduct is that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof, *12 Mod. 471.* He is chargeable with the debts of the deceased, so far as *assets* comes to his hands. *Dyer 166.* And as against creditors in general, shall be allowed all payments made to any other creditor in the same or superior degree. *1 Urban. Cas. 33.* himself only excepted; in which he differs from a rightful executor. *5 Rep. 30: Moor 527.* And though, as against the rightful executor or administrator, he

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he cannot plead such payment, yet it shall be allowed him in mitigation of damages; (12 Mod. 441. 471;) unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. *Wentw. ch. 14.*

When there is a rightful executor, and a stranger possesses himself of the testator's goods, without doing any further act as executor, he is not an executor *de son tort*, but a trespasser; *Dyer 105: Rol. Abr. 918. See 5 Rep. 82.* An executor of his own wrong may be sued as executor; and he shall be sued for legacies, as well as a rightful executor. *Noy 13.* Though an executor *de son tort* cannot maintain any suit or action, because he cannot produce any will to justify it, yet he will be severely punished for a false plea; for in such case the execution shall be awarded for the whole debt, though he meddled with a thing of very small value. *Noy 69.*

Debt was brought against an executor of his own wrong, who pleaded that he *never was executor*, nor administered as such; it was held, not to be material whether he had assets or no, but to prove that *he had administered any thing* was enough; for this would make him chargeable with the debt: but if he had not pleaded falsely, he would have been liable for no more than the value of the goods of the deceased. *Style 120.*

If an executor of his own wrong possesses himself of goods, and afterwards administration is granted him, he may by virtue thereof retain goods for his own debt. *5 Rep. 30.* And where a man took possession of an intestate's goods wrongfully, and sold them to another, and then took out administration, it was adjudged that the sale was good by relation. *Moor 126.* An executor *de son tort* shall be allowed in equity, all such payments which a rightful executor ought to have paid. *2 Chanc. Rep. 33. See further post. VI. 2, and this Dict. title Der. asstavit.*

2. The executor or administrator must *buy* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if the executor, or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased; and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. *Salk. 196: Godolph. p. 2. c. 26. § 2. See post. VI. 2, and this Dict. title Devastavit.*

3. The executor or administrator *durante minore etate*, or *durante absentia*, or *cum testamento annexo*, must prove the will of the deceased: which is done either in common form, which is only upon his own oath before the Ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed. *Godolph. p. 1. c. 20. § 4.* When the will is so proved, the original must be deposited in the registry of the Ordinary; and a copy thereof in parchment is made out under the seal of the Ordinary; and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually filed the probate.

If there are many executors of a will, and one of them only proves the will, and takes upon him the executorship, it is sufficient for all of them; but the rest after may join with him, and intermeddle with the testator's estate: but if they all of them *refuse* the executorship, none of them will ever afterwards be admitted to prove the will; the Ordinary in this case grants administration with the will annexed. *9 Rep. 37: 1 Rep. 113: Perk. 485.*

As the testator has thought the executor appointed a proper person to be intrusted with his affairs, the Ordinary cannot adjudge him disabled or *incapax*: but a *mandamus* shall issue from *B. R.* for the Ordinary to grant probate of the will, and admit the executor, if he refuse him: neither can the Ordinary insist upon security from the executor, as the testator hath thought him able and qualified. *1 Salk. 293.*

And although an executor becomes bankrupt, yet it is said the Ordinary cannot grant administration to another: but if an executor become *non compos*, the Spiritual Court may commit administration for this natural disability. *1 Salk. 307.* If an executor takes goods of the testator's, and convert them to his own use; or if he either receive or pay debts of the testator, or give bond for payment; make acquittances for them, or demand the testator's debts as executor; or give away the goods of the testator, &c. these are an administration, so that he cannot afterwards refuse the executorship: and it has been held, that if the wife of the testator take more apparel than is necessary, it is an administration. *Offic. Exec. 39.*

It is usual when there is a contest about a will, or when the right of administration comes in question, to enter a caveat in the Spiritual Court, which by their law is said to stand in force for three months. *Godolph. 253: Goldsb. 119: 2 Rol. Rep. 6: Cro. Jac. 463, 4.*

But it is said, that our law takes no notice of a caveat, and that it is but a mere cautionary act done by a stranger, to prevent the Ordinary from doing wrong; and that therefore, if administration be granted pending a caveat, this is valid in our law, though by the law in the Spiritual Court, it may be such an irregularity as will be sufficient to repeal it. *1 Rol. Rep. 191: Cro. Jac. 463: 2 Rol. Rep. 6.*

In defect of any will, the person entitled to be administrator, must also at this period take out letters of administration under the seal of the Ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must by *Stat. 22 & 23 Car. 2. c. 10.* enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the Ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative: *4 Inst. 335.* Hence the courts, where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts. and the prerogative offices, of the provinces of *Canterbury* and *York*. *Lynedewoite*, who flourished in the beginning of the 15th century, and was official to archbishop *Chichele*, interprets these hundred shillings to signify *solidos legales*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes (*Provin. l. 3. c. 13.*) that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0*d.* This will account for what is said in our ancient books, that *bona notabilia* in the diocese of *London* (4*l.* 3*s.* 5*d.* *Godolph. p. 2. c. 22.*) and indeed every where else (*Plowd.*

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281,) were of the value of ten pounds *by composition*: for, if we pursue the calculations of *Lynedevode* to their full extent, and consider that a pound of gold is now almost equal to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia*, to nearly 70*l*. But the makers of the canons of 1603, understood this ancient rule to be meant of the shillings current in the reign of James I. and have therefore directed (*Can. 92*.) that five pounds shall for the future be the standard of *bona notabilia*; so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that as the bishops themselves were originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands were to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all.

4. The executor or administrator is to make an *inventory* of all the goods and chattels, whether in possession or action of the deceased; which he is to deliver in to the Ordinary upon oath, if thereunto lawfully required. *Stat. 21 H. 8. c. 5*: By *Stat. 1 Jac. 2 c. 17. § 6*, No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor, or next of kin; nor shall he be compellible to account before any Ordinary or judge empowered by the act of 22 & 23 Car. 2. cap. 10, otherwise than as aforesaid. See 9 *Rep.* 39: 2 *Inst.* 600: *Reg.* 407.

5. He is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased; *Co. Lit.* 209; and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. *Dyer*, 23: *Co. Lib.* 347: *Stat.* 3: *Bacon*, 183; unless such release be obtained by *stat. Mer.* 620: *Co. Lib.* 318: 2 *Leon.* 209; but in case of administrators it is otherwise. 1 *dek.* 460. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator, that is, *sufficient or enough* (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever *assets* so come to his hands, he may convert into ready money, to answer the demands that may be made upon him: See 6 *Rep.* 47: *Co. Lit.* 374. In actions against executors, the jury must find assets to what value, for the plaintiff shall recover only according

to the value of assets found. 1 *Ro. Rep.* 58. As to *real assets by descent*, see this Dict. title *Assets*.

The chattels real and personal of the testator coming to the executor, are leases for years, rent due, corn growing and cut, grafs cut and severed, &c. cattle, money, plate, household goods, &c. *Co. Lit.* 118: *Dyer* 130, 537. An executor having a lease for years of land in right of the deceased, if he purchase the fee, whereby the lease is extinct, yet this lease shall continue to be assets, as to the creditors and legatees. 1 *Rep.* 87: *Bro. Lease* 63. Though a plantation be an estate of inheritance, yet being in a foreign country, it is a chattel in the hands of executors to pay debts. 1 *Vent.* 358. The executor is not only intitled to all personal goods and chattels of the testator, of what nature soever they are; but they are also accounted to be in his possession, though they are not actually so; for he may maintain an action against any one who detains them from him: he is likewise intitled to *things in action*; as right of execution on a judgment, bond, statute, &c. Also to money awarded on arbitration, where the party dies before the day, &c. *Co. Lit.* 209: 2 *Vent.* 249: 1 *Dauv. Abr.* 549.

If goods of the testator are kept from the executor, he may sue for them in the Spiritual Court, or at common law; and if one seized of a messuage in fee, &c. hath goods in the house, and makes a will and executors, and dies, the executors may enter into the house, and carry away the goods. *Lit.* 60. An executor may, in convenient time after the testator's death, enter into a house descended to the heir, for removing and carrying away the goods; so as the door be open, or the key be in the door. *Offic. Exec.* 8. He may take the goods and chattels to himself, or give power to another to seize them for him. 9 *Rep.* 38. If an executor with his own goods redeem the goods of the testator; or pays the testator's debts, &c. the goods of the testator shall, for so much, be changed into the proper goods of the executor. *Jenk. Cent.* 188.

Where a man by will devises that his lands shall be sold for payment of debts, his executors shall sell the land, to whom it belongs to pay the debts. 2 *Leon.* c. 276. And if lands are devised to executors to be sold for payment of the testator's debts, those executors that act in the executorship, or that will sell, may do it without the others. *Co. Lit.* 113. By *Stat. 21 H. 8. c. 4*; Bargains and sales of lands, &c. devised to be sold by executors, shall be as good, if made by such of the executors only as take upon them the execution of the will, as if all the executors had joined in the sale. If lands are thus devised to pay debts, a surviving executor may sell them; but if the devise be, *that the executor shall sell* the land, and not *of the land to him* to be sold, here being only an *authority*, not an *interest*; if one dies the other cannot sell. 1 *Lau.* 203.

6. The Executor or Administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pay those of a lower degree first, he must answer those of a higher out of his own estate. And first he may pay all funeral charges, and the expences of proving the will, and the like. Secondly, debts due to the King on record or specialty. 1 *And.* 129. Thirdly, such debts as are by particular statutes to be preferred to all others;

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others; as the forfeitures for not burying in woollen; (*Stat. 30 Car. 2. c. 3*;) money due upon poor rates (*Stat. 17 Geo. 2. c. 38*;) for letters to the post-office (*Stat. 9 Ann. c. 10*;) and some others. Fourthly, debts of record; as judgments (doquetted according to the *Stat. 4 & 5 W. & M. c. 20*.) statutes and recognizances. (*4 Rep. 60: Cro. Car. 363*.) Fifthly, debts due on special contracts; as for rent; (for which the lessor has often a better remedy in his own hands, by distraining;) or upon bonds, covenants, and the like under seal. (*Wentw. cb. 12*.)

Lastly, debts on simple contracts, *viz.* upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are by some (*1 Rol. Abr. 927*.) with reason preferred to any other: and so stood the ancient law, according to *Bracton*. (*lib. 2. c. 26*.) and *Fleta*. (*b. 2. c. 56. § 10*.) Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to. *10 Mod. 496*. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt whether the executor acts or not. (*Plowd. 184: Salk. 299*.) provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. *Salk. 303: 1 R. L. Abr. 921: 5 Rep. 30: 8 Rep. 136*. But if a person dies intestate, and the Ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes in only by the act of law, not by the act of the party. *5 Rep. 136: 1 Salk. 306*.—See also *1 Ch. Rep. 292: Mon 855: Hutt 123*.

If no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt; though he has nothing left for the rest, for, without a suit commenced, the executor has no legal notice of the debt. *D. 132: 2 Leon 60*.

Pursuing a bill in equity against an executor, he may pay any other debt of a higher nature, or of as high a nature, where he has legal assets: but where there is a final decree against an executor, if he pays a bond, it is a mit payment; for a decree is in nature of a judgment. *2 W. 507*.

If there be several debts due on several bonds from the testator, his executor may pay which bond debt he pleases, except an action of debt is actually commenced against him upon one of those bonds; and in such case, if, pending an action, another bond creditor brings another action against him, before judgment obtained by either of them, he may prefer which he will by *assessing a sum* to one and paying him, which judgment he may plead in bar to the other action. (*Faulk. 8*.) See *Sid. 21*. But this judgment confessed must be before plea. The usual way is, if there is time, and an executor or administrator is desirous of preferring another creditor of equal degree with him who sues, is, instantly, before plea to confess a judgment, and then plead it, with a *pro confesso* admission.

If judgment for 100*l.* is suffered, and the plaintiff compounds for 60*l.* the judgment for the whole sum shall not be allowed to keep off other creditors. *8 Rep. 113*. Judgments are not to be kept on foot by fraud. *Sid. 230: 1 W. 76*.

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On a *Sci. Fac.* against an executor, he cannot plead fully administered, but must plead specially that no goods of the testator came to his hands, whereby he might discharge the debt; for he may have fully administered, and yet be liable to the debt, where goods of the testator's afterwards come to his hands. *1 Lill. 568: Cro. Eliz. 575*. In *Scire Facias* against executors, upon a judgment against their testator, they pleaded *Plene Administravit*, by paying debts upon bonds *ante notitiam*: It was adjudged no plea, for at their peril they ought to take notice of debts upon record, and first pay them; and though the recovery be in another county than that where the testator lived: but where an action is brought against executors in another county than where they live, and they not knowing thereof, pay debts upon specialty, it is good. *Cro. Eliz. 793*.

Where day of payment is past, the penalty of a bond is the sum due at law, but where the day of payment is not come, the sum in the condition is the debt, and the executor cannot cover the assets any further. *The Bank of England v. Morrice, Widdow. Annals 224*.

A bill may be exhibited in the Chancery against an executor, to discover the testator's personal estate; and thereupon he shall be decreed to pay debts and legacies. *Abr. Ca. Eq. 238*. If a person being executor, and his testator greatly indebted, be desirous to pay the assets as far as they will go, and that his payments may not be afterwards questioned, he may bring a bill in equity against all the testator's creditors, in order that they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment. *2 Penn. 37*.

Where there are only equitable assets, they must be equally paid amongst all the creditors; for a debt by judgment, and simple contract is in conscience equal. *2 P. W. Williams 416*. As to what are legal, and what equitable assets, see *Fin. Abr. title Payment*. And it is held, that bonds, and other debts, shall be paid equally, by executors, where a person has devised lands to them, to be sold for the payment of his debts. *1 P. Wms. 430*.

A debt devised by the testator, is not to be paid by the debtor to the legatee but to the executor who can give a sufficient discharge for it, and is answerable to the legatee if there be sufficient assets. If an executor pay out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay; the executor by bill in Chancery may force the legatees to refund. *Chan. Rep. 136, 149*. One legatee paid shall refund against another, and against a creditor of the testator, that can charge the executor only in equity: but if an executor pays a debt upon simple contract, there shall be no refunding to a creditor of a higher nature. *2 Vent. 360*.

The following extracts from Mr. Cox's admirable notes to his edition of *P. & Williams's Reports*; (*1 P. Wms. 293, 603*;) will serve as a general summary or abridgement of the determinations, relative to the application of the different funds of a testator's estate, in payment of his different debts.

The personal estate of a testator shall in all cases be primarily applied in discharge of his personal debt (or general legacy) unless he by express words, or manifest intention exempt it. *2 Atk. 625: 3 Atk. 102: Holford v. Port, 3 P. Wms. 324: Fier v. Chubbett, 1 W. P. G. 192*:

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C. 192: *Forbes v. Robertson*, Bumb. 302: *Walker v. Jackson*, 2 Atk. 624: *Bridgeman v. Dove*, 3 Atk. 202: *Inchiquin (E) v. French*, Amb. 33: 1 Wils. 82. S. C. *Samuel v. Wake*, 1 Bro. C. R. 144: *Ancaffer (D)* v. Mayor, Bro. C. R. 454.—Yet it may be so exempted; as in *Bumpfield v. Wyndham*, Pre. Ch. 101: *Wainwright v. Bentlowes*, 2 Vern. 718: Amb. 581: *Stapleton v. Colville*, Talb. 202: *Walker v. Jackson*, 2 Atk. 624: *Ankerston v. Cooke*, 1 Bro. C. R. 456, 7. and the case of *Kynaston & Kynastons* cited there—*Holiday v. Bowman*, cited 1 Bro. C. R. 145: *Webb v. Jones*, 2 Bro. B. R. 60.

Every loan creates a debt from the borrower whether there be a bond or covenant for payment or not. *Cope v. Cope*, 2 Salk. 449: *Howell v. Price*, 1 P. Wms. 291: *Balby v. Hearn*, 2 P. Wms. 455: *King v. King*, 3 P. Wms. 458.

So the personal estate shall be liable although such personal debt be also secured by mortgage. *Howell v. Price*, 1 P. Wms. 291. *Cope v. Cope*, 3 Salk. 449: *Pockley v. Pockley*, 1 Vern. 36: *King v. King*, 3 P. Wms. 360: *Galton v. Hancock*, 2 Atk. 436: *Robinson v. Gee*, 1 Fez. 251: *Belvedere (E) v. Rolfe*, 6 Bro. P. C. 520.—*Phillips v. Phillips*, 2 Bro. C. R. 273.

So lands subject to or devised for payment of debts, shall be liable to discharge such mortgaged lands either descended or devised. *Bartholomew v. May*, 1 Atk. 487: *Tweedale (MSS.) v. Cozentry*, (E) 1 Bro. C. R. 240. Even though the mortgaged lands be devised expressly subject to the incumbrance, 2 P. Wms. 360: *Seale v. St. Elby*.—So lands descended shall exonerate mortgaged lands devised. *Galton v. Hancock*, 2 Atk. 424.—So unincumbered lands and mortgaged lands both being specifically devised (but expressly "after payment of all debts") shall contribute in discharge of such mortgage. *Carter v. Barnardiston*, 1 P. Wms. 505: 2 Bro. P. C. 1.

But in all these cases the debt being considered as the personal debt of the testator himself, the charge on the real estate is merely collateral. The rule therefore is otherwise where the charge is on the real estate principally, although there be a collateral personal security. *Cozentry (Countess) v. Cozentry (E)*, 2 P. Wms. 222: *Freeman v. Edwards*, 2 P. Wms. 437: *Wilson (E) v. Dunnington*, 2 P. Wms. 664, in n: *Hard v. Ld. Dalling*, 2 Bro. C. R. 316.—Or where the debt, although personal in its creation, was contracted originally by another. *Cope v. Cope*, 2 Salk. 449: *Bazot v. Oughston*, 1 P. Wms. 747: *Leman v. Kneeban*, 1 Fez. 51: *Relifson v. Gee*, 1 Fez. 251: *Pangloss v. Freeman*, Amb. 115: *Lucan v. Martin*, 1 Fez. 312: *Relifson v. Hudson*, 1 Bro. C. R. 58: *Perkins v. Bayntun*, 2 P. Wms. 667, in n: *Shafio v. Shafio*, 1b: *Buflot v. Percival*, 1b: *Ta v. Farwell*, 2 Bro. C. R. 57: *Toddell v. Toddell*, 2 Bro. C. R. 101, 152. *Billinghurst v. Walker*, 2 Bro. C. R. 604.

With respect to the priority of application of real assets, when the personal estate is either exempt or exhausted; it seems that, First, the real estate expressly devised for payment of debts shall be applied: Secondly, to the extent of specialty debts, the real estate descended: Thirdly the real estate specifically devised subject to a general charge of debts. *Galton v. Hancock*, 2 Atk. 424: *Pearce v. Conber*, 3 Atk. 560: *Wilde v. Clarke*, 2 Bro. C. R. 261 n: *Darvies v. Topp*, Id. 259 n: *Donne v. Lewis*, Id. 257.

It being the object of a Court of equity that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement

consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy v. Athol (D)*, 2 Atk. 446: *Lucan v. Martins*, 1 Fez. 312: *Mogg v. Hodges*, 2 Fez. 53.

If therefore a specialty creditor, whose debt is a lien on the real assets receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt. 2 C. C. 4: *Sagitary v. Hyde*, 1 Vern. 455: *Neave v. Alderton*, 1 Eq. Ab. 144: *Wifson v. Fielding*, 2 Vern. 763: *Galton v. Hancock*, 2 Atk. 436.—And legatees shall have the same equity as against assets descended. *Culpepper v. Aston*, 2 C. C. 117: *Bowman v. Reeve*, Pre. Ch. 578: *Tipping v. Tipping*, 1 P. Wms. 730: *Lucy v. Gardner*, Bumb. 137: *Lutkins v. Leigh*, Talb. 54.—So where lands are subjected to payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been, satisfied out of personal assets. *Hastwood v. Pope*, 3 P. Wms. 323. So where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. *Masters v. Masters*, 1 P. Wms. 422: *Bligh v. Darnley (E)*, 2 P. Wms. 620: *Hyde v. Hyde*, 3 C. R. 83.

But from the principles of these rules, it is clear that they cannot be applied in aid of one claimant, so as to defeat the claim of another and therefore a pecuniary legatee shall not stand in the place of a specialty creditor as against land devised; though he shall as against land descended. *Scott v. Scott*, Amb. 383: *Chyton v. Burt*, 1 P. Wms. 678: and *Hastwood v. Pope*, 3 P. Wms. 324: But such legatee shall stand in the place of a mortgagee who has exhausted the personal assets to be satisfied out of the mortgaged premises though specifically devised. *Lutkins v. Leigh*, Talb. 53: *Forster v. Ld. Leigh*, Amb. 171. For the application of the personal assets in case of the real estate mortgaged, does not take place to the defeating of every legacy. *Onal v. Mead*, 1 P. Wms. 603: *Tipping v. Tipping*, Id. 730: *Darvies v. Gardner*, 2 P. Wms. 190: *Ryder v. Wager*, Id. 335.

It is now settled that the Court of Chancery will not marshall assets in favour of a charitable bequest so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. *Mog v. Hodges*, 2 Fez. 52: *Attorney General v. Tyndal*, Amb. 614: *Poller v. Blayden*, Amb. 704: *Hill and v. Taylor*, Id. 713. II. and it is to be observed that none of the rules abovementioned justify any fund to a claim to which it was not before subject; but only take care that the election of one claimant shall not prejudice the claims of the others. 2 Atk. 438: 1 Fez. 312.

7. When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend: but he may not give himself the preference herein, as in the case of debts. 2 Vern. 434: 2 P. Wms. 25. See title *Legacy*.—The assent of an executor to legacies is held necessary to entitle the legatee; but as this assent may be compelled, see *March* 97, it does not seem necessary to state the effect of a dissent where there are assets sufficient to answer

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answer both debts and legacies. Where there are not assets the assent of the executor to a legacy would subject him to a devastavit.—See *Co. Litt.* 111: *Keilw.* 128: *Perk.* 390: *Plowd.* 525, 543: 4 *Rep.* 28: *Cro. Eliz.* 719. and this Dict. title *Legacy*.

8. When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the Residuary Legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship *Perkins* 525.—But whatever ground there might have been formerly for it, this opinion seems now to be understood, with the following restriction; that although where the executor has no legacy at all, the *residuum* shall in general be his own, yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator. *Proc. Chan.* 323: 1 *P. Wms.* 7: 544: 2 *P. Wms.* 338: 3 *P. Wms.* 43, 194: *Str.* 559: *Lawson v. Lawson*, *Dom. Proc.* 28 April 1777.

The result of the many cases on this subject, (as ingeniously stated in a note of Mr. Cor's to his edition of *P. Wms.* vol. 1. p. 550,) appears to be this.

By law the appointment of an Executor vests in him beneficially, all the personal estate of the testator not otherwise disposed of; but wherever courts of Equity have seen, on the face of the will, sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus, in case of a complete intestacy, i. e. the next of kin; as where the executors are expressly called executors *in trust*, or where any other expressions occur, shewing the office only to be intended them, and not the beneficial interest *Pitt v. Pitt*, 2 *Vern.* 99: *Rachfield v. Careless*, 2 *P. Wms.* 158: *Graddon v. Hick*, 2 *Atk.* 18: *Dean v. Dalton*, 2 *Bro. C. R.* 63: *Barnet v. Barnby*, 3 *Bro. C. R.* 28. So where there is a residuary clause, but the name of the residuary legatee is not inserted. *Wheeler v. Shears*, *Mess.* 288: *Coyne* (Bishop) *v. Young*, 2 *Vez.* 91: *North* (Lord) *v. Purdon*, 2 *Vez.* 495. Or where the residuary legatee dies in the life-time of the testator, *Nicholl v. Crisp*, *And.* 769: *Bennett v. Bachelor*, 3 *Bro. C. R.* 28.

So a pecuniary legacy to a sole executor affords a sufficient argument to exclude him from the residue; as it is absurd to suppose a testator to give expressly a part of the fund to the person he intended to take the whole. *Cook v. Walker*, cited 2 *Vern.* 676: *Johnson v. Prescott*, *Burb.* 112: *Darret v. Davies*, 3 *P. Wms.* 40. And it is settled (notwithstanding the case of *Bell v. Smith*, 2 *Vern.* 675,) that the wife being the executrix shall make no difference, as appears as well by the cases mentioned in *Farrington v. Ambly*, (1 *P. Wms.* 544. and *seq.*) as by 2 *Eq. Ab.* 444. p. 58: *Martin v. Rebow*, 1 *Bro. C. R.* 154. So equal pecuniary legacies to two or more executors shall exclude them from the surplus. *Pitt v. Smith*, 1 *P. Wms.* 7, and the several cases there mentioned, and 3 *Bro. C. R.* 111. Neither will legacies to the next of kin vary the rule. *Andrew v. Clark*, 2 *Vez.* 162.

But wherever the legacy is consistent with the intent that the executor should take the whole, a court of equity will

not disturb his legal right: and therefore where the gift to the executor is only an exception out of another legacy, it shall not exclude him from the residue, because it is necessary to make such exception expressly. *Griffith v. Rogers*, *Pre. Ch.* 231: *Hjkins v. Hjkins*, 1 *Pre. Ch.* 263: *Granville* (Ld.) *v. Beaufort*, (Dls.) 1 *P. Wms.* 114: *Jones v. Westcombe*, *Pre. Ch.* 316: *Newstead v. Johnson*, 2 *Atk.* 45: 2 *Eq. Ab.* 444. p. 58. So the same principle seems to have prevailed in *Lawson v. Lawson*, 7 *Bro. P. C.* 511. So a legacy to one only of two or more executors shall exclude neither from the surplus; because the testator might intend to such a one, a preference *pro tanto*, *Coleworth v. Brangan*, *Pre. Ch.* 323: *Mason v. Hawkins*, 4 *Bro. P. C.* 1: *Johnson v. Twist*, cited 2 *Vez.* 167: *Cloyne* (Bp.) *v. Young*, 2 *Vez.* 91: *Wilson v. Watt*, 2 *Vez.* 166. The same rule and reason hold, where several executors have unequal pecuniary legacies. *Biasbridge v. Wadroff*, 2 *Atk.* 69: *Bowler v. Hunter*, 1 *Bro. C. R.* 328: although in the last case the following were objected as authorities against the determination, viz. 2 *Vern.* 677: *Pre. Ch.* 92: 2 *Vern.* 361: and *Sachel v. Jefferies*, *Pre. Ch.* 169: and 1 *Bro. P. C.* 167.

Then as to specific legacies, it is determined that a specific legacy will exclude a sole executor, *Randal v. Bocky*, 2 *Vern.* 425: *Southat v. Watson*, 3 *Atk.* 226: *Martin v. Rebow*, 1 *Bro. C. R.* 154. and also that distinct specific legacies of unequal value to several executors, shall not exclude them. *Blinkborne v. Frost*, 2 *Vez.* 27: and the language of Lord Hardwick in *Southat v. Watson*, treats specific and pecuniary legacies as standing precisely upon the same ground in questions of this nature. See title *Legacy*.

However no case occurs in the books in which distinct specific legacies of equal value to several executors have excluded them from the surplus. And the argument which supports this rule as to pecuniary, certainly does not apply with equal force to specific legatees; since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, &c. &c. amongst his executors in some particular manner; although equally in point of value and consistently with an intention that they should take the surplus. The case of *Shrimpton v. Stanhope*, cited 3 *Atk.* 230. is not a case of distinct specific legacies; for it appears from *Reg. Lib. B.* 1736 *fo.* 104, that the testator there gave some specific legacies to a man and his wife jointly, whom he also made his executors. And so in *Willis v. Brady*, *Barn.* 14, and these cases therefore seem like legacies to a sole executor.

With regard to the admission of parol evidence, in cases of this kind, see *Rachfield v. Careless*, 2 *P. Wms.* 158; and *Re Lord* (D.) *v. Rutland* (Dls.) 2 *P. Wms.* 210: and Mr. Cor's notes on the former of those cases.

Concerning the *adminstrato* indeed there was formerly much debate, whether or no he could be compelled to make any distribution of the intestate's estate. *Grubb*, p. 2. c. 32. For though (after the administration was taken in effect from the Ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal Courts, and the bonds declared void at law. 1 *Lev.* 233: *Cent.* 125: 2 *P. Wms.* 447. And the right of the husband not only to administer, but also to enjoy exclusively,

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sively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distribution does not extend to this case. But now these controversies are quite at an end; for by the statute commonly called the Statute of Distribution, 22 & 23 Car. 2. c. 10. (explained by 29 Car. 2. c. 30.) it is enacted, that the surplusage of intestates' estates, (except of *femes covert*, which are left as at common law. Stat. 29 Car. 2. c. 3. § 25.) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions, to his children, or if dead, to their representatives, that is, their *lineal* descendants: if there are no children or legal representatives, subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives, if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, further than the children of the intestate's brothers and sisters. Raym. 496: Lord Raym. 571.

The next of kindred, here referred to, are to be investigated by the rules of consanguinity, as those who are entitled to letters of administration, of whom sufficient has already been said, (*ante*. III.) And therefore by this statute, the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate, and without wife or issue; in exclusion of the sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; (See 1 P. Wms. 48.) And the father need not administer. (Pr. Ch. 260.) But by Stat. 1 Jac. 2. c. 17, if the father be dead, and any of the children die intestate, without wife or issue, in the life-time of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions—And in case a man die leaving a wife and a mother and brothers and sisters, the wife shall have only a moiety, the remainder going to his mother, brothers and sisters equally. 2 P. Wms. 344.

This statute of distribution bears in its principle a near resemblance to our ancient *English* law, previous to the statute of wills, by which, (See Glanvil. l. 2. c. 5: Bracton, l. 2. c. 26: Fleta, 2. c. 57;) a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. And so if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable* parts; and the will *de rat. male p. te bonorum* was given to recover them. F. N. B. 122.

By the same Statute of distributions it is directed that no child of the intestate (except his heir at law,) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the

other shares, the children so advanced shall have so much only as will make them equal. And this with respect to goods and chattels is part of the ancient custom of London, of the Province of York, and of Scotland: and with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of *birthright*.

It may be observed that the doctrines and limits of representation, laid down in the statute of Distribution, seem to have been in some measure also borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the Common-law, knows no other rule of succession but that *per stirpes* only. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A. B. and C; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A. had been dead leaving three children, and another, B. leaving two; then the distribution must have been *per stirpes*; viz. one third to A's, three children, another third to B's two children; and a remaining to C. the surviving brother: Yet if C. had also been dead, without issue, then A's, and B's, five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one fifth part. Prec. Chanc. 54.

A question hath been made, if a father die intestate, leaving only one son, which son also dies intestate, whether administration should be granted, to the next of kin, of the father or of the son? The latter determination hath been, that, by this statute of distribution of intestate's estates, a right is vested in one child, where there is one and no more (viz.) a right to sue for the estate; and by consequence, if he die, before the estate is recovered and actually in his possession, it must go to his administrator, and not to the administrator of the father. Palmer v. Allcock, 3 Mol. 58: Vide Shower 26. and 2 Vern. 274.

So where a person died intestate, leaving two, who were next a-kin, in equal degree to him; one of them died intestate within the year, and before distribution; adjudged, that an interest was vested in him, and his next of kin shall have the administration, like the case of a residuary legatee dying before probate of the will, (viz.) his next of kin shall have the administration, and the next of the testator. Show. 25.

9. The Statute of Distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places, the restraint of devising is removed, their ancient customs remain in full force, with respect to the estates of intestates.

In the city of London, (Ld. Raym. 1329,) and province of York, (2 Burr. Eccl. Law 746.) as well as in the kingdom of Scotland, (Id. 782.) and probably also in Wales, (concerning which there is little to be gathered, but from the Stat. 7 & 8 W. III. c. 38.) the effects of the intestate, after payment of his debts are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children,

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children, his substance (deducting for the widow's her apparel and the furniture of her bed-chamber, (which in London is called the *widow's chamber*) is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children they shall respectively, in either case, take one moiety, and the administrator the other, 1 *P. Wms.* 341: *Salk.* 246.—If neither widow nor child, the administrator shall have the whole. 2 *Shorr.* 175.—And this portion or *dead man's part*, the administrator was wont to apply to his own use. (2 *Freem.* 85: 1 *Vern.* 133.) till the Stat. 1 Jac. 2. c. 17. declared that the same should be subject to the statute of Distribution. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom, and two by the statute; if he leaves a widow and one child, she shall have sixteen parts as before; and the child shall have ten, six by the custom and four by the statute, if he leaves a widow and no child, the widow shall have three fourths of the whole, 10 by the custom and one by the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage in bar of her customary part, it puts her in a state of non-entity with regard to the custom only; (2 *Vern.* 665: 3 *P. Wms.* 16.) but she shall be entitled to her share of the *dead man's part* under the statute of Distribution, unless barred by special agreement. 1 *Id.* 15: 2 *Chm. Rep.* 252. and if any of the children are advanced by the father in his life-time with any sum of money, (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom; (2 *Freem.* 279: 1 *Equ. Caf. Abr.* 155: 2 *P. Wms.* 526:) but if they are fully advanced, the custom entitles them to no farther dividend. 2 *P. Wms.* 527.

Thus far in the main the customs of London and of York agree: but besides certain other less material variations there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament (2 *Vern.* 558.) and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and in case of intestacy, shall fall under the statute of Distributions, *Proc. Chanc.* 557. The other, that in the province of York, the heir at Common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part. 2 *Burn.* 754.

VI. 1. Against an *administrator* and for him, action will lie, as for and against an executor, and he shall be charged to the value of the goods, and no further; unless it be by his own false plea, or by wasting the goods of the intestate. An executor or *administrator* shall never be charged *de bonis propriis*, but where he doth some wrong; as by selling the testator's goods, and converting the money to his own use, concealing or wasting them, or by

pleading what is false. *Dyer* 210: 2 *Rulf. Rep.* 295. But this plea must be of a fact, within his own knowledge. If an *administrator* plead *plene administravit*, and 'tis found against him, the judgment shall be *de bonis propriis*, because 'tis a false plea, and that upon his own knowledge. 2 *Cro.* 191: *Contra* where he pleads such a plea, and that he hath no more than to satisfy such a judgment, &c. the recovery shall be *de bonis testatoris*, &c. 2 *Roll. Rep.* 400. This must mean, where such plea is true in fact. Upon *plene administravit* pleaded by an *administrator*, the plaintiff must prove his debt, or he shall recover but a penny damages, though there be assets; because the plea only admits the debt, but not the quantum. 1 *Salk.* 296.

Special bail is not required of *administrators* or executors in any action brought against them for the debt of the intestate; except where they have wasted the goods of the deceased: nor shall costs be had against them. Vide tit. *Costs*. See *Co. Eliz.* 503: *Telv.* 168: *Hut.* 69: 2 *Roll. Rep.* 87: 1 *Salk.* 207: 3 *Salk.* 106. Not even on a writ of error where judgment is affirmed. Where an *administrator* is plaintiff, he must shew by whom *administration* was granted; for that only intitles him to the action: but if an *administrator* is defendant, the plaintiff need not set forth by whom *administration* was granted, for it may not be within his knowledge. *Sid.* 220: 1 *Lutw.* 301. Generally an *administrator* shall be charged by others, for any debt or duty due from the deceased, as he himself might have been charged in his life time; to for as he hath any of the intestate's estate, to discharge the same. *Co. Lit.* 219: *Dyer* 14.

If a man have judgment for land in a real or mixed action, and for damages, and then dies; his executor or *administrator*, not the heir, shall have execution for the damages; but not for the land. *Fitz. Adm. n.* 53: *March* 9.

2. For the goods of the testator, taken from them, or for trespass upon the land, &c. *Executors* may, before the will proved, bring action of trespass, detinue, &c. And if they tell on the will, or other goods of the testator, before the will is proved, they may have actions for the money payable, before the same is proved. *Offic. Exec.* 35. It has been ruled, that an executor may commence an action before probate; but he cannot declare upon it, without producing in court the letters testamentary: he is not like an *administrator*, who hath no right till *administration* committed; for his right is the fact. Before, as after probate of the will, and the not proving it, is only an impediment to the action. 1 *Salk.* 303.

[Probate obtained before trial of the action seems sufficient, unless oyer of the letters testamentary is demanded; for it is of the will, not the probate, protest is made, and on the trial, for any matters relative to the personal estate, with which the executors have to do, the probate is the proper proof of the will. J. M.]

Executors may maintain action of trover for goods converted in the life of the testator. *Cro. Eliz.* 377. And by the Stat. *W. 1* (13 E.) c. 23, executors shall have a writ of account, and the like action and process, as the testator might have had.—By Stat. 4 E. 3. c. 7. the executors may bring actions for trespass done to their testator, as for goods and chattels carried away in his life, and shall recover their damages in the same manner as he should have done.—By Stat. 25 E. 3. *ff.* 5. c. 5, executors of executors shall have actions of debt, account, and of goods

EXECUTOR VI. 2.

goods taken away of the first testator's; and have execution of statutes, &c. and shall answer to others, so far as they recover goods of the first testator, as the first executor.—As to process against Executors, See *Stat. 9 E. 3. c. 3.*

Formerly, if an executor wasted goods and left an executor, and died leaving assets, his executor should not be chargeable, because it was a personal tort. *2 Lev. 120*; but now it is otherwise by the *Stat. 4 & 5 W. & M. c. 24.*

The law subjects the executors to every person's claim, and action, which he had against the testator, except as to a trespass *vi et armis*, &c. committed by the testator; for which reason the executor is said to be the testator's assignee, and to represent the person of the testator: but for personal wrongs done by the testator to the person, or goods, &c. of another, the executor doth not represent him: because personal actions die with the person. *Co. L. 209*; *9 Rep. 89*. See title *Action*.

Nothing can be debt in the executor, which was not debt in the testator. *Co. Eliz. 232*. A promise to pay to an executor, when the testator is not named, is not good. *Co. Jac. 570*. But a testator may bind his executor, as to his goods, though he himself is not bound. *Ibid.* And an executor may recover a duty due to the testator, though he be not named. *Dyer 14*. Action lies against an executor upon a collateral promise made and broken by the testator. *Co. Jac. 663*. The testator's promise to do any collateral thing, as to build an house, &c. which is not a debt, binds executors. *Jenk. Cent. 290, 336*. Assumpsit lies upon a contract of the testator; and the realor is the same upon a promise, where the testator had a valuable consideration. *Palm. 329*. Though a debt upon a simple contract of the testator, cannot be recovered of the executor by action of debt; yet it may by assumpsit. *1 Lev. 200*; *9 Rep. 87*.

If two persons are jointly bound, and one of them dies, the survivor only shall be charged, and not the other's executor. *Palsb. 16 Car. 2*. When there are two executors, if one of them dies, action is to be brought against the surviving executor, and not the executor of the deceased; but in equity the testator's goods are liable in whosoever's hands they are. *1 Leon. 304*; *Clan Rep. 57*.

If there be no assets, the obligee executor may sue the heir of the obligor testator in action of debt upon his bond. *1 Salk. 304*; *1 Lil. Abr. 575*.

If an executor releases all actions suits and demands, it extends only to demands in his own right, not such as he hath as executor. *Sims. 153*. An executor shall be charged with rent in the *detinet*, if he hath assets; and if he continues the possession, he shall be charged in the *debet* and *detinet*, in respect of the perception of the profits, whether he hath assets or not. *1 Lev. 127*. But an executor is not liable in the *debet* and *detinet* for part, and in the *detinet* for the other part, because they require several judgments, viz. *De bonis propriis* for the *debet* and *detinet* and *de bonis testatoris* for the *detinet*. *3 Lev. 74*. See title *Debet and Detinet*.

If an executor has a term, and the rent reserved is more than the value of the premises, in action brought against him for it in the *debet* and *detinet*, he may plead the special matter, viz. *I have no assets*, and that the assets less value than the rent, and demand judgment. He ought not to be charged in the *detinet tantum*:

and he cannot waive the lease; without renouncing the whole executorship. *1 Salk. 297*.

One executor cannot regularly sue another at law; but he may have relief in equity: In the eye of the law all are but as one executor; and most acts done by, or to any of them, are esteemed acts done by, or to all of them. *1 Rol. Abr. 918*. If where one executor is sued, he plead that there is another executor, he ought to shew that he hath administered. *1 Lev. 161*. And he only that administers is to be sued in actions against executors; but actions brought by executors are to be in the name of all of them, though some do not take upon them the executorship. *1 Rol. 924*; *Jenk. Cent. 106, 107*. If any executor refuses to join in an action, with his co-executors, he must be summoned and severed.

An executor is not disabled by outlawry to sue for the debts of the testator.

By the *Stat. of Frauds 29 Car. 2. c. 3*, No action shall charge an executor to answer damages out of his own estate, upon any promise to another, unless there be some writing thereof signed by the party to be charged therewith. See *Rann v. Hughes, 4 Bro. P. C.*

By *Stat. 17 Car. 2. c. 8 § 1*, On any judgment after verdict, had by or in the name of an executor, or administrator; an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment. If an executor makes himself a stranger to the will of the testator, or pleads *Ne unques executor* or any *falsa plea*, and it is found against him, judgment shall be *de bonis propriis*: in other cases *de bonis testatoris*. *Co. Jac. 447*.

If on a *scire facias* against an executor, the sheriff return a *destravit*; the plaintiff shall have judgment and execution *de bonis propriis* of the defendant: and if *nulla bona* be returned, he may have a *capias ad satisfaciendum*. or an *elegit*. *2 Nels. 791*; *Dyer 185*. But one executor shall not be charged with a *destravit* made by his companion; for the act of one shall charge the other no further than the goods of the testator in his hands amount to. *Co. Eliz. 318*.

If an executor does any waste, or mis-employs the estate of the deceased, or doth any thing by negligence or fraud, &c. it is a *destravit* and he shall be charged for so much out of his own goods. *8 Rep. 133*. And a new executor may have an action against a former executor, who wasted the goods of the deceased; or the old one may remain chargeable to creditors, &c. *Hib. 266*.

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old right, and is quasi a payment to him. *Off. of Ex. 158*; *Telv. 10*; *1 Lev. 189*.

So if the executor sue a person in trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he shall pay the executor such a sum at a future day, and the party fails, this is a *destravit*; and he shall answer *ad valorem*. *2 Lev. 189*; *2 Jon. 88*; *8 C. 1 Fern 474*; *8 C.*

It is a *destravit* to permit interest to run in arrears, and then suffer judgment for it; and want of assets to pay before the incurring of it by the administrator shall not be intended unless it be expressly pleaded. *2 Lev. 40*; *Hil. 23*; *24 Car. 2. B. R. Seaman v. Dec.*

An executor in case of a *destravit* is in nature of a trustee of an estate. *Chan. Cases 304*.

EXECUTORY DEVISE.

EXECUTORY ESTATE, Is where an estate in fee created by deed or fine is to be afterwards executed by entry, livery, writ, &c. Leases for years, rents, annuities, condition, &c. are called inheritances executory. *Wood's Inst.* 293. Estates executed are when they pass presently to the person to whom conveyed, without any after-act. *2 Inst.* 513. See title *Estate*.

EXECUTORY DEVISE, The Devise of a future interest. A Devise that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. *1 Eq. Cas. Abr.* 186.

An executory devise differs from a remainder in three very material points. 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate, may be limited after a fee simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. See title *Remainder* and *2 Comm.* 172—5.

1. The first case happens when a man devises a future estate to arise upon a contingency: and, until that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage, here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro*. This limitation though it would be void in a deed, yet is good in a will, by way of executory devise. *1 Sid.* 153. For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do if it passes at all) therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in presenti*. And, since it may thus commence *in futuro*, there is no need of a particular estate to support it, the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such any executory devise not being a present interest, cannot be barred by a recovery, suffered before it commences. *Cro. Jac.* 593. See this Dict. title *Fine and Recovery*.

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A. and his heirs; but, if he dies before the age of twenty-one, then to B. and his heirs: this remainder also, though void in a deed, is good by way of executory devise. *2 Mod.* 289.

In both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being, or within a moderate term of years; for Courts of Justice will not indulge even wills so as to create a perpetuity; which the law abhors, *12 Mod.* 267, *1 Vern.* 164. *1 Salk.* 229. The utmost length that has been hitherto allowed for the continuance of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme covert as shall first attain the age of twenty one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son, and this hath been decreed to

be a good executory devise. *Farr.* 232. This limit was taken from the time in which an estate may be rendered unalienable by a strict settlement. An executory devise to an unborn son, of a man, may be suspended a few months beyond the life of the father and twenty one years afterwards; by a posthumous birth.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term for years. *8 Rep.* 95.

And, at first, the courts were tender, even in the case of a will of restraining the devisee for life from aliening the term, but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the power of alienation, especially in very long terms was introducing a species of perpetuity. *Bro. tit. Chattels* 23: *Dyer* 74. But, soon afterwards it was held, that the devisee for life hath no power of aliening the term so as to bar the remainderman. *Dyer* 358: *8 Rep.* 96; yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *in esse* during the life of the first devisee; for then, as it is expressed, all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainderman who happens to survive the rest. It was also settled that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee. *1 Sid.* 451: *Skin.* 341: *3 P. Wms.* 358.

Having said thus much on Executory Devises in general, subsequent information may be thus divided.

I. Of Executory Devises of Lands of Inheritance.

II. Of Executory Devises of Terms for Years.

I. If a particular estate is limited, and the inheritance passes out of the donor, this is a contingent remainder; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an executory devise; and in all cases of executory devises, the estates descend until the contingencies happen. *Raym.* 28: *1 Lutw.* 798. Where a contingent estate limited, descends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a remainder. And so it is, if the estate be limited by words *in presenti*, as when a person devises his lands to the heirs of A. B. who is living, &c. Though if the same were to the heir of A. after his death, it would be as good as an executory devise. *2 Saund.* 380: *4 Mod.* 255.

One by will devises land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then *ensent*, be delivered of a son, then the land to remain to him in fee, and dies, and the son is born; in this case it was held, that the fee of the brother shall cease, and vest in the son, by way of executory devise, on the happening of the contingency; and here such fee estate enures as a new original devise to take effect when the first fails. *Dyer* 33, 127: *Cro. Jac.* 592. A remainder of a fee may not be limited by the rules

EXECUTORY DEVISE.

rules of law after a fee simple; for when a man hath parted with his whole estate, there cannot remain any thing for him to dispose of: but of late times a distinction hath been made between an absolute fee-simple, and a fee-simple which depends upon a contingency, or is conditionally limited; especially where such a contingency may happen in the course of a few years, or of one or two lives; and where such a remainder is limited by will, it is called an executory devise. 2 Nelf. Abr. 797.

An estate devised to a son and his heirs, upon condition that if he did not pay the legacies given by the will within such a time, that then the land should remain to the legatees, &c. and their heirs: this limitation of a fee in remainder, after a fee limited to the son, being upon the contingency, of the son's failing in payment of the legacies, was adjudged good by way of executory devise. Cro. Eliz. 833. And where the father devised his lands to his youngest son and his heirs, and if he die without issue, the eldest son being alive, then to him and his heirs; this was held a good remainder in fee to the eldest brother, after the conditional contingent estate in fee to the youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue, was a collateral determination of his estate, whilst the other was living. Godb. 282: 2 Nelf. Abr. 798.

There can be no executory devise after an estate-tail generally limited, because that would tend to a perpetuity; and a contingency is too remote where a man must expect a fee upon another's dying without issue, generally: But dying without issue, living another, may happen in a little time, because it depends upon one life; and therefore a devise of a fee simple to one, but to remain to another upon such a contingency, is now held good by executory devise. Cro. Jac. 695.

If a devise be "to A. for ever, that is, if he shall have a son or sons who shall attain 21, but if A. shall die without son or sons to inherit, that the son of B. shall inherit," this is a fee in A. with an executory devise to the son of B. who shall take it A. die without issue, or if the issue die before 21. 1 Bro. C. R. 147.

If a devise be to the second son, then unborn, of A. B. and after his decease, or accellion to his paternal estate, then to his second son and his heirs-male, with remainders over: such second son of A. B. when born, will take an estate in tail-male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands descend to the heir of the testator. 2 Blac. Rep. 1159.

II It has now been long fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of 21; and that the limits of executory devises of real and personal property are precisely the same. Fearne.

It is very common to bequeath chattel interests to A. and his issue, and if he dies without issue to B. It seems now to be determined, that where the words are such as would have given A. an estate tail in real property; in cases of personal property the subsequent limitations are void, and A. has the absolute interest: But if it appear from any clause or circumstance in the will, that the

testator intended to give it over, only in case A. had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See Fearne and the cases referred to in Cox's 2. 17. iii. 262.

Formerly where a term of years, (which is but a chattel) was devised to one; and that if he died, living another person, it should remain to the other person, during the residue of the term, such a remainder was adjudged void: For a devise of a chattel to one for an hour, was a devise of it for ever. Dyer 74. But it was afterwards held, that a remainder of a term to one, after it was limited to another for life, was good: In a case where a testator having a term, devised that his wife should have the lands for so many years of the term as she should live; and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a term for years was adjudged good. Dyn 253, 358.

A person possessed of a term, devised it to his wife for eighteen years, and after to his eldest son for life, after to the son's eldest issue male during life; though he have no such issue, at the time of the devise, and death of the devisor, if he has before his own death, he shall have it as an executory devise. 1 Rol. 612. But if one devise a term to his wife for life; the remainder to his first son for life, and if he dies without issue, to his second son, &c. the remainder to the second son is void, and no executory devise; yet where the dying without issue living at a person's death, may be confined to one life, it hinders not a remainder over. 1 Eq. Abr. 194.

Executory devises, as to terms for years, are not extended beyond a life or lives; they ought to arise within the compass of one life. 1 Salk. 229. Where there is an executory devise, there needs not any particular estate to support it; and because the person who is to take upon contingency, hath not a present but future interest, his estate cannot be barred by a common recovery. 2 Nelf. Abr. 797, 798. It is held executory devises, and limitations of the trust of a term, are governed alike. 1 Vern. 234.

Lessee for years devised all his term to his son, and his will was, that his wife should have the occupation and profits of the lands, during the minority of his son, &c. and he made her sole executrix, and died; she afterwards proved the will, then she sold the term, and died; adjudged that this sale was void against her son, because it shall be intended that the devise to the wife, shall precede the devise to the son, though it followed in words, and then she will not have the whole term, but only so much thereof for so long time as she should live, before her son came of age; and that the remainder was to vest in him, upon the contingency of his living till he came of full age. Plow. Com. 53. 519.

The husband being possessed of a term for years, devised the lease itself to his wife for her life, and after her death to her children unpreferred; it was insisted for the wife, that she had the whole term, the devise being of the lease itself, and the lands are not mentioned throughout the will; but adjudged that the wife had only an estate for so many years of the lease as she should live, and that so much as remained unexpired at her death, was to vest in the children upon the contingency of their living at that time. 1 And. 61; 2 Leon. 92; 3 Leon. 89; Gold. 26.

EXEMPLIFICATION,

EXEMPLIFICATION OF LETTERS PATENT

See this *Evidenc.*

EXEMPLIFICATION, A writ granted for the exemplification of an original record. *Reg. Orig.* 290.

EXEMPTION, Exemptio.] A privilege to be free from service or appearance; as knights, clergymen, &c. are exempted from appearing at the county-court by statute, and Peers from being put upon inquests. 6 *Rep.* 23. Persons seventy years of age, apothecaries, &c. are also exempted by law from serving on juries; and justices of peace, attorneys, &c. from parish offices: 2 *Inst.* 247. There is an exemption from tolls, &c. by the King's Letters Patent: And a writ of exemption, or of ease, to be quit of serving on juries, and all public service. *Shop. Epitom.* 1049. See further the proper titles in this Dict.

EXENNIIUM or EXHENIUM, A gift or present; and more properly a new year's gift.

EXERCITUALB, A heriot; paid only in arms, horses, or military accoutrements. *Leg. Edw. Conf.* 1.

EXETER. By letters patent under the Great Seal, the seits of the castle of Exon (part of the dutchy of Cornwall) to be granted to some persons appointed by the justices in quarter-sessions for the county of Devon, for the term of 99 years, to the use of the said county and for other public uses; under the ancient yearly rent of 10 *l.* per annum, payable to the crown. *Stat. 9 Ann. c.* 19.

EXFREDIARE, From *ex* and the Sax. *Frede, Frith, Peace.*] To break the peace, or commit open violence. *Leg. H. 1. c.* 13.

EX GRAVI QUERELA, A writ that lies for him to whom any lands or tenements in fee are devised by will, (within any city, town or borough, wherein lands are devisable by custom,) and the heir of the devisor enters, and detains them from him. *Reg. Orig.* 244: *Old Nat. Br.* 87. And if a man devises such lands or tenements unto another in tail, with remainder over in fee, if the tenant in tail enter, and is seised by force of the entail, and afterwards dieth without issue; he in remainder shall have the writ *ex gravi querela* to execute that devise. *New Nat. Br.* 441. Also where tenant in tail dies without issue of his body, the heir of the donor, or he who hath the reversion of the land, shall have this writ in the nature of a *formedon in the reverter.* *Ibid.* If a devisor's heir be ousted by the devisee, by entry off the lands; he may not after have this writ, but is to have his remedy by the ordinary course of the common law. *Co. Lit.* 111.—If the claimant's title accrues within twenty years, the most eligible method of proceeding, is now by Ejectment.

EXHIBIT, Exhibitum.] When a deed, or other writing is in a suit in Chancery exhibited to be proved by witnesses, and the examiner or commissioners appointed certify on the back of it, that the deed or writing was shewed to the witness, to prove it at the time of his examination, and by him sworn to; this is then called an exhibit in law proceedings. The same under a commission of bankrupt.

EXHIBITIO. An allowance for meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar: the benefaction settled for the maintaining of scholars in the Universities, not depending on the foundation, are called *exhibitions.* *Paroch. Antiq.* 304.

EXIGENDARIES. See *Exigent.*

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EXIGENT, or Exigi facias.] A writ that lies when the defendant in an action personal cannot be found, nor any thing of his within the county, whereby to be attached or distrained; and is directed to the sheriff, to proclaim and call him *five county-court days*, one after another, charging him to appear upon pain of outlawry: It is called *exigent*, because it *exigat* the party, i. e. requires his appearance or forth-coming to answer the law; and if he come not at the last day's proclamation, he is said to be *quingies exactus*, (*five times exacted*), and is outlawed. *Crompt. Jurif.* 188.

The statutes requiring proclamations on exigents awarded in civil actions, are 6 *Hen. 8. c.* 4: 31 *Eliz. cap.* 3. Exigents are to be awarded against receivers of the King's money, who detain the same; and against conspirators, rioters, &c. *Stat. 18 Ed. 3. c.* 1. And a writ of proclamation shall be issued to the sheriff to make three proclamations in the county where the defendant dwells, for him to yield himself, &c. *Stat. 31 Eliz. c.* 3.

The writ of exigent also lies in an indictment of felony, where the party indicted cannot be found: And upon suing out an exigent for a criminal matter before conviction, there shall be a writ of proclamation, &c. 3 *Inst.* 31. 4 & 5 *W. & M. c.* 22. If a person indicted of felony absent himself so long that the writ of exigent is awarded, his withdrawing will be deemed a *flight in law* whereby he will be liable to forfeit his goods; and though he renders himself upon the exigent, after such withdrawing, and is found Not guilty, it is said the forfeiture shall stand. 5 *Rep.* 110: 3 *Inst.* 232. After a *capias* directed to the sheriff to take and imprison a person, &c. if he cannot be taken, an exigent is awarded: And after a judgment in a civil action, the exigent is to go forth after the first *capias*; but before judgment there must be a *capias*, *alias* and *pluries.* 4 *Inst.* 177. If the defendant be in prison, or beyond sea, &c. he or his executors may reverse the award of the exigent. See further this Dict. title *Outlawry.*

EXIGENTER, Exigendarius.] An officer of the court of Common Pleas; of which officers there are four in number: They make all exigents and proclamations, in actions where process of outlawry doth lie; and also writs of *superfedeas*, as well as the *prothonotaries*, upon such exigents made out in their offices. But the issuing writs of *superfedeas* is taken from them by an officer in the same court, constituted by letters patent to King James the First.

EXIGI FACIAS, See *Exigent.*

EXILE. A banishment, or driving one away from his country. And this exile is either by restraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon disgust, but may come back at pleasure. 2 *Lev.* 191.

One natural and regular consequence of personal liberty, under the laws of England is that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it unless by sentence of the law. Exile and Transportation are both punishments unknown to the common law; and wherever the latter is inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or by the express direction of some statute. See *Magna Charta, c.* 29; which expressly declares that no freeman shall be banished unless by the

judgment of his peers, or by the laws of the land. And for the provisions of the *Habeas Corpus Act*, s. 31 *Car. 2. c. 2.* (termed by *Blackstone* a second *Magna Charta* and stable bulwark of our liberties,) with respect to sending Englishmen prisoners to Scotland, Ireland, or beyond the seas; see titles *False Imprisonment*; *Habeas Corpus*.

Soldiers and sailors form necessary exceptions to these rules; but it is said the King cannot even constitute a man Deputy, or Lord Lieutenant of Ireland, nor make one a foreign Ambassador, against his will: since these in reality might be no more than honourable exiles. 2 *Inft.* 46.

See further on this subject, this Dict. titles *Abjuration*, *Clergy*, *Felony*, *Transportation*.

EXILIUM, Signifies in law construction, a spoiling: And by the statute of *Marlbridge* it seems to extend to the injury done to tenants, by altering their tenure, ejecting them, &c. and this is the sense that *Fleta* determines, who distinguishes between *vassum*, *destructio* and *exilium*; for he tells us that *vassum* and *destructio* are almost the same, and are properly applied to houses, gardens or woods; but *exilium* is when servants are enfranchised, and wards unlawfully turned out of their tenements. *Fleta*, lib. 1. cap. 11. See *Stat. Marlbr. c. 25*.

EXITUS, Issue or off-spring: and applied to the issues or yearly rents and profits of lands. *Stat. West. 2. c. 45*. See title *Issues*.

EXLEGALITUS, He who is prosecuted as an outlaw. *Leg. Edw. Confess. c. 38*.

EX MERO MOTU, Words used in the King's charters and letters patent, to signify that he grants them of his own will and mere motion, without petition or suggestion of any other: And the intent and effect of these words, is to bar all exceptions that might be taken to the charters or letters patent, by alledging that the King in granting them was abused by false suggestions. *Kitch. 352*. When the words *ex mero motu* are made use of in any charter, they shall be taken most strongly against the King. 1 *Co. Rep.* 451.

EX OFFICIO. The power a person has by virtue of an office, to do certain acts, without being applied to: as a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it *ex officio*, at discretion. *Sc. Dal.* 270.

EX OFFICIO INFORMATIONS. Informations at the suit of the King, filed by the Attorney-General, as by virtue of his office; without applying to the court wherein filed, for leave, or giving the defendant any opportunity of shewing cause why it should not be filed. See title *Information*.

EXONERATIONE SECTÆ, A writ that lay for the King's ward, to be free from all suit to the county-court, hundred court, leet, &c. during wardship. *F. N. B.* 158.

EXONERATIONE SECTÆ AD CURIAM BARON'. A writ of the same nature, sued by the guardian of the King's ward, and directed to the sheriff or stewards of the court, that they do not distrain him, &c. for not doing suit of court. *New Nat. Br.* 352. And if the sheriff distrain tenants in ancient demesne to come to the sheriff's torn or leet, they may have a writ commanding the sheriff to forbear, &c. *Ibid.* 359. Likewise if a man have lands in divers places in the county, and he is constrained to come to the leet where he is not dwelling, when he resides within the precinct of any other leet, &c. then he shall have this writ to the sheriff to discharge him from

coming to any other court-leet than in the hundred where he dwelleth. *Ibid.* 357.

By the common law, persons shall not be distrained to come to court leets, for the lands belonging to their churches; and if they be, they may have the writ *exoneracione sectæ*, &c. *F. N. B.* 394. So shall a woman holding land in dower, if she is distrained to do suit of court for such land; when the heir has lands sufficient in the same county. *Ibid.*

EX PARTE, Of the one part; as a commission in Chancery *ex parte*, is that which is taken out and executed by one side or party only, on the other party's neglecting or refusing to join: When both plaintiff and defendant proceed, it is a joint commission.

EX PARTE TALIS, Is a writ that lies for a bailiff or receiver, who having auditors assigned to take his account, cannot obtain of them reasonable allowance, but is cast into prison. And the course in this case is to sue this writ out of the Chancery, directed to the sheriff to take four mainpernors to bring his body before the barons of the Exchequer at a certain day, and to warn the lord to appear at the same time. *F. N. B.* 129.

EXPECTANT, Having relation to or depending upon; and this word is used in the law with *fee*, as *fee-expectant*.

EXPECTANCY, *Estates in*; are of two sorts; one created by act of the parties, called a remainder; the other by act of law, called a reversion. See titles, *Estate*; *Remainder*; *Reversion*; *Executory Devise*.

EXPEDITATE, *Expeditare*. In the laws of the forest, signifies to cut out the ball of the dog's fore-feet, for the preservation of the King's game: But the ball of the foot of a mastiff is not to be taken out, but the three claws of the fore-foot on the right side are to be cut off by the skin. *Crompt. Jurisd.* 152: *Manwood*, cap. 16. This relates to every man's dog who lives near the forest; and was formerly done once in every three years: and if any person keeps a great dog not expeditated, he forfeits to the King 3s. 4d. 4 *Inft.* 308. See title *Forest*.

EXPEDITATÆ ARBORES, Trees rooted up or cut down to the roots.—*Fleta*, lib. 2. c. 41.

EXPENDITORS, Persons appointed by commissioners of sewers to pay, disburse, or expend the money collected by the tax for the repairs of sewers, &c. when paid into their hands by the collectors, on the reparations, amendments and reformations ordered by the commissioners, for which they are to render accounts when thereunto required. *Laws of Sewers* 87, 88. See title *Sewers*. The steward who supervises the repair of the banks and water-courses in *Rodney Marsh*, is called the *Expenditor*.

EXPENSÆ LITIS, Costs of suit, allowed a plaintiff or defendant, recovering in his action. See title *Costs*.

EXPENSIS MILITUM NON LEVANDIS, &c. An ancient writ to prohibit the sheriff from levying any allowance for knights of the shire, upon those that hold lands in ancient demesne. *Reg. Orig.* 261. For there was also a writ *de expensis militum levandis*, for levying expences for knights of the parliament, &c. *Reg. Orig.* 191. See title *Parliament*.

EXPLEES, The rents or profits of an estate, &c. See *Esplees*.

EXPLORATOR, A scout; also a huntsman, or hafer.

EXPORTATION,

EXPORTATION, The shipping or carrying out the native commodities of England for other countries; mentioned in the statutes relating to the Customs. See this Dist. title *Navigation Act*.

EXPOSITION OF DEEDS, shall be favourable, according to the apparent intent; and be reasonable and equal. *Sc. Ca. lib. 313*. See title *Deed*.

EX POST FACTO, Is a term used in the law, signifying something done after another thing that was committed before. And an act done, or estate granted, may be made good by matter *ex post facto*, that was not so at first, by election, &c. As sometimes a thing well done at first, may afterwards become ill. *5 Rep. 22: 8 Rep. 146*. See title *Statute*.

To **EXTEND**, *Extenders*.] To value the lands or tenements of one bound by a statute, who hath forfeited his bond, at such an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. *F. N. B.* See the next article.

EXTENDI FACIAS, or **EXTENT**, *Extenta*.] A writ of execution, or commission to the sheriff for the valuing of lands or tenements; and sometimes the act of the sheriff or other commissioner upon this writ. *Bro. 313*. See this Dist. title *Execution*. This term is also used for the estimate or valuation of lands, which when made to the utmost value, is said to be the full extent; whence come our extended rents, or rack rents.

If one bound to the King by specialty, or to others by statute, recognizance, &c. hath forfeited it; so that by the yearly rent of the debtor's lands, the creditor is to be paid his debt; upon this the creditor may sue a writ to the sheriff out of the Chancery to deliver him the lands and goods to the value of the debt, which is termed a *liberate*. *F. N. B. 131*. This is after the extent directed to the sheriff to seize and value the lands, &c. of the debtor, to the utmost extent. *4 Rep. 67*.

Lands and goods are to be appraised and extended by the inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt: every extent ought to be by inquisition and verdict, by the *Stat. Westm. 2*. And the sheriff cannot execute the writ without an inquisition. *Cro. Jac. 569*.

The body of the cognisor, and all lands and tenements that were his at the time of the statute, &c. entered into, or afterwards, into whose hands soever they come, are liable to the extent. *2 Inst. 396*. But copyhold lands are chargeable only during the life of the cognisor; and may not be extended by *elegit*, so as to admit a stranger to have interest in the lands held by copy, without the admittance of the lord. Lands in ancient demesne, annuities, rents, &c. are extendible. *1 Rol. Abr. 88*. Two parts of an entire rent may be delivered upon an extent by the sheriff. *Cro. Eliz. 742*. But if the cognisor of a statute have a rent-charge, and before the extent he purchase parcel of the land; the rent is gone, and shall not be in execution: 'Tis otherwise if he purchases after extent of the rent. *Dyer 206*. A reversion of lands, &c. may not be extended; but a plaintiff had judgment for his debt and damages *de reversione cum acciderit*, and a special *elegit* to extend the moiety, &c. *2 Sid. 86: Dyer 373*.

An advowson in gross is not extendible on *elegit*, &c. *Stat. Westm. 2. cap. 18*. An office of fruit cannot be extended, because 'tis not assignable; and nothing shall be

extended, but what may be assigned over. *Dyer 7*. Though an office is extendible in equity. *Chanc. Rep. 49*. Goods and chattels, as leases for years, cattle, &c. in the cognisor's own hands, and not sold for valuable consideration, are subject to the extent. As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered in extent at a price that is reasonable: And on a *seire facias ad computand'* the cognissee is to account according to the extended value; not the real value of the land. *Hard. 136*. If the extenders appraise and value the lands too high, the cognissee at the return of the writ may pray that they may take and retain the lands at the rate appraised; and then 'tis said he may have execution against their lands for the debt; but this may not be on *elegit*. *Cro. Jac. 12*. It has been adjudged, that at the return of the writ the cognissee may refuse the lands, &c. extended, if over valued. *Cro. Car. 148*.

Where lands are extended at under-value, and delivered in execution, the cognissee hath an interest in the land, which cannot be diverted by finding of surplusage. *Cro. Eliz. 266: Cro. Jac. 85*. The cognisor cannot enter upon the cognissee, when satisfaction is received for the debt, but is put to his *seire facias* on an extent: Though on an *elegit*, the defendant may enter because the land is only awarded, till the debt, which is certain, is satisfied; whereas on extent, the land is to be held until the debt, damages and costs, &c. are satisfied: And the cognissee being in by matter of record, shall not be put out but by matter of record, viz. a *seire facias* brought against him. *4 Rep. 67: March's Rep. 207, 208*. See *qu.* Where is the difference? Is not the tenant by *elegit* in by matter of record?

After an extent returned, a *liberate* shall go to the sheriff, reciting the *extendi facias* and return, and commanding that he deliver the goods and lands to the cognissee (under a statute-staple, &c.) *si per extensum et pretium illa mere voluit*. *F. N. B. 131: Lutw. 432*.

The cognissee hath no absolute property in lands by the extent, till the delivery upon the *liberate*; but notwithstanding, by the very extent they are in *custodia legis* for his benefit. *Cro. Car. 106, 148*. No actual seisin can be on an extent, and a cognissee of a statute staple, &c. cannot bring ejectment before the *liberate*; nor can the sheriff upon the *liberate* turn the tenant out of possession, as he may upon a *hab. fac. possessionem*. *1 Vent. 41*. Where there is an extent upon a statute, and a *liberate* thereupon, but not returned, yet it is good; though regularly, when inquisitions are taken, the writ ought to be returned. *4 Rep. 67: 1 Lill. Abr. 592*. The sheriff may be charged to make a return of his writ, if he put the cognissee in possession of part only; and so the cognissee may have possession of the whole. *2 Nelf. Abr. 774*. But it is said if a person suing out an extent, die before the return of a writ, the sheriff may not proceed in his inquisition, &c. afterwards; for there must be a prosecution *de novo*.

After a full and perfect execution had by extent, returned, and of record, there shall never be any re-extent upon an eviction: But by *Stat. 32 Hen. 8. cap. 5*, if lands delivered in execution on a judgment, statute or recognizance shall be evicted, without fraud, or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoveror or

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corusee may have a *scire facias* against the person on whom the execution was first subd, his heirs, executors or assigns, of lands then liable, returnable in the same Court, 40 days after the teste; and if the defendant makes default, or shews not cause, the Chancellor or Justices of the court where the *scire facias* is returned shall make a new writ of the like nature of the former execution for levying the residue of the debt. *Co. Lit.* 290.

If lands be extended upon a mistake, &c. a re-extent may be had; see *Dyer* 299. If part of the lands is evicted, the cognisee is to hold over the residue of the land till the debt is satisfied. 4 *Rep.* 65. When lands are delivered in extent, it is as if the cognisee had taken a lease thereof for years, until the debt is satisfied; and he shall never afterwards take out a new execution: the cognisee having accepted the land upon the *liberate*, the law presumes the debt to be satisfied. 1 *Lutw.* 229. An extent was filed, and though it was discovered that lands were omitted, the court would not grant a re-extent. *Sib.* 356. By *Stat.* 16 & 17 C. 2. c. 5, (made perpetual by *Stat.* 22 & 23 C. 2. c. 2;) when any judgment, statute or recognizance shall be extended (within twenty years after such judgment, &c. had,) the same shall not be avoided or delayed by occasion that any part of the lands extendible are omitted out of such extent: saving to the parties whose lands shall be extended, their remedy for contribution against those whose lands are omitted; except heirs within age.

Where a *scire facias* issues, and is delivered to the sheriff to be executed, the property of the goods is vested by the *delivery*, and an extent afterwards for the King comes too late. *Comb.* 123; See also 2 *Black. Rep.* 1294: *Doug.* 415, 597. See title this Dict. *Execution*.

EXTINGUISHMENT; from *Lat. Extinguo.*] The Extinction or annihilation of a right, estate, &c; by means of its being merged in, or consolidated with, another, generally a greater or more extensive, right or estate. Wherever a right, title, or interest is destroyed, or taken away by the act of God, operation of law, or act of the party, this in many books is called an Extinguishment. *Co. Lit.* 147, b: 1 *Ro. Ab.* 933.

This Extinguishment is of various natures, as applied to various rights; viz. *Estates, Commons, Copyholds, Debts, Liberties, Services, and Ways*: See more at large under those titles; what follows will give some general information on the subject.

EXTINGUISHMENT OF ESTATES. If a man hath a yearly rent out of lands, and afterwards purchases the lands whereout it ariseth, so that he hath as good an estate in the land as in the rent; now both the property and rent are consolidated or united in one possessor; and therefore the rent is said to be extinguished. Also where a person has a lease for years, and afterwards buys the property; this is a consolidation of the property and fruits, and is an extinguishment of the lease: But if a man have an estate in land but for life or years, and hath a higher estate, as a fee simple, in the rent; the rent is not extinguished, but in suspense for a time; for after the term, the rent shall revive. *Terms de Ley*.

Extinguishment of a rent is a destroying of the rent by purchase of the land; for no one can have a rent going out of his own land; though a person must have as high an estate in the land, as in the rent, or the rent will not be extinct. *Co. Litt.* 147. If a person hath a rent-charge

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to him and his heirs issuing out of lands, and he purchaseth any part of the land to him and his heirs, as the rent is intire and issuing out of every part of the land, the whole rent-charge is extinguished: though it is not so where one hath a rent-service, and purchaseth part of the land out of which it issues; *being apportionable* according to the value of the land, so that it shall only extinguish the rent for the part purchased. *Lit.* 221: *Co. Litt.* 148. And if the grantee of a rent-charge purchases parcel of the lands, and the grantor by his deed granteth that he may distrain for the rent in the residue of the land, this amounts to a new grant. *Co. Lit.* 147. See titles *Grant*; *Estate*.

If a man be seised of a rent-charge in fee, and grants it to another and his heirs, and the tenant attorns; the grantor is without remedy for the rent in arrear before his grant; and such arrears become as it were extinct. *Vaugh.* 40: 1 *Lill. Abr.* 594. *A. B.* made a lease for years of lands to another, and afterwards granted a rent-charge to *C. D.* who devised the said rent to the said *A. B.* till 100 *l.* should be levied; then to *B. G.* and died: Adjudged that by the devise to *A. B.* the rent was suspended, and that a personal thing once suspended by the act of the party is extinguished for ever. *Dyer* 140.

If tenant for life, makes a lease for years, rendering rent, and afterwards the reversion descends to the tenant for life; this is not an extinguishment of the term; but it is otherwise if he have the reversion by purchase. 1 *Co. Rep.* 96. A jointenant for life purchases the land in reversion, it will extinguish the estate for life for a moiety, and sever the joint-tenure. 2 *Rep.* 60. Lands are given to two men, and the heirs of their bodies; though they have an estate for life jointly, and several inheritances, yet the estate for life is not extinct: *Contra*, if it be by several conveyances; as where a lease is made to two for their lives, and after the lessor grants the reversion to them and their heirs, &c. here the life estate will be extinguished. *Co. Litt.* 182.

If one after his title begun to be tenant by the curtesy, make a feoffment in fee upon condition, and enter for the condition broken; the estate is extinct, so that if his wife die, he shall not be tenant by the curtesy. 1 *Rep.* 18. Where a man hath an estate for his own life, and for another's life at once; the estate *pour autre vie* will be extinguished in the estate for his own life, which is greater in law than the other. 11 *Rep.* 87: *Dyer* 11. See *Bro.* 409: *Moor* 94: 2 *Nelf. Ab.* 821.

When the freehold cometh to the term, the estate for years is extinct. 2 *Nelf. Ab.* 820. Where the remainder of a term is granted over to another, if the party in possession purchase the fee-simple, though by this means his interest is extinguished; yet that shall not defeat the reversionary interest. 10 *Rep.* 52: 2 *Nelf.* 820.

A fine, &c. of lands, will extinguish a term: and by purchase of an estate in fee-simple, an estate-tail in land is extinct. 9 *Rep.* 139. But if a fee-simple and fee-tail meet together by descent, the estate-tail will not be extinguished. 3 *Rep.* 61. Descent of lands to the same person who has a term, will extinguish the term. *Moor* 286.

When a lessor enters tortiously upon the lessee against his consent, the rent is extinguished. 2 *Lev.* 343. But it has been adjudged, that rent is not extinct by the entry of the lessor, but only suspended; and revives by the lessee's re-entry. *Dyer* 361. An infant has a rent, and purchases

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purchase the land out of which it is issuing; by this the rent will be suspended, but not extinct. *Bro. Extinguish.* A man lessee for years takes a wife, or woman lessee a husband, that hath the reversion after the lease; here the term is not extinguished. 12 Rep. 81. See title *Baron and Feme*.

EXTINGUISHMENT OF COMMON. By purchasing lands wherein a person hath common appendant, the common is extinguished. *Cro. Eliz.* 594. A commoner releases his common in one acre, it is an extinguishment of the whole common. *Show. Rep.* 350. And where a person hath common of vicinage, if he incloses any part of the land, all the common is extinct. 1 *Brownl.* 174.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improve part of the waste leaving sufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguishment. *Dyer* 339; *Hub.* 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 *Shep. Abr.* 152. See title *Common*.

EXTINGUISHMENT OF COPYHOLD. It is laid down as a general rule, that any act of the copyholder's, which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. *Hutt.* 81; *Cro. Eliz.* 21; 1 *Jon.* 41.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. *Moon* 184; 2 Co. 168; *Godb.* 11, 101.

So if a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for these are acts which denote his intention to hold no longer by copy. *Hutt.* 65; 1 *Jon.* 41. S. C.; *Godb.* 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; so if he accepts an estate for life by parol, if with livery, this is an extinguishment; otherwise not; for without livery nothing but an estate at will passes, which cannot merge or extinguish an estate at will. 1 *And.* 199; *Latch.* 213.

If one seised of a manor in right of his wife lets lands by indenture for years, this doth not destroy the custom as to the wife; for after the death of her husband she may demise it again by copy. *Cro. Eliz.* 459.

So if a copyhold is in the hands of a subject, who after becomes King, the copyhold is extinct, for it is below the Majesty of a King to perform such servile services; yet after his decease the next that hath right shall be admitted, and the tenure revived. 2 *Sid.* 88; 4 Co. 24; *Cro. Eliz.* 252. See 2 *Leon.* 208; 4 Co. 26 b; *Cro. Eliz.* 103. And a copyhold estate is extinct whenever it becomes not demisable by copy. *Coke's Copyholder.* 62. See further title *Copyhold*.

EXTINGUISHMENT OF DEBT. If some sole debtor take the debtor to husband; or there be two joint obligors in a bond, and the obligee marries one of them; or in case a person is bound to a feme sole and another, and she takes the obligor to husband; in these cases, the debt will be extinguished. 8 Rep. 136. And if a debtor makes

the debtor his executor, or him and another executor, and they take the executorship upon them; or if the debtor makes his debtor executor, &c. it is an extinguishment of the debt, and it shall never revive. *Plowd.* 184. 1 *Sid.* 304. But where a debtor or debtor executor legally refuseth; or he and others being made executors they all refuse, then the debt is revived again. *P'trad.* 185. See titles *Baron and Feme: Executor*.

It is agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 1 *Rel. Abr.* 470; 471, 604; 6 Co. 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at Common-law. *Yelv.* 38.

So if a bond-creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond. 6 Co. 44 b.

But these cases must be understood where the debtor himself enters into these securities; and therefore if a stranger give bond for a simple contract due by another, this does not extinguish the simple contract debt; but if upon making the contract, a stranger gives bond for it, or, being present, promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon, or pursuant to the contract. 2 *Leon.* 110.

But the accepting a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. *Cro. Jac.* 579; 2 *Brownl.* 29; *Cro. Jac.* 649, 650.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304, 716, 727; 1 *Brownl.* 74; *Lit. Rep.* 58; *Cro. Car.* 86.

Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished. *Stam.* 1042.

By a release of part of a debt due on bond, the whole is gone, and the obligation extinguished. *Bio. Contract.* 80; 1 *And.* 235.—See further titles *Acceptance: Bond*.

EXTINGUISHMENT OF LIBERTIES. Liberties and franchises granted by the King, may sometimes be extinguished, and sometimes not. *Moon* 474. When the King grants any privileges, liberties or franchises, which were in his own hands, as parcel of the flowers of the crown, such as *bona felonum, fugitivorum & utilitatorum*, waifs, strays, deodand, wreck on the sea, &c. if they come to the crown again, they are drowned and extinct in the crown, and the King is seised of them *jure coronæ*: but if liberties of fairs, markets or other franchises, and jurisdictions, be erected and created by the King, they will not be extinguished, nor their appendances levered from the possessions. 9 Rep. 25. A man has liberties by prescription, if he takes letters patent of them, the prescription will be gone and extinct; for things of a higher determine those of a lower nature. 2 H. 7. 5. See title *King*.

EXTINGUISHMENT OF SERVICES. The lord purchases or accepts parcel of the tenancy, out of which an intire service is to be paid or done; by this the whole service will be extinct: but if the service be *pro bono publico*, then no part of it shall be extinguished; and homage and fealty are not subject to extinguishment, by the lord's purchasing part of the land. 6 Rep. 1, 105: Co. Lit. 149. If the lord and another person do purchase the lands, whereout he is to have services, they are extinct: also by severance of the services, a manor may be extinguished. Co. Lit. 147: 1 And. 257. See title *Tenure*.

EXTINGUISHMENT OF WAYS. If a man hath a highway as appendant, and after purchases the land wherein this way is, the way is extinct. *Terms de Ley*. Though a way of necessity to market, or church, or to arable land, &c. is not extinguished by purchase of ground, or unity of possession. 11 H. 7. 25: Co. Litt. 155. See title *Way*.

EXTIRPATIONE. A judicial writ, either before or after judgment, that lies against a person who when a verdict is found against him for land, &c. doth maliciously overthrow any house, or extirpate any trees upon it. Reg. Jud. 13, 56.

EXTOCARE. To grub up lands, and reduce them to arable or meadow. *Mon. Ang. tom. 2. p. 71*.

EXTORTION, *extorsio*, from *extorqueo*, to wrest away.] In a large sense, any oppression under colour of right; It is usually applied to that abuse of publick justice which consists in the unlawful taking by an officer, &c. by colour of his office, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due. Co. Lit. 368: 10 Rep. 102. See title *Bribery*; *Fees*.

The distinction between *bribery* and *extortion* seems to be this. The former offence consists in the offering a present or receiving one if offered; the latter, in demanding a fee or present, by colour of office.

At the Common law, which was affirmed by the statute of *Westm. 1. c. 26*, it was extortion for any minister of the King, whose office did any way concern the administration and execution of justice, or the common good of the subject, to take any reward for doing his office, except what he received from the King: though reasonable fees for the labour and attendance of officers of the courts of justice are not restrained by statute, which are stated and settled by the respective courts; and it has been thought expedient to allow these officers to take certain immediate fees in many cases. 2 Inst. 209: 3 Inst. 149: 1 Hawk. P. C. c. 68.

The taking of money by virtue of an office, implies the act to be lawful; but to take any money by colour of an office, implies an ill action: and the taking being for expedition of business, is judged by colour of the office, and unlawful. 2 Inst. 206: Co. Lit. 368.

Yet according to some it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a premium it would be impossible in many cases to have the laws executed with vigour and success. 2 Inst. 210: 3 Inst. 149: Co. Lit. 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing, which the law

will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. 1 Rel. Abr. 16: 1 Rel. Rep. 313: *Noy 76*: 1 Jon. 65: Cro. Eliz. 654: *Moor 468*: Cro. Jac. 109.

It is extortion to oblige an executor to prove a will in the bishop's court, and to take fees thereon, knowing the same to have been proved in the Prerogative Court. Str. 73.—Or in a sheriff's officer to admit a prisoner to bail, upon an agreement to receive a certain sum when the prisoner should pay to a third person another sum of money. 2 Burr. 924.—To arrest a man in order to obtain a release from him, 8 Mod. 189.—In a gaoler to obtain money from his prisoner by any colourable means. 8 Mod. 226: Stra. 575.—Or in a church-warden *colore officii*. 1 Sid. 307.—In a miller, if he takes more toll than is due by custom. *Ld. Raym.* 159. Or a commissary for absolution. 3 Leon. 268.—Or a ferry-man more for his ferry. 4 Mod. 101.—Or to seize upon the place where a fair is held, and by building stalls to force an exorbitant price for them. *Ld. Raym.* 150.—Or in an under-sheriff to refuse to execute process till his fees are paid. *Salk.* 330.—Or to take a bond for his fee before execution is sued out, *Hut.* 53. Or for a coroner to refuse his view until his fees be paid. 3 Inst. 149.

Extortion, by the Common law is severely punished, on indictment, by fine and imprisonment, and removal of officers from the offices wherein committed. 1 Hawk. P. C. c. 68. By the Stat. 3 Ed. 1, Inferior officers of justice, &c. guilty of extortion, are to render, by c. 26, double, and by c. 30, treble value; and there are divers other statutes for punishing extortions of sheriffs, bailiffs, gaolers, clerks of the assize, and of the peace, attornies and solicitors, &c. See Stat. 23 H. 6. cc. 7; 9. See title *Sheriff*. 33 Hen. 8. c. 24: 29 Eliz. c. 4: 1 Jac. 1. c. 10: 9 & 10 W. 3. c. 41: 10 & 11 W. 3. c. 23: 3 Geo. 1. c. 15: 17 Geo. 3. c. 26. § 6. As to the extortion of officers of the customs, distraining merchants for undue charges, &c. See Stat. 28 H. 6. c. 5; and this Dict. title *Customs*.

In cases of extortion, there must be a positive charge and that the person charged with it took so much *extorsio* or *colore officii*; which words are as essential as *proditio* or *felonia* for treason or felony. 2 Salk. 680.

Officers may be jointly indicted of extortion as they may be jointly guilty of the offence. 1 Salk. 382.

The place, where the extortion was committed, should be set down in the declaration. See Pl. C. c. 200. The sum certain extorted must be particularly set forth, and he cannot say, that the defendant did extort divers sums from divers men generally. *Godb.* 438. pl. 583. *Mich.* 4 Car.

The indictment, (which may be brought at the Sessions Str. 73.) or information, must state the fact particularly. 3 Leon. 268: 25 E. 3. §. 3. c. 9: 11 Mod. 80. It must also specify the time when the offence was committed. 4 Mod. 101, 3. But although it be omitted to be stated for what the thing extorted was taken, it is good after verdict. *Sid.* 91. And in general the Court of K. B. will oblige the party to demur to a defective indictment for extortion. 5 Mod. 13. And whatever may be the sum, if there is proof only of a shilling taken, the defendant is guilty: for the taking is the offence and not the contract. *Ld. Raym.* 149. And he also who assists is equally guilty, for there are no accessaries in extortion. Str. 73.

Against.

EXT

Against attorneys for extortion, action may be brought, and the party grieved shall have treble damages and costs; but information will not lie on the *Stat. 3 Jac. 1 cap. 7, Sid. 434: 2 Nels 822.*

If an officer by terrifying another in his office, take more than his ordinary fees or duties he is guilty of extortion which may be compared to unlawful usury, &c. And *Crompton* says, that wrong done by any man is a trespass, but excessive wrong is properly extortion. *Crompt. Just. 8.* And extortion has been deemed more odious than robbery, because it carries an appearance of truth; and is often accompanied with perjury in officers, &c. by breaking their oaths of office.

EXTRACTA CURIÆ. The issues or profits of holding a court arising from the customary fees, &c. *Paroch. Antiq. 572.*

EXTRACTS of writings or records, being notes thereof. See title *Egrents.*

EYR

EXTRAJUDICIAL. Is when judgment is had in a cause, not depending in that court where given; or wherein the judge has not jurisdiction.

EXTRAPAROCIAL. Out of any parish; any thing privileged and exempt from the duties of a parish.—See this Dict. title *Poor.*

EXTRAVAGANTS. Certain constitutions of the Popes, so called, because *extra corpus canonicum Gratiani, five extra decretorum libros vagantur. Du Cange.*

EXTUMÆ. Reliques in churches and tombs.—*Cartular. Abbat. Glaston. MS.*

EXUPERARE. To overcome; sometimes it signifies to apprehend or take, as, *exuperare vivum vel mortuum Leg. Edm. c. 2.*

EY, Insula, an island.] where the names of places end in *ey*, it denotes them an island. As *Ramsay*, is the island of *Rams*; *Sheppy*, the island of *Sheep*; *Wetsey*, the island of *Harts*, &c.

EYERY of hawks. See title *Aerie.*

EYRE. Vide *Eire*, and *Justices in Eyre.*

F.

FAB

F Is a letter wherewith *felons, &c.* are branded and marked with an hot iron, on their being admitted to the benefit of clergy. See this Dict. title *Clergy*.

FABRICK LANDS, Are lands given towards the rebuilding or repairing of cathedral and other churches; for in ancient times, almost every person gave by his will more or less, to the *fabrick* of the cathedral or parish church where he lived; and lands thus given were called *fabrick lands*, being *ad fabricam episcopalem*: these lands are mentioned in the *Stat. 12 Car. 2. c. 8.*

FACTA ARMORUM, Feats of arms, jousts, tournaments, &c. *Hist. Joh. Bromton, in R. 1. p. 1261.*

FACIO, In fact; as where any thing is actually done, &c. See *De facto*.

FACTOR, The agent of a merchant abroad, residing in this country; or *é contra*.—A factor is authorized by a letter of Attorney, with a salary or allowance for his care. He must pursue his commission strictly; and the same person may be factor for many different merchants. *Mak. 21.*

If the principal give the *factor* a general commission to act for the best, he may do for him as he thinks fit; but otherwise he may not. Though in commissions at this time, it is common to give the *factor* power in express words, to dispose of the merchandize, and deal therein as if it were his own; by which the *factor's* actions will be executed, though they occasion loss to his principal. *Lex Mercat. lib. 81: Stat. 1178.*

Goods remitted to a *factor* ought to be carefully preserved; and he is accountable for all lawful goods which shall come to his hands, yet if the factor buy goods for his principal, and they receive damage after in his possession, through negligence of his, the principal shall bear the loss, and if a *factor* be robbed, he shall be discharged in account brought against him by his principal. *4 R. 1. 83. See title Bailment.*

If the *factor* has orders from his principal not to sell any goods but in such a manner, and breaks those orders, he is liable to the loss or damage that shall be received thereby: and where any goods are brought or exchanged without orders, it is at the merchant's choice whether he will accept of them, or turn them over his *factor's* hands. When a *factor* has bought, or sold goods pursuant to orders, he is immediately to give a bill of it to his principal; but the bills and orders must be certified before the time of the buying or selling, whereby his reputation might possibly suffer; and when a factor has made a considerable profit for his principal, he must take due care in the disposition of the same; for without commission or particular orders, he is answerable. A factor shall suffer for not observing orders; and not for acting for another man's account in merchandise, especially receding from the orders of his principal, though there may be a proba-

FACTOR.

bility of advantage by it: if he make any composition with creditors without orders, he shall answer it to his principal. *Lex Mercatoria.*

Factors ought to observe the contents of all letters from their principals, or written to them by their order. A merchant is answerable in action upon the case for the deceits of his factor, in selling goods abroad: and as somebody must be a loser by such deceit, it is more reasonable that he who employs, and puts confidence in the deceiver, should lose, than a stranger. *1 Salk. 289.*

Factors are liable to the statutes concerning bankrupts. *Stat. 5 Geo. 2. c. 30, § 39.* See title *Bankrupt*. Factor not to buy cattle on his own account. *Stat. 31 Geo. 2. c. 40. § 11.* See title *Cattle*.

A bare commission to a *factor* to sell and dispose of merchandize, is not sufficient power for the factor to entrust any person, or to give a further day of payment than the day of the sale of the goods; for in this case, on the delivery of the one he ought to receive the other: and by the general power of doing as if it were his own, he may not trust an unreasonable time, *viz.* beyond one or three months, &c. the usual time allowed for the commodities disposed of; if he doth, he shall be answerable to his principal out of his own estate. *1 Bull. 102:* But in *2 C. C. 57,* it is said that by his general commission a factor has authority to sell upon credit.

If a *factor* buys goods on account of his principal, where he is used so to do, the contract of the *factor* shall oblige the principal to a performance of the bargain; and the principal is the proper person to be prosecuted, on non performance: but if the *factor* enters into a charter-party of freightment with a master of a ship, the contract obliges him only; unless he lades aboard generally his principal's goods, then both the principal and lading become liable for the freight and not the *factor*. *Golish. 137.*

It is a general rule that where a factor, who is authorized to sell goods in his own name, makes the buyer debtor to himself, though he is not answerable to his principal for the debt, if the money be not paid; yet he has a right to receive it, if it be paid, and his receipt is a discharge to the buyer. The factor may compel such payment by action, and the buyer cannot defend himself by saying that the principal was indebted to him more than the amount. *Co. op. 255, 6.* Where goods are sold by a factor at his own risk, for which he has an additional allowance, the vendee is not answerable to the owner. *Strat. 1182. See De Credit.*

Though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Strat. 1178.*

If a

FACTOR.

If a factor sells goods as his own, by indorsement of the bill of lading, though no delivery is made, the goods being at sea, the vendee shall keep possession unless fraud appears between him and the factor. 4 Burr. 2046: 1 Blac Rep. 629. See *post*, the last paragraph of this article.

It hath been held in Equity, that if one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence, that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of superior creditors, &c. for as money has no ear mark, Equity cannot follow that in behalf of him who employed the factor. 1 Salk. 160.

If a person doth employ a factor to sell goods, who sells them on credit, and before the money is paid dies indebted, more than his assets will pay; this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission: for a factor is in nature only of a trustee for his principal. 2 Vern. 638.

Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold, and if the factor become bankrupt, must be returned to the principal, subject to such lien as the factor may have thereon. 2 Blac Rep. 1154.

A factor has a *Lien* on goods consigned to him, not only for incident charges, but as an *item* of mutual account, for the general balance due to him, so long as he retains the possession, if he parts with the possession, he parts with his *lien*. See 1 Burr. 489: 1 Blac Rep. 104. If he be surety in a bond for his principal, he has a *lien* on the price of the goods sold by him for his principal to the amount of the sum he is bound for. Cowp. 251. A dyer, merely as a manufacturer has not a general *lien*; but a packer being in the nature of a factor has. 4 Burr. 2214.

A factor has no *lien* on goods for a general balance, unless they come into his *actual* possession: and if in consideration of goods being consigned to him he accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession; the consignor may stop them *in transitu*. 1 Term Rep. 119. If a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor; the factor's assignees have no property in such cargo, and cannot recover the produce of it, against the assignees of the principal, if the latter have sold it, and received the purchase money. 1 Term Rep. 783. See 4 Bro. P. C. (8vo. ed.) 47.

The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignor; but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person. 4 Bro. P. C. (8vo. ed.) 57. See 2 Term Rep. 63: 1 H. Blac. R. p. 357: And further as to stopping goods *in transitu* 2 Term Rep. 674: 3 Term Rep. 465.—See further this Dist. title *Merchant*.

VOL. I.

FAI

FACTORAGE, Is the wages or allowance paid and made to a factor by the merchant. The gain of *factorage* is certain, however the success proves to the merchant; but the commissions and allowances vary according to the customs and distance of the country, in the several places where factors are resident: *Lex Mercat.* See title *Factor*.

FACTUM, a man's own act and deed; fact or feat; particularly used in the civil law for any thing stated and made certain. See *Fait*.

FACULTY, *facultas*.] As restrained from the original and active sense, to a particular understanding in law, is used for a privilege granted to a man by favour and indulgence, to do that which by law he ought not to do. And for the granting of these, there is an especial court under the Archbishop of Canterbury, called the *Court of the Faculties*; and the chief officer thereof the *Master of the Faculties*; who has power by the Stat. 25 H. 8. cap. 21, to grant dispensations; as to marry persons without the bans first asked, (and every diocesan may make the like grants) to ordain a deacon under age, for a son to succeed the father in his benefice, one to have two, or more benefices incompatible, &c. And in this court are registered the certificates of bishops and noblemen granted to their chaplains, to qualify them for pluralities and non-residence. 4 Inst. 337. See title *Chaplain*.

FASTING MEN, In *Men. Angl. tom. 1. pag. 100*, are rendered to signify vassals: but *Cowell* thinks they rather mean pledges or bondsmen; which, by the custom of the Saxons, were *fast* bound to answer for one another's peaceable behaviour. See *Fasting-men*.

FAG, A knot or excrescency in cloth; and in this sense it is used in the statute 4 Ed. 4. cap. 1. The *fag-end*, signifies that end of a piece of cloth or linen, where the weaver ends his piece, and works up the worst part of his materials.

FAGGOT, A badge wore in the times of *papery*, by persons who had recanted and abjured what was then adjudged to be heresy: those were condemned not only to the penance of carrying a *faggot*, as an emblem of what they had merited, to such an appointed place of solemnity; but, for a more durable mark of infamy, they were to have the sign of a *faggot* embroidered on the sleeve of their upper garment: and if this badge or *faggot* was at any time left off, it was often alledged as the sign of *apostasy*.

FAIDA, Malice or deadly feud. *Leg. H. 1. c. 82.*

FAILURE or **RECORD**, Is when an action is brought against a man, who alledges in his plea matter of record in bar of the action, and avers to prove it by the record; but the plaintiff saith, *Nul tiel record*, viz. denies there is any such record: upon which, the defendant hath day given him by the court to bring it in; and if he fails to do it, then he is said to *fail of his record*, and the plaintiff shall have judgment to recover. *Terms de Ley*. In debt upon an escape, the plaintiff declared, that he had obtained a judgment in an inferior court, upon which the defendant was taken, and the sheriff suffered him to escape; the defendant pleaded *Nul tiel record*, and being at issue, the record was certified at the day; by which it appeared that there were several variances in the continuances and process; but because the plaintiff's declaration, it was held that those variances made no failure of record. *Hob. 179.*

3 X

In

In *Formedon* for the manor of *Isfield*, the defendant pleaded in bar a common recovery of the said manor against the donee in tail, who replied *Nul tiel record*, and the defendant having brought in the record, it appeared that the recovery was of the manor of *Isfield*; and adjudged, that this being in a common recovery, shall be no failure of record for this small variance, but shall be amended, being the misprision of the clerk. 5 *Rep.* 46. And where a fine with proclamations was levied, and upon an issue of *Nul tiel record*, on which it was brought in at the day, tho' the year of the King was left out in the proclamations made in one term, as it was expressed in the proclamations of the other two terms, they were held to be right, and the omission no failure of record. *Dyer* 234. If a judgment, &c. be reversed for error, *Nul tiel record* may be pleaded. 8 *Rep.* 142. And where the tenor only of a record, &c. is brought in, it is a failure of record. *Dyer* 187.

FAINT-ACTION. *Fr. faine.*] A feigned action; such that although the words of the writ are true, yet for certain causes the plaintiff hath no title to recover thereby; but a false action is properly where the words of the writ are false. *Co. Litt.* 361.

FAINT-PLEADER. A fraudulent, false or collusive manner of pleading to the deceit of a third person; against which, among other things, was made the *Stat.* 3 *Ed.* 1. *cap.* 19.

FAIR-PLEADER. See title *Beau-pleaders*.

FAIR. *Fr. foire, Lat. feria, nundine.*] A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious providing of such things as the subject needeth; and the utterance of what commodities we abound in above our own uses and occasions: and both our *English* and the *French* word seems to come from *feriae* [festivals]; because it is incident to a fair that persons shall be privileged from being molested or arresed in it, for any other debt, or contract than what was contracted in the same, or at least was promised to be paid there. See *Stat.* 17 *Ed.* 4. c. 2, made perpetual by 1 *R.* 3. c. 6: and this Dict. title *Courts of Pie-powders*. See also *Stats.* 2 *E.* 3. c. 15; 5 *E.* 3. c. 5; 27 *H.* 6. c. 5; 1 & 2 *P. & M.* c. 7; 18 *Eliz.* c. 21.

I. *The Right to a Fair, and the Manner of holding it.*

II. *The Duty, Power, and Interest of the Owners of Fairs.—How far a Sale in a Fair changes the Property of a Thing therein sold, See this Dict. title Market.*

I. The first institution of fairs and markets seems plainly to have been for the better regulation of trade and commerce, and that merchants and traders might be furnished with such commodities as they wanted, at a particular mart, without that trouble and loss of time, which must necessarily attend travelling about from place to place; and therefore as this is a matter of universal concern to the commonwealth: so it hath always been held, that no person can claim a fair or market, unless it be by grant from the King, or by prescription, which supposes such a grant. 2 *Inst.* 220: 3 *Mol.* 123.

And therefore, if any person sets up any such fair or market, without the King's authority, a *quo warranto* lies against him; and the persons who frequent such fair, &c. may be punished by fine to the King. 3 *Mol.* 127.

Also it seems, that if the King grants a patent for holding a fair or market, without a writ of *ad quod damnum* executed and returned, that the same may be repealed by *fine facias*; for though such fairs and markets are a benefit to the commonwealth; yet too great a number of them may become nuisances to the public, as well as a detriment to those who have more ancient grants. 3 *Lev.* 222.

Fairs are generally kept once or twice in the year; and it has been observed, that fairs were first occasioned by the resort of people to the feast of Dedication, and therefore in most places the fairs, by old custom, are on the same day with the wake or festival of that Saint to whom the church was dedicated; and for the same reason they were kept in the church-yard, till restrained by *Stat.* 13 *E.* 1. st. 2. c. 6: 2 *Inst.* 221. *Blount.* 'The Court of Pie-powder is incident to every fair, &c. By *Stat.* 2 *Ed.* 3. c. 15, fairs are not to be kept longer than they ought by the lords thereof, on pain of their being seized into the King's hands, until such lords have paid a fine for the offence; and proclamation is to be made how long fairs are to continue.—By *Stat.* 5 *E.* 3. c. 5, no merchant shall sell any goods or merchandise at a fair after the time of the fair is ended, under the penalty of forfeiting double the value of the goods sold, one fourth part thereof to the prosecutor, and the rest to the King. Any citizen of London may carry his goods or merchandise to any fair or market in England at his pleasure. See *Stat.* 3 *Hen.* 7. c. 9; and this Dict. title *London*.

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c. that for this detriment and injury done to him, an action on the case lies; for it is implied in the King's grant, that it should be no prejudice to another. 2 *Rol. Abr.* 140.

Also, although the new market be held on a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner, than if held on the same day with his. 2 *Saund.* 172: 1 *Mol.* 69. See title *Market*.

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some prejudice in the profits arising from his fair, &c. an action on the case lies. 1 *Rol. Abr.* 105: 2 *Vent.* 26, 28. So if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies for this. 1 *Rol. Abr.* 105.

The King is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market, 3 *Mol.* 123. But if no place be limited for keeping a fair by the King's grant, the grantees may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what part of such place they will. 3 *Mol.* 108.

At what time fairs are to be held, see *Stat.* 27 *H.* 6. c. 5. & 1 *Car.* 1. c. 1: 29 *Car.* 2. c. 7; and this Dict. title *Holidays*.

II. *Owners*

II. Owners and governors of fairs are to take care that every thing be sold according to just weight and measure; for that and other purposes they may appoint a clerk of the fair or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just fees. See 4 *Inst.* 271: *Moo* 523: 1 *Salk.* 327.

Fairs and markets are such franchises as may be forfeited; as if the owners of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuser, and by extorting fees and duties where none are due, or more than are justly due. 2 *Inst.* 220. *Finch* 164: 3 *Mod* 108.

As to their interest, it arises chiefly from tolls. Toll payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, pickage, or the like. 2 *Inst.* 222: 2 *Jon* 207.

But this is not incident to a fair or market without special grant; for where it is not granted, such a fair or market is accounted a free fair or market. 2 *Inst.* 220: *Cro. Eliz.* 559.

Toll is a matter of private benefit to the owner of the fair or market, and not incident to them; therefore if the King grants a fair or market, and grants no toll, the patentee can have none, and such fair or market is counted free. *Cro. Eliz.* 558: 2 *Inst.* 220. *S. P.*: 2 *Lutw.* 1336 *S. P.* resolved.

Also if the King, at the time he grants a fair or market, grants a toll, and the same is outrageous and excessive, the grant of the toll is void, and the same becomes free. 2 *Inst.* 220: 2 *Lutw.* 1336. But the King, after he grants a fair or market, may grant that the patentee may have a reasonable toll; but this must be in consideration of some benefit accruing from it to those who trade and merchandise in such fair or market. 2 *Inst.* 221.

No toll shall be paid for any thing brought to the fair or market, before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my Lord Coke says, that a fair or market by prescription is better than one by grant. 2 *Inst.* 221.

And by *stat. Westm.* 1. cap. 31. "Touching them that take outrageous toll, contrary to the common custom of the realm in market towns, it is provided, that if any do so in the King's town, which is let in fee-farm, the King shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the King shall do in like manner; and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he carried away his toll, and shall have forty days' imprisonment."

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, an action on the case lies against him. 1 *Roll. Ab.* 103, 104, 106.

Some persons however are exempt from payment of toll, and if the King or any of his progenitors have granted to any to be discharged of toll, either generally, or specially, this grant is good to discharge him of all tolls to the King's own fairs or markets, and of the tolls, which, together with any fair or market have been granted after

such grant of discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription. 2 *Inst.* 221.

Also the King himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute *Westm.* 1. cap. 31: 2 *Inst.* 221. So tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, or for life, years, or at will. 2 *Inst.* 221: 4 *Inst.* 269: 1 *Roll. Ab.* 321.

But this privilege does not extend to him who is a merchant, and is living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow and are the produce of the land. *F. N. B.* 228: 2 *Leam.* 191: *Cro. Eliz.* 227: 2 *Inst.* 221: 1 *Roll. Ab.* 321, 2.

Owners of fairs and markets are to appoint toll-takers or book-keepers, on pain of 40 s. and they shall enter and give account of horses sold, &c. *Stat. 1 Ed 2 P. M.* c. 7: 31 *Eliz.* c. 12. See farther titles *Toll: Horses: Market.*

FAIT, *factum.*] A deed or writing, lawfully executed to bind the parties thereto. See title *Deed.*

FAIT ENROLLE, *Fi.*] A deed of bargain and sale, &c. and forging the inrollment of it is a great misdemeanor, but not forgery within the *Stat. 5 Eliz.* 1 *Keb.* 568.

FAITOURS, *Fi.*] In the statute 7 R. 2. cap. 5, is used for evil doers; and may be interpreted idle livers, from *faitourlyse*, which signifies a kind of sleepy disease, proceeding from too much sluggishness: and in the same statute it seems to be synonymous with vagabonds. *Terms de Ley.* See titles *Poor: Vagrants.*

FALANG, A jacket or close coat, *Blount.*

FALCATURA, One day's mowing of grass; a customary service to the lord by his inferior tenants: *falcata* was the grass fresh mowed, and laid in *swathes*; and *falcator* the servile tenant performing the labour. *Kennet's Gloss.*

FALCO, A falcon. *Falconarius*, a falconer; *falco gentilis*, a jer-falcon; *Falco Sparuius*, a Sparrow-Hawk — *Coel.*

FALDA, A sheepfold. — *Rot. Chart.* 6 *Hon.* 3.

FALDAGE, *faldagium.*] A privilege which several lords antiently reserved to themselves, of setting up folds for sheep in any fields within their manors, for the better manurance of the same; and this was usually done not only with their own but their tenants' sheep, which they call *scilicet faldæ*. This *faldage* is termed in some places a *fold course*; and in old charters *faldfoea*, i. e. *libertas faldæ*, or *faldagii*.

FALDÆ CURSUS, A sheep walk or feed for sheep. 2 *Cent.* 139.

FALDFEY, FALD FEE, A fee or rent paid by some customary tenants for liberty to fold their sheep upon their own land.

FALDISTOR, *Sax.*] The highest seat of a bishop, inclosed round with a letice. *Coel.*

FALDWORTH, A person of age, that he may be reckoned of some decennary. *Du Cange.*

FALERÆ, *Lat. phaleræ.*] The tackle and furniture of a cart or wain. *Mon. Angl. tom.* 2. 256.

FALESIA, A great rock, bank or hill by the sea side. *Dumgill.*

FALSE—

An officer hath a warrant upon a *capias ad satisfaciend'* against an earl, or countess, &c. who are privileged in their persons, and he arreſts them: it is ſaid action of *faſſe*

—IMPRISONMENT

false imprisonment will not lie against the officer, because he is not to examine the judicial act of the court, but to obey. 6 Rep. 56: 10 Rep. 75.

If an arrest is made by one who is no legal officer, it is *false imprisonment*, for which action lies. *Co. Lit.* 69. An action of *false imprisonment* lies against a bailiff for arresting a person without warrant, though he afterwards receives a warrant: and so it is if he arrests one after the return of the writ is past; for it is then without writ. 2 Inst. 53. If a sheriff, or any of his bailiffs, arrests a man out of his county, &c. or after the sheriff is discharged of his office; or a person arrests one on a justice's warrant after his commission is determined, &c. it will be *false imprisonment*. Dyer 41. And if the sheriff, after he hath arrested a man lawfully, when a legal discharge comes to him, as a *superseas*, or the like, do not then discharge the party, he may be sued in this action. 2 R. 1. 12: Fitzb. 253.

In case the plaintiff in a suit brings an unlawful warrant to a sheriff, and shews him the defendant, requiring him to make the arrest; or if he bring a good warrant and direct the sheriff to a wrong man, &c. for this the action of *false imprisonment* will lie against both. Bro. Tresp. 99, 307: *Faux. Imp.* 19: 1 Brownl. 211. If a warrant be granted to arrest, or apprehend a person, where there are several of the name, and the bailiff or other officer arrests a wrong person, he is liable to action of *false imprisonment*; and he is to take notice of the right party in his peril. Dyer 244: *Moor* 457.

A man arrested on a Sunday may bring his action of *false imprisonment*; but one has been refused to be released in such a case. 5 Mod. 95. See titles *Arrest: Sunday*. If a bailiff demand more than his just fees, when offered him, and keep a person in custody thereupon, it is *false imprisonment* and punishable: and if a sheriff, or gaoler keeps a prisoner in gaol, after his acquittal, for any thing except for fees, it is unlawful imprisonment. 2 Inst. 482: *Wood*. 16. If a man falsely imprisons A. B. and the gaoler detains him till he pays so much money, he shall have action of *false imprisonment*, and taking so much money from him against such person. *Mod. Caf.* 179.

Unlawful or *false imprisonment* is sometimes called *duress* or *imprisonment*, where one is wrongfully imprisoned till he seals a bond, &c. 2 Inst. 482. See title *Duress*.

An imprisonment will be unlawful, and give this action, although the cause be good, when he that makes it doth the same without any colour of authority; or if he has a colour, yet if he hath no good authority, from the court, &c. or where a court or officer hath power, but do not well make it out; or when the authority is well made forth, and not rightly pursued and executed. 4 Rep. 64: 8 Rep. 67: Dyer 242. And all persons male or female, that have a hand in a wrong imprisonment, shall be sued in action of *false imprisonment*; and the party grieved may sue any one of them for it. *Co. Lit.* 57: Bro. Tresp. 113, 256.

A man under arrest, or in the stocks, &c. is said to be in prison: And in a common arrest, where lawful, the officer may make any place his prison, because the writ commands that *Habeas Corpus ejus coram*, &c. *apud Westm.* which is a general authority. 1 Salk. 401.

It is not in every case where a man is wrongfully imprisoned, that an action *vi et armis*, for false imprison-

—JUDGMENT.

ment will lie, but in some cases, it must be an action *on the case*, as where a warrant issues against a man, without legal cause, and he is, under colour of that authority, wrongfully imprisoned, as there was colour of authority, the action must be *case*, and not trespass *vi et armis*, and so in similar cases. *J. M.*—See title *Action*.

In criminal cases, where a man is falsely imprisoned, he may bring a *Habeas Corpus*, and upon return of the writ, setting forth the cause of the commitment, if it appears to be against law, he shall be discharged; or he may be bailed, if it be doubtful, &c. 4 Inst. 182. See titles *Habeas Corpus: Imprisonment*.

FALSE JUDGMENT, *Falsum Judicium*.] A writ that lieth where *false judgment* is given in the county-court, court baron, or other courts not of record. *F. N. B.* 17. 18. See title *Error*.

A judgment may be falsified, reversed or avoided without a writ of error for matters foreign to, or *dehors*, the record; that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself; and therefore if the whole record be not certified, or not timely certified by the inferior court, the party injured thereby, in both civil and criminal cases, may allege a *Diminution* of the record, and cause it to be rectified. See this Dict. title *Diminution*. Thus if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter without writ of error. As where a commission issues to A. and B. and twelve others or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B. in this case all proceedings, trials, convictions and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error. 2 Hawk. P. C. c. 50 § 2. It being a high misdemeanor in the judges so proceeding, and little, if any thing, short of murder in them all, in case the person so attainted be executed and suffer death. 4 Comm. 390.

So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now upon any trial the purchaser is at liberty, without bringing any writ of error, to falsify, not only the time of the felony or treason supposed, but the very point of the treason or felony itself; and is not concluded by the confession or outlawry of the vendor: though the vendor himself is concluded, and not suffered then to deny the fact which he had by confession or slight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the fact of the crime committed; though he is at liberty to prove a mistake in time: or that the offence was committed after the alienation and not before. 3 Inst. 231: 1 Hal. P. C. 361.

This writ may be brought on a judgment in a plea, real or personal: and for errors in the proceedings of inferior courts, or where they proceed without having jurisdiction, writ of *false judgment* lieth: though the plaintiff assign errors in a writ of *false judgment*, he shall not lay,

In hoc erratum est, &c. but unde queritur distinetur sibi falsum iudicium factum fuisse iudicium in hoc, &c. *Moor* 73: 2 *Nelf. Abr.* 819. If a writ of *false judgment* abate for any fault in the writ, the plaintiff shall not have *Scienc factas ad audiend'* *et oris*, upon the record certified, because it comes without an original: but if the plaintiff dies, and *false judgment* is given in the inferior court, his heir shall have a *Sci. fac. ad audiend'* *error*, against him who recovered upon that record which is removed into *C. B.*; and where the plaintiff in a writ of *false judgment* is nonsuit, it was formerly a question, whether the other party shall sue execution upon this record so removed against the plaintiff, without suing out a *Scienc factas*; but it has been adjudged, that he may do it, *Hil. 23 Hen. 6: New Nat. Br.* 39.

When a record is removed into *C. P.* by writ of *false judgment*, if the party alleges variance between the record removed, and that on which judgment was given, the trial shall be by those who were present in court when the record was made up. 2 *Lutw.* 957: *Stat.* 1 *Ed.* 3. c. 4. A man shall not have a writ of *false judgment* but in a court where there are suitors; for if there be no suitors, there the record cannot be certified by them. *New Nat. Br.* 40. Where *false judgment* is given on a writ of *justitias*, directed to the sheriff, the party grieved shall have a writ of *false judgment*; although the judgment be for debt, or trespass above the sum of 40s. *Ibid.*

Where a record of a judgment in the county-court was vicious, and the judgment reversed in *C. B.* the suitors were ordered to be amerced a mark, and the county clerk fined 5*l.* And if a plaintiff in an inferior court declare for more than 40s. Judgment shall be reversed by writ of *false judgment*; but where damages are laid under that sum, costs may make it amount to more. 1 *Moul.* 249: 2 *Mod.* 102, 206.

Upon *false judgment* before bailiffs, or others who hold plea by prescription, in every sum in debt by bill before them a party shall not have a writ of *false judgment*; but a writ of error thereupon. *M.* 4 *E.* 4. For defaults of tenants for life, in writs of right, &c. writ of *false judgment* lies by him in reversion: and this writ may be brought against a stranger to the judgment, if he be tenant of the land. A judgment shall be intended good till reversed by writ of *false judgment*, &c. See titles *Accedas ad Curiam*; *Attaint*.

FALSE LATIN. Before the statute directing law proceedings to be in *English*, if a *Latin* word was significant though not good *Latin*, yet an indictment, declaration, or fine, should not be made void by it: but if the word was not *Latin*, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 *Rep.* 121: 2 *Nelf.* 830.

FALSE NEWS. Spreading false news, to make discord between the King and nobility, or concerning any great man of the realm, is punished by Common-law, with fine and imprisonment, which is confirmed by statutes *Westm.* 1, 3 *Ed.* 1. c. 34: 2 *Rub.* 2. *Stat.* 1. c. 5: 12 *Ric.* 2. c. 11. See 2 *Inst.* 226: 3 *Inst.* 198.

FALSE OATH. See title *Perjury*.

FALSE PLEA. *In principe quod reddat* against two, if the one comes and takes the entire tenancy upon him, and which they are at issue, and it is found against the tenant, by this he shall lose his moiety; for it is found

against the tenant for his part, because it is tried *per pais* upon issue; contra, of plea to the writ by demurrer. Note the difference. *Br. Preamptory*, pl. 73. cites 8 *Ed.* 3. 17.

Plaintiff in a suit in Chancery against an executor, shall have the same advantage thereof, as if the same plea were found false by verdict at law; and shall have all the same consequences here, as follow on a false plea at law to all intents. 2 *Chanc. Caf.* 201 — See titles *Plea*, and *Pleading*.

FALSE PROPHECY. See title *Prophecy*.

FALSE RETURN. On a false return by a mayor, &c. to a *mandamus*, or by a sheriff, &c. to a writ, a special action on the case will lie. See title *Action*.

FALSE TOKENS. Where persons get money or goods into their hands, by forged letters, or other counterfeit means, they are punishable by imprisonment, &c. See title *Chats.*

FALSE VERDICT. A writ of *attaint* lieth, to inquire whether a jury of twelve men have given a false verdict; that so the judgment following thereupon may be reversed. It is allowed in almost every action except in a writ of right. See titles *Attaint*; *Jury*; *Trial*.

TO FALSIFY. To prove a thing to be false. *Perk.* 383.

FALSIFYING A RECORD. A person that purchases land of another, who is afterwards outlawed of felony, &c. may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchaser cannot falsify as to the offence; though he may for the time, where the party is found guilty generally in the indictment, &c. because the time is not material upon evidence. And any judgment given by persons who had no good commission to proceed against the person condemned, may be falsified by shewing the special matter, without writ of error. Also where a man is *attainted* of treason or felony, if he be afterwards pardoned by parliament, the attainder may be falsified by him or his heir, without plea. 2 *Hawk.* P. C.

FALSIFYING A RECOVERY. Issue in tail may falsify a recovery suffered by tenants for life, &c. And it has been held, that a person may falsify a recovery had by the issue in tail, where an estate-tail is before bound by a fine. 2 *Nelf. Abr.* 831. But where there is tenant for life, remainder in tail, and reversion in fee, tenant for life suffers a common recovery, in which he in remainder is vouched, and the uses declared to him, who had the remainder in tail; adjudged, that by the recovery all remainders and reversions are barred, and that they could not falsify this recovery. 10 *Rep.* 43.

He in reversion suffered a common recovery, and declared the uses; his heir shall not falsify it by pleading that his father had nothing at the time of the recovery, because he is stopped to say he is not tenant to the purchase. *Godb.* 189. An infant brought an assise in *B. R.* pending which action the tenant brought an assise against the infant in *C. B.* for the same land, and had judgment by default, which he pleaded in bar to the assise brought by the infant; who set forth all this matter in his replication, and that the demandant, at the time of the second writ brought, was tenant of the land, and prayed that he might falsify this recovery; and it was held that he might because he could not have writ of error, or attainder. *Godb.* 271: *Cro. Eliz.* 284. It has been determined, that a recovery

covery is not so firm, but it may be falsified in point of recovery of the thing itself, between the same parties. *Ibid.*—See titles *Fine and Recovery*.

FALSIFYING A VERDICT. Where in any real action, there is a verdict against tenant in tail, the issue can never falsify such verdict in the point directly tried; but only in a special manner, as by saying that some evidence was omitted, &c. 2 *Ld. Raym.* 1050. See titles *Trial: New Trial: Jury: Verdict*.

FALSONARIUS. A forger.—*Hoveden* 424.

FALSO RETURNO BREVIUM. A writ that lieth against the sheriff who hath execution of process, for false returning of writs. *Reg. Jud.* 43.

FAMILIA. Signifies all the servants belonging to a particular master; but in another sense it is taken for a portion of land, sufficient to maintain one family: It is sometimes mentioned by our writers to be a Hide of land, which is also called a *Mansie*; and sometimes *Carucata* or a plough-land. *Blount*.

FANATICKS. Persons supposing themselves inspired. A general name for *Quakers*, *Anabaptists*, and other sectaries and dissenters from the church of England. See *Stat. 13 Car. 2. c. 6*.

FANATIO, *Minis Fanationis*] The fawning season or fence-months in forests. *Kennet's Gloss.* See title *Fence-Month*.

FARANDMAN. *Sax*] A traveller or merchant stranger, to whom by the laws of Scotland justice ought to be done with all expedition, that his business or journey be not hindered. *Sk ne c. 104*.

FARDEL OF LAND. *l'ardella Terra*] Is generally accounted the fourth part of a *Tard Land*; but according to *Nel*, (in his *Compliat Lawyer*, p. 57,) It is an eighth part only, for there he says that two *fardels* of land make a *mok*, and four *moks* a *yard land*.

FARDING DEAL. *Quadrantata terra*.] is the fourth part of an acre, and besides *quadrantata terra*, we read of *obolata*, *denariata*, *solidata*, and *librata terra*, which probably arise in proportion of quantity from the *farding-deal*, as an half penny, penny, shilling or pound in money, rise in value; and then must *obolata* be half an acre, *denariata* an acre, *solidata* twelve acres, and *librata terra* twelve score acres of land: but some hold *obolata* to be but half a perch, and *denariata* a perch; and there is mentioned *viginti libratas terra vel redditus*, in *Reg. Orig.* 94, 248, whereby it seems that *librata terra* is so much as yields 20 s. *per annum*. *F. N. B.* 87. *Spelm. Gloss.*

FARE. *Sax*] A voyage or passage by water; but more commonly the money paid for such passage, in which sense it is now used. See *Stat. 3 P. & M. cap. 16*. So for what we pay an hackney or stage coachman for our carriage.

FARINAGIUM. Toll of meal or flour.—*Ordin. Insul. d. Jersey* 17 *Edw.* 2.

FARLEU. Is money paid by tenants in the West of England in lieu of a *best*; and in some manors in Devonshire, *farleu* is distinguished to be the best goods; as *best* is the best beast, payable at the death of a tenant. *Cowel*.

FARLINGARII Whoremongers and adulterers. *Sax*.

FARM, OR FERM. Lat. *firma*, from the *Sax. fiorme*, i. e. Food; and *feorman* to feed or yield victuals.] A large messuage and land, taken by lease under a certain yearly rent, payable by the tenant; and in former days,

about the time of William the First, called the Conqueror, these rents were reserved to the lords in victuals and other necessities arising from the land; but afterwards in the reign of King *Hen. 2.* were altered and converted into money. *Terms de Ley.* A farm is most properly the chief messuage in a village; and it is a collective word, consisting of divers things gathered in one, as a messuage, land, meadow, pasture, wood, common, &c. *Locare ad firmam* is to let or set to farms; and the reason of it may be in respect of the firm or sure hold the tenants thereof have above tenants at will. A farm in Lancashire is called *Ferm belt*; in the North a *Tack*; and in Essex a *Wike*: And *ferm* is taken in various ways. *Powd* 195.

FARMER. He that holds a farm, or is tenant or lessee thereof. *Terms de Ley.* And it is said generally every lessee for life or years, although it be but of a small house and land, is called *Farmer*, as he is that occupieth the farm: as this word implies no mystery, except it be that of husbandry, husbandman is the proper addition of a farmer. 2 *Havok. P. C. c. 23. § 115*. By statute, no parson or spiritual person may take farms or leases of land, on pain of forfeiting 10 l. *per month*, &c. See title *Clergyman*—No person whatsoever shall take above two farms together, and they to be in the same parish, under the penalty of 3 s. 4 d. a week. *Stats. 25 H. 8. c. 13: 32 H. 8. c. 28. §. 4*.

FARTHING. Was the fourth part of a Saxon penny, as it is now of the English penny.

FARTHING OF GOLD. *quasi fourth thing.*] A coin used in ancient times, containing in value the fourth part of a Noble. It is mentioned in the *Stat. 9 H. 5 cap. 7*, where it is ordained, that there shall be good and just weight of the noble, half noble, and farthing of gold, &c.

FARTHING OF LAND. Seems to differ from *Farthing-deal*; for it is a large quantity of land: in a survey book of the manor of *West Slapton* in Com. *Devon* is entered thus: *A. B.* holds six farthings of land at 126 l. *per annum*.

FARUNDFL of land. See title *Farding-deal*.

FASIUS. Fr. *Faisseau*.] A faggot of wood. *Mon. Angl. tom. 2. p. 238*.

FAST-DAYS. Are days of fasting and humiliation, appointed to be observed by publick authority. There are fixed days of fasting enjoined by our Church, at certain times in the year, mentioned in ancient statutes, particularly the 2 & 3 *Ed. 6. c. 19.* and 5 *El. c. 5*. And by *Stat. 12 Car. 2. c. 14*, the 30th of January is ordained to be a day of fasting and repentance, for the murder of King Charles I. Other days of fasting which are not fixed, are occasionally appointed by the King's Proclamations. Though abstinence from eating of fish is required on those days, by our laws; it is made penal to affirm that any forbearing of flesh, or eating of fish is necessary to salvation. 1 *Havok. P. C.* See *Embing Days*.

FASTERMANS, among the Saxons were pledges. *Leg. Ed. Confess. cap. 38.* Vide *Fastingmen*.

FAT, VAIT, OR WALE, Is a large wooden vessel used by maltsters and brewers, for measuring of malt with expedition, containing eight bushels or a quarter. *Stats. 1 H. 5. c. 10: 11 H. 6. c. 8*. It is also a vessel made use of by brewers to run their wort into, and by others for the making of salt at *Droitwich* in the county of *Worcester*.

FATUA MULIER, A whore *Du Fresno*.

FAUSEIUM, A faucet, musical pipe or flute

FAUTORS,

FAUTORS, Favourers or supporters of others; abettors of crimes, &c.

FEAL. The tenants by knight service did swear to their lords to be *feal* and *leal*, i. e. to be faithful and loyal. *Spelm. de Parliament*, 59. See *Fealty*.

FEALTY, *Fidelitas*, Fr. *Feauté*, i. e. *Fides*, *fidei*, *obsequii et servitii ligamen, quo particulariter vassalus domino astringitur*. *Spelm.*] The oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds lands by the oath of *fealty*, has it in the freest manner; because all persons that have *fee*, hold *per filium et fiduciam*, that is, by *fealty* at least. *Smith de Repub. Ang. lib. 3. c. 8*. And *fealty* is incident to all manner of tenures except *frankalmoigns* and *tenancy at will*. See title *Tenures*; l. 6, *et passim*. This *fealty*, which is used in other nations, as well as *England*, at the first creation of it bound the tenant to *fidelity*; the breach whereof was the loss of his *fee*.

It is usually mentioned with *homage*, but differs from it; being an obligation permanent, which binds for ever: and these differ in the manner of the solemnity, for the oath of *homage* is taken by the tenant kneeling; but that of *fealty* is taken standing, and includes the six following things, *viz.*

1. *Incolume*, that he do no bodily injury to the lord.
2. *Tutum*, that he do no secret damage to him in his house, or any thing which is for his defence.
3. *Honestum*, that he do him no injury in his reputation.
4. *Utile*, that he do no damage to him in his possessions.
5. *Facile*, and 6. *Possibile*, that he render it easy for the lord to do any good, and not make that impossible to be done, which was before in his power to do: all which is comprised in *Leg. Hen. 1. c. 5*.

Fealty has likewise been divided into *general* and *special*; *general*, to be performed by every subject to his prince; and *special*, required only of such as in respect of their *fee*, are tied by oaths to their lords. *Grand Custom. Normand.*

By *Stat. 17 Ed. 2. p. 2*, the form of this oath is appointed, and as now observed, it runs as follows, *viz.* *I A. B. will be to you my lord C. true and faithful, and bear to you fealty and faith for the lands and tenements which I hold of you: and I will truly do and perform the customs and services that I ought to do to you. So help me God.* The oath is administered by the lord or his steward; the tenant holding his right hand upon the book, and repeating after the lord, &c. the words of the oath; and then kissing the book. *Terms de Ley.*

The law with respect to *fealty* continues the same as when Lord Coke wrote; (See 1 *Inst* 686. in note:) for it does not appear to be varied by *Stat. 12 C. 2. c. 24*, or any other statute made since: but it is no longer the practice to exact the performance of *fealty*. In the case of copyholders it is become a thing of course on admitting them to enter a respite of *fealty*; but with respect to such as hold by other tenures it is never thought of. In *Wood's Inst.* 133, it is said that lessees for life or years ought to do *fealty* to their lords for the lands they hold.—However it may not be amiss to remember that the title to *fealty* still remains; that it is due from all tenants except tenants in *frankalmoigne*, and such as hold at will or by sufferance, and if required must be iterated at every change of the lord; it differing in this respect from *homage*, which except in special cases is only due once; that

the receiving of it is at least attended with the advantage of preserving the memory of tenures; which though perhaps sufficiently done in the case of copyholds by the admittances and by the payment of fines and quit-rents and continual render of other services, may be very necessary in cases where *fealty* is the only service due; and lastly, that the law for compelling the performance of *fealty* has provided the remedy by distress, which is an inseparable incident to all services due by tenure, and, in the case of *fealty* cannot as it is said, be excessive. See 1 *Inst.* 68 a: 103 b: 104 a b: 152 b: 2 *Inst.* 107: 4 Co. 8, b.

FEASTS, Anniversary times of *feasting* and thanksgiving, as *Christinus*, *Easter*, *Whitsuntide*, &c. The four *feasts* which our laws especially take notice of, are the *feasts* of the annunciation of the blessed Virgin Mary, of the nativity of St. John the Baptist, of St. Michael the Archangel, and of St. Thomas the Apostle; (or in lieu of the last, the birth of our Lord Christ,) on which quarterly days, rent on leases is usually referred to be paid. See *Stats. 5 Ed. 6. c. 3*: 12 *Car. 2. c. 30*.

FEE; and **FREE-SIMPLE**.—*Tenant in fee simple*, is he which has lands or tenements to hold to him and his heirs for ever. *List. c. 1. § 1*.

The word *fee* is sometimes used for the compass or circuit of a lordship or manor, as we say the *lord of the fee*, &c. as well as the particular estate of the tenant: and also for a perpetual right incorporeal; as to have the keeping of prisons, &c. in *fee*. *Bract Lib. 2. c. 5*. *Old Nat. Br.* 41. And when a rent or annuity is granted to one and his heirs, it is a *fee personal*. *Co. Lit. 1. 2*.

As to the general nature and origin of estates in *fee-simple*, and the other estates arising therefrom, See this Dict. titles *Estate*; *Tenure*, III. 5. It is therefore in this place sufficient to inquire,

- I. In what Things one may have a *Fee simple*.
- II. By what Means such an Estate may be acquired.
- III. By what Words it may be created.

I. A man may have an estate, in *fee-simple* of all lands or tenements or other things real. *Co. Lit. 1 b*. Of lordships, advowsons, commons, cisterns, and all hereditaments. *Co. Lit. 4 a*. So he may have a *fee simple* in things mixed; as in franchises, liberties, &c. *Co. L. 2 a*.

So if a man grants to another and his heirs all woods, underwoods, timber-trees or others in such a part of a forest, saving the soil; the grantee has a *fee* to take in *alieno solo*. *R. 8 Co. 137 b*.

So, in things personal; as in annuity. *Co. Lit. 2 a*. In a dignity granted to him and his heirs. *Co. Lit. 2 a*. In a swan mark. 7 *Co. 17*. In a part or share of the *New River* water. *Ca. Parl* 207.

So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a *fee* to him and his heirs, qualified in a particular manner: as if a Queen consort institutes an hospital, and reserves the patronage *sibi & reginis Angliæ succedentibus*. *Ca. Cb.* 214.

But in estates in *fee* before such defaultory inheritance it cannot be; as the duchy of Cornwall limited to the prince & his heirs, *regis Angliæ primogenitis*, shall not be good, except when limited by act of parliament. 8 *Co. 16*.

II. A

FEE-SIMPLE.

II. A man may take a fee by descent or by purchase. In what manner a man may take by descent, see under title *Descent*.

With respect to purchasers, it is to be noted, that some are incapable of purchasing.

An alien cannot purchase any lands in England. *Vaugh.* 227, 291: 7 Co. 16, 17, 18: *Dyer*, 2. pl. 8. See *Alien*.

All persons attainted of treason or felony are incapable of purchasing. 2 *New Abridg.* 249: Co. Lit. 8. a. See *Dig. Feud. lib. 2. tit. 23, 24: Vigellius* 242, 350: *Spel. Gloss.* 214, 215.

If a man be attainted of felony, and after purchase land, and dies, the King shall have it by his prerogative, and not the lord of the fee; because his person being forfeited to the King, he cannot purchase but for the King. Co. Lit. 2 b.

A monster not having human shape cannot purchase or inherit, but an hermaphrodite shall inherit or purchase *secundum prævalentiam sexus interfectentis*; one born deaf and dumb may inherit; so may one born deaf, dumb and blind, because it is for their advantage; but they cannot contract, because they cannot understand the signs of contracting; an infant, an idiot, and a person of non sane memory may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property; so also an infant or a person of non sane memory may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for their benefit, and because the freehold cannot be in the grantor, contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; if at full age, or after recovery of his memory they agree thereto, they cannot avoid it; but if they die during minority or lunacy, the heirs may avoid it; for they shall not be subject to the contracts of persons who wanted capacity to contract; so, if after his memory recovered, the lunatick or person non compos die without agreement to the purchase, their heirs may avoid it. Co. Lit. 2. 8: 2 *Vent.* 303. See title *Estate*.

A feme covert is capable of purchasing; for such an act does not make the property of the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife; but here the will of the wife is supposed the mind of the husband, (he not objecting,) since no man is supposed not to assent to that which is for his benefit; but in this case the husband may disagree, and it shall avoid the purchase. Co. Lit. 3 a. See title *Baron and Feme*.

By the stat. 11 & 12 W. 3. c. 4, *Papists* are disabled from purchasing lands, &c. See title *Papist*.

Persons capable of purchasing may gain a fee-simple by feoffment; or by fine, or common recovery; which are of the nature of a feoffment upon record; or by grant, or by exchange, release, or confirmation, which are in the nature of grant; or by bargain and sale; or by covenant to stand seised; or by devise. See title *Estate*.

So a man may gain a fee by wrong; as by *disseisin*, *abatement*, or *intrusion*. See those titles.

III. It is the word *heirs* makes the inheritance; and a man cannot have a greater estate. Lit. 1. To have fee-simple implies, that it is without limitation to what heirs, but to heirs generally: though it may be limited by act

of parliament. 4 *Inst.* 206. If one give or grant land to J. D. and his heirs; and if he die without heirs, that J. D. shall have it to him and his heirs: by this J. D. hath a fee-simple, and J. D. will have no estate. *Dyer* 4, 33. This means by parol, with livery and seisin, or by deed, &c. but not by will.

Where land is given or granted by fine, deed or will, in possession, reversion, or remainder, to another and his heirs; it will be a fee-simple. *Prosser* 134. And if land be granted to a man and his heirs, *habendum* to him for life only, and livery of seisin is made; it is a fee-simple estate, because a fee is expressed in the gift. 2 *Rep.* 23.

A lease is granted to one for a term of years, and after that the lessee shall have the land to him and his heirs by the rent of 10 l. a year; if the grantor make livery upon it, 'tis a fee-simple: otherwise but for years. Co. Lit. 217. Where lands are granted to A. for life, remainder to B. for life, the remainder to the right heirs of A. here A. hath a fee-simple. 20 *Hen.* 6. 35: *B. & E.* 34, 35. A gift or grant to a man's wife during life, after to him in tail, and after to his right heirs; he will have a fee-simple estate. 2 *Rep.* 91.

If lands are granted to a man and his successors, this creates no fee-simple: but if such a grant be made to a corporation, it is a fee-simple; and in case of a sole corporation, as a bishop, parson, &c. a fee-simple is to them and their successors. Co. Lit. 8. b: *Wm.* 119. An estate granted to a person, to hold to him for ever, or to him and his assigns for ever, is only an estate for life; the word *heirs* being wanted to make it fee-simple: but in wills, which are more favoured than grants, the fee-simple and inheritance may pass without the word *heirs*. Co. Lit. 19, 9.

And by deed of feoffment a fee-simple may be created, which would be an estate-tail by will; as where lands are given to another, and his heirs male, &c. without the word *body*. *Hob.* 32. A gift to a man and his children, and their heirs, is a fee-simple to all that are living. Co. Lit. 8: *Lit. Rep.* 6.

A feoffment to B. & his heirs, without saying *su.* gives him a fee-simple. Co. Lit. 8 b. So to a son and the heirs of his father. *Scamb. Co. Lit.* 220. b. So to B. & his heirs and their heirs; if he has issue, it gives them a joint estate in fee. Co. Lit. 9 a. So to B. *hereditus* & successors *su.* gives a fee. Co. Lit. 9 a.

So a grant to the King in *perpetuum* gives him a fee, without the words, *his heirs or successors*, for he never dies. Co. Lit. 9 b. So a feoffment to a corporation aggregate in *perpetuum* gives a fee; for it never dies. Co. Lit. 9 b. 1 *Rel.* 832. l. 55.

Or, to a corporation sole, to be held in *frankalmoin*, &c. Co. Lit. 9 b: 1 *Rel.* 833. l. 5. So if A. re-enters *in alio plene* as B. entailed him, he has a fee without the word *heirs*. Co. Lit. 9 b. — This must mean where A. had an estate in fee of the feoffment of B. 1 *Rel.* 833. l. 12. So a grant to the church of B. gives a fee, without the word, *heirs or successors*. 1 *Rel.* 833. l. 3.

And a limitation to the right heirs of B. gives a fee, without the words, *and their heirs*. 1 *Rel.* 133. l. 16. So a fee may be given without the words, *his heirs*, by fine *sur concessione de droit come cro.* &c. Co. Lit. 9 b. or by a common recovery. Co. Lit. 9 b.

So a fee passes without the words, *his heirs*, where a man gives land with his daughter, &c. in *frankalmoin*, &c.

FEE.

Co. Lit. 9 b. If a parcener, or joint-tenant releases to his companion *Co. Lit. 9 b.* If the lord, &c. releases to the tenant; which enures by way of extinguishment. *Co. Lit. 9 b.* If a man releases a mere right, as where a disseisor releases to the disseisor all his right. *Co. Lit. 9 b.*

So, if a rent be granted upon partition, for owelty (or equality) of partition *Co. Lit. 9, 10.* So if a peer be summoned to parliament by writ, he has a fee in his dignity, without the word *habeat*. *Co. Lit. 9 b.* So, by the forest law, if the King at a justice seat, grants to another an *assart* in *forestry*, without more, he has a fee. *Co. Lit. 10 a.* So, by custom, a grant of a copyhold, *pro hereditate sua*, or *perpetua*, may give the inheritance. *4 Co. 29 b.*

A *fee simple* determinable upon a contingency, is a *fee* to all intents; though not so durable as absolute *fee*. *11 a. 6 273.* But see title *De fe.*

In pleading estates in fee simple, they may be alledged generally, but the commencement of estates-tail, and other particularities, must regularly be shewn. *Co. Lit. 10 3.* The fee simple itself, being the chief and most excellent; he who hath it in lands or tenements may give, grant, or charge the same by deed or will at his pleasure; or he may let it to any person upon it: And if he bind himself and his heirs to warranty, or for money by obligation, or otherwise, and leave such land to the heir, it shall be charged with warranty and debts. Also the wife of a man that is seised of such an estate, shall be endowed; and the husband of a woman having this estate, shall be tenant by the curtesy. *Co. Lit. 273; Do 310. Pol. 3 266.*

Though fee simple is the most ample estate of inheritance, it is subject to many incumbrances, as judgments, statutes, mortgages, fines, judgments, dower, &c. And there is a fee-simple *conditioned*, where the estate is defeasible by not performing the condition; and a *quantity* fee simple, which may be defeated by a limitation. This is called a *base fee*, upon which no reversion or remainder can be expectant. *Co. Lit. 18 10 Pol. 1.*

See farther on this subject titles *Dignity, Land; Feudal Law; Dower; Tenure; Will, &c.*

FEE EXPLECANT [*Feudum Explecandum*] See *Land*.

FEE-FARM See title *Tail*.

FEE FARM, *Feudum*] Or *fee farm rent*; is when the lord, upon creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to firm, or was reasonably worth, or at least a fourth part of the value; *without homage, service, or other services*, beyond what are especially comprised in the rentment. *2 Inst. 44.* By *Feudum*, a third part of the yearly value of the land may be appointed for the rent, where lands are granted in *fee farm*, &c. *F. N. B. 110.* And *Lord Coke* lays *fee-farm* rents may be one half, a third, or fourth part of the value. *Co. Lit. 143.* See *2 Comm. 43; D. 17. 62, or note*, and the notes to *1 Inst. 143.*

These *fee-farm* rents seem to be more or less, according to the conditions or consideration of the purchase of the lands out of which they are issuing. It is the nature of *fee-farm*, that if the rent be behind and unpaid for the space of two years, then the lord or his heirs may bring an action to recover the lands, &c. *2 Inst. 46. 110. 1. See also Gifford.*

FEEES.

Feodifirma appellatur, cum quis, ex dono vel concessione alterius, prædia tenuerit sibi et hæredibus suis, reddendo vel dimidiam, vel tertiam, vel ad minus quartam partem veri valoris. Tenens hujusmodi ad nulla servitia obligatus, nisi quæ in ipsâ Chartâ continentur: exceptâ facilitate, quæ omnibus tenuris incumbit. Spelm. Gloss. 221.

FEE-FARM RENTS OF THE CROWN. The *fee farm* rents remaining to the Kings of England from their *ancient demesnes*, were many of them alienated from the crown in the reign of King Charles II. By *Stats. 22 Car. 2 c. 6: 22 & 23 C. 2. c. 24*, (explained by *Stat. 10 An. c. 18*.) the King was enabled by letters-patent to grant *fee-farm* rents due in right of his crown, or in right of his duchies of Lancaster and Cornwall, except quit rents, &c. to trustees to make sale thereof, and the trustees were to convey the same by bargain and sale to purchasers, &c. who may recover the same as the King might. But it has been observed, that men were so very doubtful of the title to alienations of this nature, that while these rents were exposed to sale for ready money, scarce any would deal for them, and they remained unsold: but what made men earnest to buy them, was the stop upon some of his Majesty's other payments, which occasioned persons to resort to them as the most eligible in that conjuncture. Notwithstanding any of the said rents, is enabled to buy the remainder. See further title *Crown Lands*.

Also, Certain penalties allowed to officers in the administration of the law, is a recompence for their labour and trouble, ascertained either by acts of parliament or by an act of grace, which gives them an equal satisfaction with an act of parliament. *2 New Rep. 473.*

I. *Feudum* *Feudum*.

II. *What is the fee farm rent?*

I. At common law no officer, whose office related to the administration of the law, could take any reward for doing his duty, but what he was to receive from the King. *Co. Lit. 365 2 Inst. 209, 9.*

And this fundamental maxim of the common law confirmed by *H. 1. c. 23* which enacts, "That no sheriff, or other King's officer, shall take any reward to do justice, but he shall be paid of that which they take of the King, and that he who so doth shall yield twice as much, and shall be punished at the King's pleasure."

This statute comprehends escheators, coroners, bailiffs, gaoler, the King's clerk of the market, aulnager, and other inferior ministers and officers of the King, whose offices do any way concern the administration of justice. *2 Inst. 209.*

And so much hath this law been thought to conduce to the honour of the King and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been holden void; as where by prescription the clerk of the market claimed certain fees for the view and examination of all weights and measures, and it was held merely void. *4 Inst. 271; Mon. 523; 2 Inst. 209; 2 Rol. Abr. 226.*

But it hath been holden, that the fee of 20*d.* commonly called the bar fee, which hath been taken time out of mind, by the sheriff, of every prisoner who is acquitted; and also the fee of one penny, which was claimed by the coroner of every *view*, when he came before the justices in

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in eyre, are not within the meaning of the statute, because they are not demanded by the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to any of them. 2 *Infl.* 210: *Stamm. P. C.* 49.

Also it is holden by Lord Coke, that within the words of the statute 34 *Ed.* 1. which are, "No tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land;" no new offices can be erected with new fees, or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament. 2 *Infl.* 533.

Yet it is holden, that an office erected for the public good, though no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a fee, yet as a competent recompence for his trouble. *Moor* 808.

All fees allowed by acts of parliament become established fees; and the several officers intitled to them may maintain action of debt for them. 2 *Infl.* 210. All such fees as have been allowed by the courts of justice to their officers, as a recompence for their labour and attendance, are established fees: and the parties cannot be deprived of them without an act of parliament. *Co. Lit.* 368: *Proc. Cur.* 551.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a person libelled in the spiritual court for a burying fee due to him for every one who died in his parish, though buried in another; the court held this unreasonable, an prohibition was granted. *Hob.* 17: *1 R. Abr.* 557, 559. *S. C.* adjudged.

The plaintiff brought an action in the case for fees due to him as Usher of the Black Rod, and obtained a verdict. *Stran.* 747. No fee shall be taken for a report upon a reference from any court. *St. 1 Jac.* 1. c. 10.—Certain fees of sheriffs settled. *St. 3 Geo.* 1. c. 15. See title *Sheriff*—Fees on *non proceſſum* out of the Exchequer to be the same as on other records. *St. 23 Geo.* 2. c. 20. § 10.—Fees of justices' clerks to be regulated. *St. 26 Geo.* 2. c. 14: 27 *Geo.* 2. c. 16. Debts due for the sheriff's fees for executing an *elect.* *Lord Rym.* 12.2

As to the *quantum* of the fees due, it must be observed in general, that it is extortion for any officer to take more for executing his office, than is allowed by act of parliament, or is the known and settled fee in such case. 10 *Co.* 102 a: *Co. Lit.* 368.

As to the fees of sheriffs for executions, by *St. 29 Eliz.* cap. 4. it is enacted, "That it shall not be lawful for any sheriff, &c. nor for any of their officers, &c. by colour of their office, to take of any person, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more recompence than in this present act appointed, *i. e.* twelve-pence of and for every twenty shillings where it exceedeth not one hundred pounds; and six pence of and for every twenty shillings, over and above the said sum of 100*l.* that he or they shall so levy or extend, and deliver in execution, or take the body in execution for; upon pain, that the person offending, shall forfeit, to the party grieved, his treble damages;

and shall forfeit the sum of 40*l.* for every time that he, they, or any of them shall do the contrary."

II. It is extortion for any officer to take his fee before it is due; and therefore where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fees, the court held, that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Co. Lit.* 368: 10 *Co.* 102 a: 1 *Salk.* 330.

Officer must obey a writ, though fees unpaid. *Stran.* 814. Process must be obeyed though fees are not tendered. *Stran.* 1262. If an *habenas corpus ad satisfaciendum* be directed to a gaoler, he must bring up the prisoner although his fees were not paid him; and he cannot excuse himself of the contempt to the court, by alledging that the prisoner did not tender him his fees. 1 *Kebl.* 272. pl. 57. So as to an *habenas corpus ad faciendum & recipiendum*. *March* 89: 2 *A. b.* 280: 2 *Infl.* 178: 1 *Kebl.* 565. cont.

But if the gaoler brings up the prisoner by virtue of such *habenas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet: for that a gaoler is compellable to find his prisoner sustenance. See 1 *Rol. Rep.* 338: *Co. Lit.* 295: 9 *Co.* 87: *Plowd.* 68 a: 2 *Rol. Abr.* 32: 2 *Jon.* 178.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it. *Fitz. Cur.* 294: *Pulton de Pace* 88: *Keling* 75. 2 *Jon.* 56: 1 *Sid.* 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. 1 *Salk.* 332. It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, to much per pound according to the statute immediately; but that upon an *elect* he is not to have them till the *liberate*. *Poph.* 156: *Wimb.* 51. *S. P.*

FEES OF ATTORNEYS AND OFFICERS, Are considerations allowed them as a recompence for their labour: and in respect to officers, they are granted over and above their salaries, to excite them to diligence in executing their offices. They differ from wages which are paid to servants for certain work and labour done in a certain space; whereas fees are disbursed to officers, &c. for the transacting of business which occasionally occurs. If a client, when his business in court is dispatched, refuseth to pay the officer his court fees; the court on motion will grant an attachment against him, on which he shall be committed until the fees are paid. 1 *Lill. Abr.* 598. Ecclesiastical courts have not power to establish fees: But if a person bring a *quantum meruit* in *B. R.* &c. for fees, and the jury find for him, then they become established fees. 1 *Salk.* 333.

A solicitor in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in chancery. 1 *Pen.* 203: 2 *Chanc. Ca.* 153. But it hath been held, that chancellors, registers and proctors who are officers of temporal profit, and whose fees do not relate to the jurisdiction of the spiritual court, cannot sue for them in the spiritual court. See 3 *Leon.* 268: 2 *Rol. Rep.* 59: 1 *Mod.*

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16~. 2 *K.b.* 615; 3 *Krb.* 303, 441, 516; 4 *M.d.* 254; 5
M.d. 242.

ACTION on the case lies for an attorney for his *fees*, against him that retained him in his cause: And attorneys are not to be dismised by their clients, till their *fees* are paid. 1 *Lil.* 142. But attorneys are not to demand more than their just *fees*; nor to be allowed *fees* to counsel without tickets, or the signature of counsel, &c. *Stat. 3 Jac. 1. c. 7.* An attorney may have action of debt for his *fees*, and also of counsel, and costs of suit: as a counsellor is not bound to give counsel till he has his *fee*; it is said he can have no action for it: Though it has been held otherwise. *F. N. B.* 121: 1 *Brownl.* 79: 31 *H. 6. c. 9.*

There were no *fees* due to sheriffs for executing their offices, till the *Stat. 29 Eliz. c. 4*; which allows them *fees* for executing writs of execution, &c. By the *Stat. of Wym 2, 13 E. 1. cc. 42, 44*, the ancient *fees* of officers of courts of justice were ordained. And by statutes, the *fees* of sheriffs, gaolers, bailiffs, &c. are limited.

See further as connected with the subject of fees, this Dict. titles *Liberty*; *Extortion*; and also titles *Barrister*, *Sheriff*; *Attorney*; *Coroner*, &c.

FEIGNED ACTION, See title *Joint Action*.

FEIGNED ISSUE, If, in a fit in equity, any matter of fact is strongly contested, the court usually directs the matter to be tried by a jury, especially such important facts as the validity of a will, or whether *A.* is the heir at law to *B.* or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried in the court of King's Bench, or at the assizes, upon a *trial by issue*. For this purpose, a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of 5*l.* with the defendant, that *Y.* was heir at law to *B.*; then he avers that he is so and brings his action for the 5*l.* the defendant denies the wager, but avers that *A.* is not the heir to *B.* and thereupon that issue is joined, which is directed out of Chancery to be tried, and thus the verdict of the jury at law determines the fact in the court of equity. 3 C. 1. 42. If it is a matter of great difficulty and consequence, the direction may be for a *trial by bill*, with leave of the court. See titles *Chancery*;

[*A companion*] A companion,
but particularly a friend, who was bound in the *a ceremony*
for the good behaviour of another. In the laws of King
Jea it is said, if a murderer could not be found, &c. the
parents of the person slain should have five marks, and the
lawyer forty, if he had no parents, then the *king* would
have it. *Lj de m n n c i t*, folio 80. b. *Ine.*
cap. 17.

compo d it h g u i t e s m e l', as *fel'* honey, is wild honey,

LELE HOMAGERS, Were faithful subjects, from
the Saxons.

F. LO DE SI, One that commits felony by laying violent hands upon himself, or commits any unlawful malicious act, the consequence of which is, his own untimely death. When a person with deliberation and direct purpose kills himself, by hanging, drowning, shooting, stabbing, &c. he becomes *fool de e*; but the person that commits this felony, must be of the age of discretion,

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and *compos mentis* : And therefore if an infant under fourteen years of age, or a lunatick during his lunacy, or one distracted by a disease, or an idiot, kills himself, it is not felony. 3 *Inst.* 44 : *Dalt. cb.* 145. Also if a person during the time that he is *non compos mentis* giveth himself a mortal wound, though he dieth thereof when he recovers his memory, he is not *felo de se* ; because at the time of the stroke he was not *compos mentis*. *Dalt.* 342. 344. And he who desires and persuades another man to kill him, is not a *felo de se* ; his assent being void in law, and the person killing him a murderer. *Kelw.* 136. It is *felo de se* where a man maliciously attempts to kill another, and falls upon his sword, or shooting at another the gun bursts, whereby he kills himself ; but he must be the *only* agent. 1 *Hawk. P. C. c.* 27 : 1 *Hal. P. C.* 413.

A *felo de se* cannot make a will of goods and chattels ; [or rather such will, if made, is void ;] for they are forfeited by the act and manner of his death . but he may make a devise of his lands, for they are not subject to forfeiture. *Plowd.* 261.

A *felo de fe* shall forfeit all his goods and chattels real and personal; but not until it is lawfully found by the oath of twelve men, before the coroner on view of the body, that he is *felo de fe*. 3 *Inft.* 55. By the return of the inquisition the goods, &c. are vested in the King: Though it hath been said, that the goods of a *felo de fe* are forfeited before inquisition, viz. immediately upon committing the fact. 1 *Lev.* 8: but see 5 *Rep.* 110, where it is adjudged that they are not forfeited till it is found of record. The lands of inheritance of a *felo de fe* are not forfeited, by reason he was not attainted in his life-time: nor is such a person's wife barred of dower, or his blood corrupted. 1 *Hawk. P. C. c.* 27. If a judgment is obtained by a plaintiff in any action, and the plaintiff hangs himself, so as to become *felo de fe*, the debt is forfeited to the King. 1 *Saund.* 36: 2 *Nelj. Abr.* 840. Goods are forfeited to the King by a *felo de fe*, for the loss of a subject, and breach of the peace. 1 *Plowd.* 261. This forfeiture has relation to the time of the act done, in the felon's life time which was the cause of his death. As if the husband and wife be possessed jointly of a term of years, in land, and the husband drown himself, the land shall be forfeited to the King; and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the King, prior to the wife's title by survivorship; which could not accrue till the instant of her husband's death. *Famb. L.* 216. But these forfeitures are, perhaps too often, saved, by the coroner's jury finding their verdict *Junacy*; to which they are inclined on a favourable interpretation, that it is impossible for a man in his senses to do a thing so contrary to nature; but if this argument be good, self-murder can be no crime, because a madman cannot be guilty of any crime. 1 *Hawk. P. C. c.* 27.

If a person *felo de se* is secretly made away with that the coroner cannot view the body; presentment is to be made of it by justices of peace, &c. to entitle the King to the forfeiture of goods. 5 *Rip.* 110. Where a person is found *felo de se*, who, on account of lunacy, &c. ought not to be so; or where one is returned *non compos* when in truth the party is *felo de se*, &c. If there be no fault in the coroner, or uncertainty in the inquisition, a

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malus inquirendum will not be granted; but the inquisition is traversable in *B. R.* 3 *Mod.* 238: 2 *Nelf. Abr.* 840. A pardon of murder, doth not pardon *felo de se*; but a pardon of all felonies and forfeitures doth. By custom and practice, the body of a *felo de se* is buried in the highway, with a stake driven through the body.

FELONS' GOODS. The statute *de prærogativa regis*, 17 *Ed. 2. c. 1*, grants to the King, among other things, the goods of felons and fugitives. If the King grant to a man and his heirs *felons' goods*, the grantee cannot devise them, &c. on the statute 32 *H. 8. c. 1*, because they are not of a yearly value; but where a person is seised of a manor, to which they are appendant, it is otherwise, for they will pass as appurtenant. 3 *Rep.* 32. See titles *Flight*; *Forfeiture*.

FELONY.

FELONIA. A general term of law including generally, all capital crimes, below treason. 4 *Comm.* 98. This word is of feudal original; but as to the derivation of which authors differ. Some deduce it, fancifully enough as it seems, from *φῆλο*; *Gri.* an impostor; from *fallo Lat.* to deceive; and Coke (1 *Inst.* 391,) says it is *crimen felleo animo perpetratum*.—All, however, agree that it is such a crime as occasions a forfeiture of the offender's lands or goods; this therefore gives great probability to *Spelman's* derivation from the *Teutonic* or *German fee*, a feud or fief, and *lon*, price or value. *Spelm. in verb. Felon*.—Felon according to this derivation, is then the same as *positum feudi*; the consideration for which a man gives up his her or estate; as in common speech it is said, such an act is as much as one's life or estate is worth. In this sense, it will clearly signify the feudal forfeiture, or rather the act by which an estate is forfeited or cheats to the lord. See 4 *Comm.* 95.

FELONY, in the general acceptance of law, comprises every species of crime which occasioned, at Common-law, the forfeiture of lands or goods. This most frequently happens in those crimes for which a capital punishment, either was or is liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were antiently punished with death in lay or unlearned offenders, though now by the statute-law that punishment is for the first offence universally remitted. See this Dict. title *Clergy, Benefit of*. Treason itself (says *Cole* 3 *Inst.* 15,) was antiently comprised under the name of Felony. And not only all offences now capital are in some degree or other, felony; but this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance medley, or in self-defence; and petty larceny or pilfering, all which are, strictly speaking Felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of Felony seems to be this:—“An offence which occasions a total forfeiture, of either lands or goods or both, at the Common law; and to which, capital or other punishment may be superadded, according to the degree of guilt.” 4 *Comm.* 94.

As felony may be without inflicting capital punishment, so it is possible that capital punishment may be inflicted for an offence which is no felony; as in case of *Homicide* by the Common-law, which though capital, never worked any forfeiture of lands or goods, an *infeoffable* incident

to felony. 3 *Inst.* 43. Of the same nature was the punishment of standing mute, which at Common-law was capital, but without any forfeiture, and was therefore no felony. In short the true criterion of Felony is forfeiture, for in all felonies which are punishable by death, the offender loses all his lands in fee simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only. 1 *Inst.* 391.

The idea of felony is so generally connected with that of capital punishment, that it seems hard to separate them; and to this usage the interpretations of law now conform. For if a statute makes any new offence felony, the law implies that it shall be punished with death (viz. by hanging,) as well as by forfeiture, unless the offender prays the benefit of clergy. *Hawk. P. C. i. c. 41 § 4; ii. c. 48*. So where a statute decrees an offence to undergo judgment of life and member, the offence becomes a Felony, though that precise word be omitted; but the words of the statute must not in such case be the least doubtful or ambiguous. 1 *Hawk. P. C. c. 41. § 1, 2*.

Under the word felony in commissions, &c. is included, petit treason, murder, homicide, burning of houses, burglary, robbery, rape, &c. chance medley, *defendant to* and petit larceny. All felonies punishable according to the course of the Common-law, are either by the Common-law, or by statute. Piracy, robbery, and murder on the sea are punishable by the civil and statute law 1 *Inst.* 391.

Felony, by the Common-law, is against the life of a man; as murder, manslaughter, *felo de se, se defendendo*, &c. Against a man's goods, such as larceny, and robbery: Against his habitation, as burglary, arson or house-burning; and against public justice, as breach of prison. 3 *Inst.* 31.

It is not very easy to recapitulate the vast variety of offences which are made Felony, by the almost innumerable statutes which have been from time to time found necessary, to restrain mankind within those bounds which the security of Society requires.—Unfortunately these are continually increasing; as the penalties of death or transportation have, after repeated trials, in many instances been found by experience, to be the only means of preventing the increase of crimes, from the commission of which milder punishments were insufficient to deter offenders.

A general list is here subjoined of *Offences by statute, within clergy, and without*. For the particulars relative to each offence, this *Dictionary* may be consulted under the proper titles; see particularly titles *Larceny*; *Robbery*; *Swearings*.

FELONIES WITHIN CLERGY. *Abuse*, the King's, embezzling.—*Assault*, with intent to spoil persons' ards.—*Bail*, perlonating; before commissioners.—*Bridle*, destroying, several specified in different statutes.—*Burning*, riches of corn, hay, &c.—*Cattle*, sheep, &c. killing in the night maliciously, or sloughering horses without notice.—*Cattle* stealing from tenters, 3d. Offence.—*Coffins*, destroying engines to drain.—*Coffins*, destroying inclosures of—*Copper*, removing from a house to steal it, amending therein, or buying it when stolen.—*Corn*, destroying quantities; 2d. off.—*Customs*; harbouring smugglers and assisting to run goods.—*Dikes* cutting in marsh land.—*Fishing* in enclosed pond, &c. with intent to steal; or buying stolen fish.—*Foreign state* serving.—*Forgery*, of bank bills and stamps for marking plate.—*Gaoler*, forcing a prisoner to become

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to come an approver; (impeacher).—*Hawok*, stealing.—*Hunting*, in the night or in disguise.—*Jewels and plate* stolen, receiving of.—*Iron bar*, fixed to buildings, stealing.—*King* or his council, conspiring to destroy.—*Labourers*; confederacy of masons against the statute of Labourers.—*Lead*; Enting black lead mines with intent to steal; stealing lead affixed to buildings; or buying or receiving it when stolen.—*Locks*, floodgates, sluices or banks, destroying.—*Manning* another.—*Marriage* clandestine, solemnizing.—*Money*; exporting silver, importing false money, blanching copper, putting off counterfeit money, or counterfeiting copper money.—*Mutiny* and desertion in seamen or soldiers.—*Palaces* of the King, entering with intent to steal.—*Peccate* stolen, buying or receiving.—*Plague*, persons infected with, going out of doors.—*Poli-gamy*, or bigamy.—*Post-Office* frauds in, as to postage of letters.—*Process* opposing execution of, in pretended privileged places.—*Records* withdrawing or secreting.—*Rescuing prisoners* for treason or felony; or offenders against statutes concerning spirituous liquors. Or offenders condemned to hard labour; or bodies of murderers.—*Robbery*, of furniture from lodgings; assaulting with intent to rob.—*Rogue*, incorrigible escaping from the house of correction or offending a second time.—*Servants*, taking their master's goods at his death; assaulting master woolcomber or weaver; imbezzling goods to the value of 40s.—*Ship* exporting alive; 2d offence.—*Ships* destroying; forcibly preventing the lading, sailing, &c. of ships by seamen, keelmen and others.—*Stamp duties* certain frauds in.—*Stolen goods* buyers or receivers of, or person taking reward to discover.—*Stores*, government imbezzling.—*Trails*, shrubs, &c. destroying in nurseries or gardens to the value of 5s.—*Tunnages*, gates, toll-houses, &c. destroying.—*Watersmen* entering in the night and killing comes.—*Watermen*, carrying too many passengers, if any drowned.—*Wools*, sitting fire to.

FELONIES WITHOUT CLERGY.—*See slaves* in certain cases.—*Bail* personating.—*Bank of England*, clerks imbezzling notes; altering dividend warrants, paper makers unauthorized using moulds for notes; (See post *Forgery*).—*Boats* of the sea, destroying.—*Burkrupt*, not surrendering; concealing his estate, &c.—*Eastland*, concealing death of.—*Black act*, offenders under.—*Blacking grounds*, robbery of.—*Bridges* wilfully damaging, those of London, Westminster and Fulham.—*Burglary*—*Burning houses*; or barns with corn.—*Catch* stealing.—*Challenging jurors* above twenty, in felonies committed by clergy.—*Clerk* stealing from the tenter.—*Clothiers* setting fire to.—*Cottons* selling with forged stamps.—*Captains*; smugglers shooting at or wounding officers of the navy or custom house; harboring transported offenders; not surrendering on proclamation.—*Deer stealing*, 2d off.—*Deeds* imrolled acknowledging in the name of another.—*Fines*, destroying works for draining of.—*Fines* acknowledging in another's name.—*Forgers* of deeds, transfers of stock, stamps, registers, &c. &c.—*Hops*, cutting the binds.—*Horse-stealing*.—*Judgments* acknowledging in another's name.—*Letters* threatening, sending; or refusing offenders so doing.—*Linen*, stealing from bleaching grounds; or cutting or destroying.—*Mail*, robbing, or stealing letters from post-office.—*Manning*; maliciously lying in wait for that purpose.—*Marblers*; setting fire to engines for draining.—*Masters* wandering without testimonials, and see *Stat.*

39 Eliz. c. 17. § 4. (post *Seamen*).—*Miles* destroying.—*Money*, uttering false money, 3d off.—*Murder*.—*Mute*, standing on trial for treason or felony.—*Northern borders*, thieves and spoilers in Cumberland, Northumberland, Westmoreland and Durham.—*Outlawry*, for felonies without clergy.—*Perjury*, convicted for, escaping, breaking prison or returning from transportation.—*Pick-pocket* of above 12d. value.—*Piracy*; under which is included, sailors hindering the captain of a ship from fighting, by forcible restraint.—*Peisoning* of malice prepensed.—*Papists recusants*, priests and jesuits in certain cases.—*Prisoners* for-swearing themselves under insolvent acts; refusing to deliver up or concealing their effects; escaping from confinement to hard labour; 2d off.—*Privy Councilers* attempting to kill.—*Quarentine*, neglecting the regulations for performing.—*Rape* of child under 10 years old.—*Rescuing convicts* from transportation, or murderers.—*Rabblers* returning from transportation, their aiders and correspondents.—*Recognizance or recovery*, acknowledging in another's name.—*Riots* and destroying buildings.—*Robbery*, of churches, on the highway, in booths in fairs, dwelling-houses, shops, ware-houses, coach-houses or stables; on board vessels; in wharfs; in lodgings if above 12d. value; stealing exchequer orders, bank notes, navy bills, promissory notes, &c.—*Sea*; Treasons, Robberies, Murders, &c. upon.—*Seamen* personating to receive their pay.—*Ships* of war and others, wilfully destroying.—*Shooting* at another.—*Silk*; destroying any silk or velvet in the loom, or the tools for manufacturing thereof.—*Smuggling*, and assembling armed for that purpose.—*Soldiers*; deserting, wandering without testimonials, inflicting in foreign service or seducing others so to do.—*Scout*—*Sea Company*; servants imbezzling their effects.—*Stamps* counterfeiting.—*Stolen goods*, helping to a reward in certain cases.—*Stores*, government; imbezzling or burning or destroying in dock yards.—*Transportation*, returning from, or being at large in the kingdom after sentence.—*Tunnages*, gates, weighing engines, locks, sluices, &c. destroying.—*Wool*; destroying woollen goods, racks, or tools, or forcibly entering a house for that purpose.—*Women*, stealing, and marrying.—*Wreck* of ships, causing by stealing pumps, &c. Realing shipwrecked goods, or killing shipwrecked persons.

Before the reign of K. Hen. I. felonies were punished with pecuniary fines; for he was the first who ordered felons to be hanged, about the year 1108. The judgment against a man for felony hath been the same since the reign of that King, i. e. That he be hanged by the neck till dead; which is entered *suspendatur per collum*, &c. 4 Inst. 124. Felony was anciently every capital crime perpetrated with an evil intention: All capital offences by the Common-law, came generally under the title of felony; and could not be expressed by any word but *felonice*; which must of necessity be laid in an indictment of felony. Co. Lit. 391. It is always accompanied with an evil intention; and therefore felony cannot be imputed to any other motive. But the bare intention to commit a felony is so very criminal, that at the Common-law it was punishable as felony, where it missed of its effect through some accident; and now the party may be severely fined for such an intention. 1 Hawk. P. C. c. 25.

Felony is punished with loss of life, and of lands not entailed, goods and chattels; And felony ordinarily works corruption

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corruption of blood; unless a statute making an offence *felony*, ordains it shall be otherwise, as some statutes do. See title *Attainder*.

The punishment of a person for *felony*, by our ancient books, is, 1st, To lose his life, 2dly, To lose his blood, as to his ancestry, and so as to have neither heir nor posterity. 3dly, To lose his goods. 4thly, To lose his lands; and the King shall have *annum, diem & vallum*, to the intent that his wife and children be cast out of the house, his house pulled down, and all that he had for his comfort or delight destroyed. 4 *Rep.* 124. A felony by statute incidentally implies, that the offender shall be subject to the like attainder and forfeiture, &c. as is incident to a *felon* at Common-law. 3 *Inst.* 47, 59, 90.

All *felonies* are several, and cannot be joint; so that a pardon of one felon cannot discharge another: but the *felony* of one man may be dependant upon that of another, and the pardon of the one by a necessary consequence enure to the benefit of the other, as in cases of principal and accessory, &c. 2 *Hawk. P. C.*

Private persons may arrest felons by their own authority, or by warrant from a justice of peace: And every private person is bound to assist an officer to take felons, &c. 2 *Hawk. P. C.* see title *Constable*.

But one ought not to be arrested upon suspicion of *felony*, except there be *probabilis causa* shewed for the ground of the suspicion. 1 *Lit. Abr.* 603. If a *felony* is not done by a man, but some person else, if another hath probable cause to suspect he is the felon, and accordingly doth arrest him, this is lawful, and may be justified. But to make good such justification, there must be in fact a *felony* committed by some person, without which there can be no ground of suspicion. 2 *Hale's Hist. P. C.* 78. And as to the person, there ought to be a *reasonable cause* to suspect him, otherwise the arrest will be illegal. See titles *Arrest*; *Constable*.

A private man arresting one for *felony*, cannot justify breaking doors, to take the party suspected; but he doth it at his peril, and if in truth he be a felon, it is justifiable; but if innocent, then it is not: To prevent a murder or manslaughter, private persons may break doors open. 2 *Hale* 82. Officers may break open a house to take a felon, or any person justly suspected of *felony*; and if an officer hath a warrant to take a felon, who is killed in resisting, it is not *felony* in the officer; but if the officer is killed, it is otherwise. *D. lit.* 289.

Persons indicted of *felony*, &c. where there are strong presumptions and circumstances of guilt, are not repleviable; but for larceny, &c. when persons are committed who are of good reputation, they may be bailed. 2 *Hawk. P. C.* The former part of the position must be, with an exception to the power of the court of King's Bench. See title *Bail*.

If one be committed to prison for one *felony*, the justices of gaol delivery may try him for another *felony*, for which he was not committed, by virtue of their commission, 1 *Lit.* 602.

In the highest crime, and in the lowest species of *felony*, *viz.* in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not by the ancient law looked upon as convicted, so as to receive judgment for the *felony*, but should, for his obstinacy, have received

the terrible sentence of *penance*, or *peine forte & dure*. If a felon stands mute by the act of God, the *felony* is to be inquired of by jury, and whether the prisoner be the same person, and all other matters in the same manner as if the criminal had pleaded. And it may be inquired of by inquest of office, whether he do so of malice or by the act of God. 2 *Hawk. P. C.* See 4 *Comm.* 325. and this Dist. titles *Peine forte & dure*; *Trial*.

Where a married woman commits *felony*, in company with her husband, it shall be presumed to be done by his command, and she shall be excused. 3 *Inst.* 310. See title *Baron and Feme VII.*

If a man's horse be going into the ground of another, and he takes it *fellet animo*, not as damage-feasant, it is no finding, but *felony*. But if A's sheep stray into the flock of B. and he drives the same along with his flock, or by mistake shears them, this is not a *felony*; though if he knew them to be another person's, and marks them with his mark, is an evidence of *felony*. 1 *Hale's Hist. P. C.* 506.

Where one steals another's goods, and a third person feloniously takes them from him; he is a *felon* as to both the others. And when there is a pretence of title to things unlawfully taken, it may be only a trick to colour *felony*; and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it. 1 *H. P. C.* 507, 509. If a person to whom goods are delivered on a pretended buying them, runs away with them, it is *felony*; and a guest stealing plate set before him at an inn, &c. is *felony*; also persons who have the charge of things, as a servant of a chamber, &c. may be guilty of *felony*; and the least removing of a thing in attempts of *felony*, is *felony*, though it be not carried off. 3 *Inst.* 308: *Kam.* 275.

But goods must not be of a base nature; such as dogs, &c. nor *feræ naturæ*, as deer, hares, &c. except they be made tame, when it will be *felony* to steal them. If any turkeys, geese, poultry, fish in a trunk, &c. are taken away, it is *felony*. 3 *Inst.* 309, 310. Stealing of tame peacocks, is *felony*; so of herons and young hawks in their nests: it is otherwise of pheasants, partridges, conies, &c. although they be so kept that they cannot escape; if they be not reclaimed, and known. *Jenk. test.* 204. As to cats, dogs, monkeys, and the like; though it be not *felony* to take them, trespass lies for them. *Jenk. ibid.*

FEME COVERT, A married woman; said to be covert *baron*. See title *Baron and Feme*.

FEME SOLE, *Fr.*] A woman alone, that is unmarried. *Feme Sole Marchant*; A married woman who by the custom of London trades on her own account, independent of her husband. See titles *Baron and Feme*; *London*.

FENCE, A hedge, ditch, or other inclosure of land for the better manurance and improvement of the same. And where a hedge, and ditch join together, in whole ground or side the hedge i. e. to the owner of that land belongs the keeping of the same hedge or fence, and the ditch adjoining to it on the other side, in repair and scoured. *Par. Offic.* 108. An action on the case or trespass lies, for not repairing of fences, whereby cattle come into the ground of another, and do damage. 1 *Salk.* 335. Also it is presentable in the Court Baron &c. By *Stat. 9 Geo. 3 c. 29*, destroying fences set up for inclosing commons is made *felony*, but within benefit of clergy. See this Dist. titles *Common*; *Inclosures*.

FENCE-

FENCE MONTH, *mensis faneationis, mensis prohibitionis, or mensis vetitui.*] Is a month wherein female deer in forests, &c. do *fatari*, and therefore it is unlawful to hunt in *for* during that time; which begins fifteen days before *Midsummer*, and ends fifteen days after it, being in all thirty days. *Manso. part 2. cap. 13: Stat. 20 Car. 2. cap. 3.* Some ancient foresters call this month the *defence month*, because then the deer are to be defended from being disturbed, and the interruptions of fear and danger; as there are certain *defence-months* for fish, particularly salmon, as appears, by the *Stat. Wexim. 2. cap. 4.* Serjeant *Fleetwood* saith, that the *fence-month* hath been always kept with watch and ward, in every bulliwick throughout the whole forest, since the time of *Cnutus*. *Fleetwood's Forest Laws, p. 5.*

FENGELD, Sax.] A tax or imposition, exacted for the repelling of enemies. *MS. Antiq.*

FENS, paludes.] Low marshes, grounds, or lakes for water; for the draining whereof in this kingdom several statutes have been enacted, which are chiefly local; and of which the following abridgments are retained as a specimen.

The statutes 4 Jac. 1. c. 8, 13, make provision for draining and securing from inundation the drowned grounds and marshes of *Lejasses* and *Fants* in *Kent*; and the fens and low grounds in the *Isle of Ely*. The St. 15 Car. 2. cap. 17, appoints *William Earl of Bedford*, and other adventurers, a corporation, for the draining of *Bulford Level* in *Bedfordshire*, consisting of a governor, bailiffs, and conservators, &c. who have power to lay and levy taxes within the great level of the *fens*; and also to erect works within the same, for carrying the water to the sea, making satisfaction to the owners of lands for injury received; throwing down any of which works, incurs treble damages, &c.

By St. 16 & 17 Car. 2. c. 11, *Draining fens, &c.* in *Lincolnshire*, are to be drained from water; and *Edward Earl of Manchester*, and several others are declared undertakers thereof, on certain trusts, with power to erect banks, bridges, drains, locks, sluices, &c. for recovery of the said *fens*; and assessees of lands held by the adventurers under the trustees, may hold assemblies for making of bye laws, for the management of the works of draining; they may charge the owner of the lands by an acre tax, &c. and on default of payment, sell the defaulter's lands, &c.

The St. 11 Geo. 2. c. 34, ordains that commissioners shall be appointed, for effectually draining and preserving of the *fens* in the *Isle of Ely* in *Cambridgeshire*; who are authorized to make drains, dams, &c. and proper works thereof; and the said commissioners may charge proprietors with a proportionable acre-tax viz. for *Waterden Fen*, at the rate of 5 s. and *Redmon, Cavendish Fen*, and the *Watts*, at 2 s. an acre by the year, for four years; and afterwards at an yearly rate, not exceeding 1 s. 6 d. per acre; they may likewise borrow money for maintaining and effecting the works, by assigning over the duties: persons obstructing the draining to forfeit 100 l. and if any person shall burn any of the engines erected, he shall be imprisoned three years; and being convicted again of the like offence, to be guilty of felony. And for raising money, for draining and future preservation of *Derping fens*, a rate of 20 s. an acre is to be paid, by all the taxable land owners, according to agreement of the proprietors; levied by distress of goods, or sale of defaulter's

lands; which may be also mortgaged to raise the money &c. by 11 Geo. 2. c. 35.

By the Stat. 21 Geo. 2. c. 18, commissioners are appointed for draining and preserving certain *fen lands* in the several parishes of *Mancey, Upwell, Walney, Downham, Witcham*, and in a certain extra-parochial place in *Byal Fen*, within the isle of *Ely*, and county of *Cambridge*, who may make an assessment of 1 s. 6 d. per acre yearly, on which they may borrow money, with like powers, authorities and directions as in Stat. 11 Geo. 2. cap. 34.

By Stat. 27 Geo. 2. c. 19, Any person convicted of maliciously cutting or destroying any bank, mill, engine, flood-gate or sluice, for draining the lands in *Bedford level* shall be guilty of felony without benefit of clergy. By Stats. 11 Geo. 2. c. 34: 14 Geo. 2. c. 24: 21 Geo. 2. c. 18, the second offence in setting fire to engines for draining the fens mentioned in those acts is also made felony without benefit of clergy.

By Stat. 22 H. 8. c. 11, cutting down and destroying the dikes in *Norfolk* and *Ely* is made felony.—And by Stat. 10 Geo. 2. c. 32, removing the materials of sea walls or banks incurs a forfeiture of 20 l.

See further titles *Rivers: Sea-Banks. Poulth.*

FEOD OR FEUD.] See title *Tenure*, I. 1.

FEODAL, feodalis, vel feudalis.] Of or belonging to the feud or *fee*. Stat. 12 Car. 2. cap. 24.

FEODALITY, Fealty. See title *Fealty; Tenures*, I. 6.

FEODARY, OR FEUDARY, feudatarius.] An officer of the court of *wards*, appointed by the master of that court by virtue of the statute 32 Hen 8. c. 26; whose business it was to be present with the *eschator* in every county at the finding of offices of lands, and to give in evidence for the King as well concerning the value as the tenure; and his office was also to survey the lands of the ward, after the office found, and to rate it. He did likewise assign the King's widows their dowers; and receive all the rents of wards, lands within his circuit, which he answered to the receiver of the court. This office was wholly taken away by the operation of statute 12 Car. 2. cap. 24, abolishing tenures.

FEODATARY OR FEUDATARY, The tenant who held his estate by *feodal service*; and grantees, to whom lands in *feud* or *fee* were granted by a superior lord, were sometimes called *homagers*; and in some writings are termed *vassals, feuds* and *feodataries*. See title *Tenures*, I.

FEODUM, See FEUD.

FEODUM MILITIS, A knight's *fee*: *feodum laicum*, a lay *fee*, or land held in *fee* of a lay lord. *Kennet's Gloss.* See title *Finds*.

FEOFFMENT, Feoffamentum, from the verb *feoffare; donatio feudi.*] A gift or grant of any manors, messuages, lands or tenements, to another in *fee*, to him and his heirs for ever, by the delivery of seisin and possession of the thing given or granted.—In every feoffment, the giver or grantor is called the *feoffor*, and he that receives by virtue thereof, is the *feoffee*. *Littleton* says, the proper difference between a *feoffor* and a *donor*, is, that the one gives in *fee-simple*, the other in *fee-tail*. *Litt. lib. 1. cap. 6.*

Blackstone, (2 *Comm.* 399,) defines feoffment to be the gift of any corporeal hereditament to another. The deed of feoffment is our most ancient conveyance of lands; and in records we often find *sees* given to knights under the phrases of *de veteri feoffamento*, and *de novo feoffamento*; the first whereof were such lands as were given or granted by

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by King Henry I. And the others, such as were granted after the death of the said King, since the beginning of the reign of Henry II. At Common-law the usual conveyance was by feoffment, to which delivery (shortly called livery) and seisin were necessary, the possession being thereby given to the feoffee; but if livery and seisin could not be made, by reason there was a tenant in possession, the reversion was granted, and the particular tenant attorned. *Co. Lit.* 9. 49. A feoffment is said, in some respects, to excel the conveyance by fine and recovery, it clearing all disseisins, abatements, intrusions, and other wrongful estates, which no other conveyance doth: and for that it is so solemnly and publicly made, it has been of all other conveyances the most observed. *W. & A. Symb.* 235: *Plowd.* 554. See this Dict. titles *Conveyance*; *Deed*; and 2 *Comm.* c. 20: *Shep. Touchst.* c. 9. and the notes to the 8vo edition 1791.

This conveyance is now but very little used; except where no consideration passes, as in case of trustees of lands for a corporation, &c. It is still however a formal, valid, and effectual mode of conveyance: but has been of late years almost entirely superseded by the conveyance by *Lease and Release*. See this Dict. under that title; as also titles *Bargain and Sale*; *Conveyance*; *Deed*.

It will be found useful to consider the learning relating to feoffments according to the following division.

I *Of what Things a Feoffment may be made.*

II *Who may make a Feoffment, and how it is to be made.*

III. *Of the different Kinds of Livery; with their Effects and Operations.*

I. A Feoffment may be of a messuage, land, meadow, pasture, or other corporeal hereditaments, and of a moiety, third, or fourth part of it; that lie in livery.

So a feoffment may be made of lands, in which a man has no fixed estate; as, if he has twelve acres to be annually assigned in such a meadow; and livery in any acre, which he has at the time of the feoffment, is sufficient. *Co. Lit.* 4 a; 48 b; 2 *Roll.* 10 l 40—50.

So, if a feoffment be of fifty acres towards the North in such a moor, which contains 100 acres, livery in any of them is sufficient. 2 *Roll.* 11 l 5: *Dy.* 372 b.

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor; and the deed ought to comprehend both; and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. *Co. L.* 48 b.

But a feoffment cannot be made of a thing of which livery cannot be given; as, of incorporeal inheritances, *rent, advowson, common, &c.* 2 *Roll.* 1 l. 20. Though it be an advowson, &c. in gross. *Cont.* 11 H. 6. 4: *Acc.* 2 *Roll.* 1 l. 21.

So a feoffment of lands, which are uncertain till a future act, is void; for livery does not operate *in futuro*: as, if A. agrees by indenture to convey 20 l. *per annum* in land to such an use, and 20 s. *per annum* to such an use, and makes a feoffment of all his lands to the uses in the indenture; it will be void for all but that where livery was made, it not being ascertained which shall be to one use, and which to the other. *R.* 1 *Roll.* 187.

In a deed of feoffment, there must be a good feoffor, that is, one able to grant the thing conveyed by the deed; a feoffee capable to take it; and a thing grantable, and

granted in the manner the law requireth. *Co. Lit.* 42; 49; 190.

See further of what things a feoffment may be made *Com. Dig.* Feoffment (A. 2) *Vin. Ab.* Feoffment (C.)

II. If a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession; the same law of an idiot; and the reason is, because the investiture being made before the *pauca curia*, their solemn attestation could not be defeated by the person himself, because it is presumed they are competent judges of the ability of the feoffor to make such feoffment. 2 *Roll. Abr.* 22 *Co. Lit.* 247: 4 *Co.* 125 a: *Show. Par. Cases* 153. and see title *Idiots and Lunatics*; 3 and *post.* II.

But if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of *dam fut infra aetatem*; yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. 4 *Co.* 125: 2 *Roll. Abr.* 2: 8 *Co.* 42, 43: *Whittingham's case*.

Yet if an infant makes a feoffment, and a letter of attorney to make livery, that is void; so if a person *non compos* makes a surrender or release, this is void in law; so if he makes a letter of attorney to give livery; but the heir at law after the death of the person of *non-sane* memory, or idiot, may avoid his feoffment; and so may the King upon an office found of his lunacy during his life. 8 *Co.* 45: *Co. Lit.* 247 a: 4 *Co.* 125 a: 2 *Roll. Abr.* 2: *Show. Par. Cases* 153.

There must be livery of seisin in all feoffments, and gifts, &c. where a corporeal inheritance or freehold doth pass; and without livery, the deed is no feoffment, gift or demise. *Lit.* 59: 8 *Rep.* 82. But a freehold may pass without livery, by the statute 27 H. 8, c. 10. By force of which statute, a feoffment to the use of the feoffor, feoffee, &c. supplies the place of livery and seisin. *Wood's Inst.* 239.

But a feoffment may not be of such things whereof livery and seisin may not be made; for no deed of feoffment is good to pass an estate without livery of seisin; and if either of the parties die before livery, the feoffment is void. *Plowd.* 214, 219. Though where a feme feoffor made a feoffment of lands with livery in view, and then married the feoffee before the livery was executed by actual entry; it was adjudged the livery might be executed after marriage, the feoffee having not only an authority to enter, but an interest passed by the livery in view, and the woman did all on her part to be done, 1 *Pent.* 186.

A man may either give or receive livery *in deed* by letter of attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties to the contract. *Co. Lit.* 52: 2 *Roll. Abr.* 8.

But such delegation, or authority to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission, to represent the parties

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ties that are to give or take the livery, and whether the authority was pursued. *Co. Lit.* 48 *b.* 52 *a.*

If a man be disseised, and makes a deed of feoffment, and a letter of attorney to enter and take possession of the land, and afterwards to make livery, according to the form of the charter, it will be a good feoffment, though he was out of possession at the time of the deed made: for the feoffment takes effect by the livery, and not by the deed. *Co. Lit.* 48, 52.

A feoffment being a Common-law conveyance, and executed by livery, makes a transmutation of estate; but a conveyance on the statute of uses, as a covenant to stand seised, &c. makes only a transmutation of possession, and not of estate. 2 *Lev.* 77: 1 *Cent.* 378. A feoffment to the use of *A.* for life, the remainder to *B.* If *A.* refuses to take the estate, *B.* shall take presently, because the whole estate is out of the feoffor by livery; but if it had been by covenant to stand seised, he should not have taken till after the death of *A.* but it would rest in the covenantor, who shall have the use in the mean time. 2 *Lev.* 77: 1 *Leon. Ca.* 279 Before the *Stat. Westm.* 1, if a man had made feoffment in fee, without declaring any use, it should have been to the use of the feoffee; though now by that statute, where no consideration or declaration of use is expressed, it shall go to the feoffor himself. 2 *Leon.* 15, 16. If I convey lands by feoffment, which I have on the part of the mother, to *S.* and his heirs, without consideration; the use will be void, and the land shall return again to me and my heirs on the part of the mother; yet if I declare the use to me and my heirs, or upon such feoffment reserve a rent in like manner, it shall go to my heirs at the Common-law, it being a new thing divided from the land. *Hob.* 31: *Co. Lit.* 13, 231: 1 *Rep.* 100: *Dyer* 134. Where a man makes a feoffment, without any consideration; by that the estate and possession passes, but not the use, which shall descend to his heir. 1 *Leon.* 182.

A feoffment in fee is made to the use of such persons, and for such estates, as the feoffor shall appoint by his will, or to the use of his last will; by operation of law the use vests in the feoffor, and he is seised of a qualified fee until he makes his will, and declares the uses; and after the will is made, it is only directory, for nothing passes by it but all by the feoffment. 6 *Rep.* 18: *Moor* 567. A feoffment in fee, upon condition, &c. was inrolled, but no livery made; and it was adjudged no good feoffment, but the inrollment shall conclude the person to say that it was not his deed. *Poph.* 6: 2 *Nelf. Abr.* 844. If a bargain and sale of lands be not inrolled, and the bargainor deliver livery and seisin of the lands *secundum formam chartæ*, &c. it has been held a good feoffment. 2 *And.* 68.

A feoffment in fee made upon condition not to alien, the condition is void; because it is repugnant to the estate; but if livery is had, the feoffment will be good against the feoffor: and a bond with condition that the feoffee shall not alien, is said to be good. *Co. Lit.* 206: *Cro. Jac.* 596. If a man makes a feoffment of lands on condition that the feoffee shall give the lands to the feoffor, and his wife in special tail, remainder to the heirs of the feoffor; and he dies before such gift is made, the feoffee ought to make it as near the intent of the condition as may be, viz. to the wife without impeachment of waste, remainder to the heirs of the body of her husband, on her body begotten, and remainder to the husband's right heirs. In

case the feoffor, and his wife both die, the feoffee then should make the estate to the issue, and heirs of the body of his father and mother begotten, remainder to the right heirs of the husband or father. *Co. Lit.* 219, 220.

Tenant in tail makes a feoffment in fee; the inheritance of the tail is not given to the feoffee by the feoffment, nor is he thereby tenant in tail; for none shall be tenant in tail but he only who is comprehended in the gift made by the donor. But it gives away all the immediate estate the feoffor had. *Plowd.* 562: *Hob.* 335. If lessee for life, and the reversioner in fee, make a feoffment in fee by deed, each gives his estate; the lessee his by livery, and the fee from him in remainder. 6 *Rep.* 15: *Lil. Abr.* 609. A feoffment was made *habendum* to the feoffee and his heirs, after the death of the feoffor, and livery was made: yet it was held to be a void feoffment, for an estate of freehold in lands cannot begin at a day to come: but where a lessor made a lease for lives, and granted the reversion to another for life, whose estate for life was to begin after the death of the survivor of the other lessees for life, this was adjudged a good estate in reversion for life. *Hob.* 171: 1 *Nelf. Abr.* 846.

If the husband alone make a feoffment of his wife's land, or of both their lands, his wife being on the land and disagreeing to it; this will be good against all persons but the wife: also so it is, if one jointenant make a deed of feoffment of the whole land his companion being then upon it; or if a man disseise me of my lands, and then enfeoff another thereof, whilst I am upon the land, &c. *Park.* § 219, 220.

Every gift or feoffment of lands made by fraud or maintenance, shall be void; and the disseisee, notwithstanding such alienation, shall recover against the first disseisor his land and double damages; provided he commence his suit in a year after the disseisin, and that the feoffor be pignor of the profits. *Stat.* 1 *R.* 2. c. 9. See *Stat.* 11 *H.* 6. c. 3.

See more fully who may make a feoffment and to whom, 4 *Co.* 125: 8 *Co.* 42 *b.* *Bac. Abr.* Feoffment, (D): *Fin. Abr.* Feoffment (E).

III. Livery may be by deed; or in law; which latter is also called *livery av thū viewu*.

The livery in deed, is the actual tradition of the land, and is made either by the delivery of a branch of a tree or a turf of the land, or some other thing, in the name of all the lands and tenements contained in the deed; and it may be made by words only without the delivery of any thing; as if the feoffor being upon the land, or at the door of the house, says to the feoffee, *I am content that you should enjoy this land according to the deed; or enter into this house or land, and enjoy it according to the deed*; this is a good livery to pass the freehold, because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor on the land, are a sufficient *inducium* to the people present, to determine in whom the freehold resides during the extent of the limitation; besides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff. *Co. Lit.* 48 *a.*: 9 *Co.* 137 *b.* *Thorowgood's case.* 6 *Co.* 26. *Sharp's case.* 2 *Rob. Abr.* 7. And see *Cro. Jac.* 80. which seems *contra*.

But if a man without any charter, being in his house, says, *I here demise you this house, as long as I live, paying 20*l.* per annum*, this passes no freehold but only an estate

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estate at will; because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed; but bare words of limitation, without some acts or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without some other act, or word to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; but besides the charter of feoffment, there must be some act or words to deliver over the possession, before the feoffee can enjoy it pursuant to the charter. 6 Co. 26: 2 Rol. Abr. 7: Co. Lit. 48: Cro. Eliz. 482: 9 Co. 138: Moor, pl. 632.

Livery in deed is thus performed — The feoffor, lessor, or his attorney, (for this may be as effectually done by deputy or attorney as by the principals themselves in person,) come to the land, or to the house; and there in the presence of witnesses declare the contents of the feoffment or lease on which livery is to be made: and then the feoffor, if it be of land doth deliver to the feoffee, all other persons being out of the ground, a clod or turf or a twig or bough there growing with words to this effect, "I deliver these to you in the name of feisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone and shut the door, and then open it, and let in the others. 1 Inst. 48. Wils. Synb. 251.

If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of feisin of any parcel, in the name of the rest sufficeth for all; but if they be in several counties there must be as many liversies as there are counties, Lit. § 414. Also if the lands be out on lease, though all be in the same county, there must be as many liversies as there are tenants; because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest. Dy. 18.

In all these cases it is prudent and usual to indorse the livery of feisin on the back of the deed; specifying the manner, place, and time, of making it, together with the names of the witnesses. Co. Lit. 48.

The livery *within view*, or the livery *in law*, is, when the feoffor is not actually on the land, or in the house, but being in sight of it says to the feoffee, *I give you yonder house, or land, go and enter into the same, and take possession of it accordingly*; this sort of livery seems to have been made at first only at the court barons, which were antiently held *sub dio*, (in the open air) in some open part of the manor, from whence a general survey or view might have been taken of the whole manor, and the *pares curie* easily distinguished that part which was then to be transferred. Pollex. 47. This livery in law cannot be given or received by attorney, but only by the parties themselves, 1 Inst. 48.

This latter sort of livery also is not perfect to carry the freehold, till an *actual entry* made by the feoffee, because the possession is not actually delivered to him, but only a licence or power given him by the feoffor to take possession of it, and therefore, if either the feoffor or feoffee die before livery, and entry made by the feoffee, the

livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and consequently no person can take possession of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he an authority from the feoffor to take possession; besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor, which he cannot do, since the estate never vested in his ancestor. Co. Lit. 48 b: 2 Rol. Abr. 3, 7: 1 Vent. 186: Moor 85: Pollex. 48.

The livery *within view* may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court baron, in the presence of *pares curie*; and these courts being held, *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture, though the lands were in a different county, for notwithstanding that, they might have been part of the same manor, for which the court was held. Co. Lit. 48 b.

This ceremony was first instituted, that the *pares* of the county might, upon any dispute relating to the freehold, determine in whom it was lodged, and from thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence, or notoriety of the change of the freehold, if after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expence in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another, by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because antiently they were under the power of the freeholder, who by recovery might destroy them; and now, unless such leases are made upon good consideration, they are fraudulent against a purchaser; and it is not to be presumed that leases at great distances should be purchased for value. Cro. Eliz. 451: 2 Vent. 204: Co. Lit. 217: 5 Co. 94 b.

Hence, by the way, we may account why a freehold in reversion or remainder cannot be granted *in futuro*, though there no livery is necessary to pass it; as where *A.* is tenant for life, remainder to *B.* in fee; *A.* makes a lease for years to *C.* and afterwards grants the land to

D. habend⁹ from *Michaelmas* next ensuing, for life; this grant to *D.* was adjudged void, though *C.* attorned to it after *Michaelmas*, because such future grants create an uncertainty of the freehold; and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and who was answerable to the lord for the services, it were unreasonable to permit him by any act of his own, to prevent or delay the prosecution of their right. *Cro. Eliz.* 451: 2 *Vent.* 204: *Co. Lit.* 217: 5 *Co. 94 b*: 2 *Co. 55*, *Buckley's case*: 2 *And.* 29: *Moor* 423: *Cro. Eliz.* 450, 585: *Hob.* 170, 171: 5 *Co. 94*: 1 *Rel. Rep.* 261.

In what cases livery may be made within the view, See *Vin. Abr. Feoffment (M)*.—And further as to the different kinds of livery, *Bac. Abr. Feoffment (A)*: *Com. Dig. Feoffment (B)*: *Vin. Abr. Feoffment (E. F.)*: And this *Dict. tit. Livery of Seisin*.

A deed of feoffment is to made by the words, *Have granted, bargain'd, enfeoffed, &c.*

FERÆ NATURÆ. Beasts and birds that are wild, in opposition to the tame; such as hares, foxes, wild geese, and the like, wherein no man may claim a property. Unless under particular circumstances, as where they are confined, or made tame, &c. See titles *Game*; *Property*.

FERDFARE, from the Sax. *fy d and fare iter*.] *Significat quietantiam eunai in exercitum. Fleta, lib. 1. c. 47.*

FERDWIT, Sax. *ferd exercitus, & witte pœna*.] Was used for being quit of manslaughter, committed in the army. *Fleta, lib. 1.*—It is rather a fine imposed on persons for not going forth in a military expedition; to which duty all persons, who held land, were in necessity obliged: and a neglect or omission of this common service to the public, was punished with a pecuniary mulct called the *ferdwite*. *Cowel*.

FERIAL DAYS, *dies feriales, feræ*] According to the *Latin* dictionary are holy days; but in the *Stat.* 27 *H. 6. c. 3*, *Ferial* days are taken for working days; all the days of the week, except *Sunday*; the week days as distinguished from *Sunday*, the profane from the sacred, were called *dies feriales*, by a charter dat. 28 *Mart.* 1448.—*Ex Cartular. Eccl. Elyensis MS.*

FERLINGATA (FERLINGUS AND FERDLINGUS) TERRÆ A quarter or fourth part of a yardland.—See titles *Fardel of Land*, and *Fardingdeal*.

FERM, firma] A house and land let by lease, &c. See title *Farm*.

FERMARY, from the Sax. *ferme, victus*] Is an hospital; and we read of friars of the *fimury*.

FERMISONA, 'The winter season of killing deer; as *tempus pinguedinis* is the summer season.

FERNIGO, A piece of waste ground where *fern* grows. *Cartular. Abbat. Glasstow. MS.*

FERRAMENTUM, ferramenta.] The iron tools or instruments of a mill—*Et reparare ferramenta ad tres carrucas, i. e.* the iron work of three ploughs. *Lib. Nig. Herts.*

FERRANDUS, An iron colour particularly applied to horses, which we at this time call an *non grey*.

FERRY, A liberty by prescription, or the King's grant, to have a boat for passage upon a river, for carriage of horses and men for reasonable toll: it is usually to cross a large river. *Terms de Ley*. A ferry is no more than a common highway; and no action will lie for one's being disturbed in his passage, unless he alledge some particular damage, &c. 3 *Mod. Rep.* 294.

A Ferry is in respect of the landing-place, and not of the water, the water may be to one, and the ferry to another; as it is of *ferries* on the *T Thames*, where the *ferry* in some places belongs to the archbishop of *Canterbury*, while the mayor of *London* has the interest of the water; and in every *ferry*, the land on both sides of the water ought to belong to the owner of the *ferry*, or otherwise he cannot land on the other part. *Sauil* 11. And every *ferry* ought to have expert and able ferrymen, and to have present passage, and reasonable payment for the passage. And it is requisite to have one, who has property in the *ferry*, and not to allow every fisherman to carry, and re-carry at their pleasure, for divers inconveniences; and especially when a place is between the divisions of two counties, any felon may be conveyed from one county to another, secretly, without any notice. *Sav.* 14.

A ferryman if it be on salt water, ought to be privileged from being pressed as a soldier, or otherwise. *Sauil* 11, 14.

Owner of a ferry cannot suppress that, and put up a bridge in its place without licence, and writ of *ad quod damnum*; per *Holt Ch. J. Show.* 243, 257: *Cart.* 193: 1 *Salk.* 12.

If a ferry be granted at this day, he that accepts such grant is bound to keep a boat for the public good; per *Holt Ch. J. Show.* 257.

Custom for the inhabitants to be discharged of toll, may have a reasonable beginning by agreement, as that the inhabitants of the town might be at the charge of procuring the grant, and in consideration thereof, one man to find the boat, and take toll; and the inhabitants to pay none. *Show* 257.

A common ferry was for all passengers paying toll, but the inhabitants of *A.* were toll-free. An inhabitant of *A.* may bring an action for taking toll, but not for neglecting to keep up the ferry; because the former is a private right, but the latter, a public. But he cannot maintain an action for not passing; for so, any other subject might bring an action, which would be endless; but the taking toll was a special damage, and without special damage he can only indict, or bring information. 1 *Salk.* 12.

The not keeping up a ferry, has been held to be indictable. See title *Bridge*.

FERSPEKEN, To speak suddenly.—*Leg. H. 1. c. 61.*

FASTA IN CAPPI, Were some grand holy days, on which the whole *choirs* and *cathedrals* wore caps. *Vita. Abbat. S. Alban.* p. 80, 83.

FESTINGMEN. The Sax. *Eftinman* signifies a surety or pledge; and to be free of *festingmen*, was probably to be free of *frank-pledge*, and not bound for any man's forth-coming, who should transgress the law. *Mon. Ang. tom.* 1. p. 123.

FESTING PENNY, Earnest given to servants when hired or retained in service, so called in some *North* parts of *England*, from the Sax. *Fistnan*, to *fasten*, or confirm.

FESTUM, A feast. *Festum S. Michaelis*, the feast of *St. Michael*, &c.

FESTUM STULTORUM, The feast of fools. See *Caput anni*.

FEUD, (Dowry) See *Dowry Feud*.

FEUDAL AND FEUDARY, See titles *Feodal* and *Feudary*.

FEUDOTE, A recompence for engaging in a *feud*, and the damages consequent; it having been the custom in ancient times, for all the kindred to engage in their kinsman's quarrel. *Sax. Dict.*

FEUDS, See title *Tenures* I.

FIAT, A short order or warrant of some Judge for making out and allowing certain processes, &c. If a *certiorari* be taken out in vacation, and tested of the precedent term, the *fiat* for it must be signed by a judge of the court, some time before the effoin-day of the subsequent term, otherwise it will be irregular: but it is said there is no need for a judge to sign the writ of *certiorari* itself; but only where it is required by statute. 1 *Salk.* 150. See title *Certiorari*.

FIAT JUSTITIA. On a petition to the King, for his warrant to bring a writ of *error in parliament*, he writes on the top of the petition *fiat justitia*, and then the writ of error is made out, &c. And when the King is petitioned to redress a wrong, he indorses upon the petition, "Let right be done the party." *Dyer* 385: *Stamf. Prærog. Reg.* 22.

FICTION OF LAW, *Fictio juris*.] Is allowed of in several cases: but it must be framed, according to the rules of law; not what is imaginable in the conceptions of man; and there ought to be equity and possibility in every legal *fiction*. There are many of these *fictions* in the civil law; and by some civilians, it is said to be an assumption of law upon an untruth, for a truth in something possible to be done, but not done. *Godolphin & Barr.* The seisin of the conusee in a fine is but a *fiction in our law*; it being an invented form of conveyance only. 1 *Lil. Abr.* 610. And a common recovery is *fictio juris*, a formal act or device by consent, where a man is desirous to cut off an estate-tail, remainders, &c. 10 *Rep.* 42.

By *fiction of law*, a bond made beyond sea, may be pleaded to be made in the place where made, *to wit*, in *Uxington* in the county of *Middlesex*, &c. in order to try the same here; without which it cannot be done. *Co. Lit.* 261. And so it is in some other cases; but the law ought not to be satisfied with *fictions*, where it may be otherwise really satisfied; and *fictions in law* shall not be carried farther than the reasons which introduce them necessarily require. 1 *Lil. Abr.* 610: 2 *Harw.* 320.

FIDEMENTIRI, Is when a tenant doth not keep that *fealty* which he hath sworn to the lord. *Leg. H.* 1. c. 53.

FIEF, which we call *fee*, is in other countries the contrary to chattels: in *Germany*, certain districts or territories are called *fiefs*; where there are *fiefs of the empire*. See this *Dict.* title *Fee*; *Tenure*.

FIERI FACIAS, A judicial writ of execution, that lies where judgment is had for debt or damages recovered in the King's courts; by which writ the sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant, &c. *Old Nat. Br.* 152. See this *Dict.* title *Execution*.

This writ, though mentioned in the statute *W. 2.* 13 *E. c.* 18, is a writ of execution at Common-law, and is called a *fieri facias*, because the words of the writ, directed to the sheriff, are *quod fieri facias de tenis & catallis*, &c. and from these words the writ takes its denomination. *Co. Litt.* 290 *b.*

This writ is to be sued out within a year and a day after judgment; or the judgment must be revived by *scire facias*: but if a *fieri facias* sued in time, be not executed,

a second *fieri facias*, or *elegit* may be sued out; and it is said some years after, without a *scire facias*, provided continuances are entered from the first *fi. fa.* which it is also held may be entered after the second *fi. fa.* taken out, unless a rule is made that proceedings shall stay, &c. *Sid.* 59: 2 *Nels. Abr.* 776. If a man recover debt against *A. B.* and levy part of it by *fieri facias*, and this writ is returned; yet he may take the body in execution by *capias* for the rest of the debt. *Rel. Abr.* 904. The sheriff on a *fieri facias* is to do his best endeavours to levy the money upon the goods and chattels of the defendant; and for that purpose to inquire after his goods, &c. And the plaintiff may inquire and search if he can find any, and give notice thereof to the sheriff, who *ex officio* is to take and sell them if he can, or if not, by a writ of *venditioni exponas*. 2 *Shep. Abr.* 111.

There may be a *testatum fieri facias* into another county, if the defendant hath not goods enough in the county where the action is laid to satisfy the execution; and the *fieri facias* for the ground of the *testatum*, may be returned of course by the attornies, as originals are. 2 *Salk.* 589. If all the money is not levied on a *fieri facias*, the writ must be returned before a second execution can be issued; because it is to be grounded on the first writ, by reciting that all the money was not levied. 1 *Salk.* 318.

Where the sheriff sells goods which he levied by *fieri facias*, and doth not pay the money, action of debt will lie against him; for the defendant is discharged as to the plaintiff, and the sheriff is now become his debtor in law; and if the sheriff die after he hath levied the debt, the like action will lie against his executors, as it is a duty when levied. *March. Rep.* 13: *Cro. Car.* 387.

If a sheriff that hath seized goods by *fieri facias* is going out of his office, he must deliver them to the new sheriff, and return his writ executed *pro tanto*; and he ought not to deliver them to the owner, by reason the writ of execution is warranted by record, and therefore the discharge thereof must appear by record. *Telv.* 44. Upon a *fieri facias* the sheriff returned, that he had levied goods *ad valentiam* of the debt; the return being filed, a motion was made that he might bring in the money, which not being done, an attachment was granted, and then the sheriff appeared and prayed to amend the return, for that the goods were damaged by lying, and he could not get buyers; but it was adjudged that the return shall not be altered, *for he might have returned this at first by saying* *excuse*; and having returned that he had levied goods *ad valentiam*, he shall pay the money. *Sid.* 407.

The sheriff cannot deliver the goods by him taken in execution to the plaintiff, in satisfaction of his debt; because his authority is *to sell* the goods. *Lut.* 589: 1 *Lil. Abr.* 611. And if a sheriff sells the goods taken by *fieri facias* at under-price, the sale is good, and the defendant can have no remedy; though where there appears to be covin between the sheriff and the buyer, the owner shall have his action upon the case. *Kilw.* 64: 1 *Salk.* 28. On a *fieri facias* the sheriff has power to take any thing but wearing cloaths; and if the defendant hath two gowns, &c. it is said he may sell one. If the sheriff executes a writ of *fieri facias*, he may afterwards return *nihil bona*, if there appear a prerogative writ; or, on better information, that the goods taken were not the defendant's. *Comb.* 356, 452.

By the seizure of the goods, the sheriff hath a property in them; but goods of a stranger, &c. in the possession of the defendant shall not be seized in execution; for the sheriff at his peril must take notice whose goods they are: though, if the sheriff inquires by a jury, where the property is lodged, and it is found that they are the defendant's goods, when they are not, this will indemnify the sheriff. *Dalt. Sher.* 60: *West's Inst.* 608.

The sheriff cannot break open the door of an house to execute a *feri facias* upon the goods of the owner or occupier; but a man's house shall be a protection for his own goods only, and not for the goods of another. 5 *Rep.* 91: 2 *Nels. Abr.* 775. If the defendant is a beneficed clergyman, and the sheriff returns *quod est clericus beneficiatus*, &c. a writ shall go to the bishop of the diocese to levy the debt *de bonis ecclesiasticis*, who thereupon sends forth a sequestration of the profits of the clerk's benefice, directed to the churchwarden, &c. But this writ of sequestration must be renewed every Term. 2 *Inst.* 4, 472, 627.

By virtue of a *feri facias* a term for years may be sold, as well as any other goods, and without an inquest or jury: afo corn growing may be sold. 8 *Rep.* 96: 1 *Rel. Abr.* 892. And if the sheriff on a *feri facias*, &c. selleth a term for years, and after that the judgment is reversed; the term shall not be restored, but the money for which it is sold. 4 *Rep.* 141.

But where a term is delivered to the plaintiff upon an *elegit*, and then the *elegit* is reversed, restitution shall be of the term. *Co. Jac.* 245. When upon a *feri facias* the sheriff sells a term; reciting it falsely, as to its commencement and ending, &c. the sale is void, because there is no such term, yet if he recites it generally, and being of divers years yet to come, sells all the interest which the defendant had in the land, the sale will be good. 4 *Rep.* 74.

If an execution is sued on a *fi. fa.* and the defendant dies before it is executed, it may be served on the defendant's goods in the hands of his executor or administrator. *Co. Eliz.* 181. Two *feri facias*'s are delivered the same day to the sheriff against the same person; he is bound to execute that first, which was first delivered; and if he executes the last first, he must answer it to the party who brought the first, who may bring an action against him; but the execution shall stand good. 1 *Salk.* 330.

A man had a judgment for debt against another, and on a *fi. fa.* the sheriff took his goods in execution, but the plaintiff suffered the goods to remain in the hands of the debtor, and would not let the sheriff proceed any further: A. B. having also a judgment against this debtor, on a *feri facias*, seized upon the same goods, and it was held good, for the former was a fraudulent execution. 7 *Mod.* 37, 38.

On a writ of *feri facias* against one partner, the sheriff may take the goods of both; yet the vendee shall have only a moiety thereof in common with the other. *Comb.* 207. By the Common law, goods were bound from the day of the *teste* of the writ; but by *Stat.* 29 *Car.* 2. c. 3. *stat.* 16, they are bound only from the time of delivery thereof, &c. *Ibid.* See *Goldb.* 147. and further this Dict. titles *Sheriff*; *Extent*; *Execution*.

FIFTEENTHS, A tribute or imposition of money, antiently laid generally upon cities, boroughs, &c. through the whole realm; so called, because it amounted

to a *fifteenth part* of that which each city or town was valued at, or a *fifteenth* of every man's personal estate according to a reasonable valuation. And every town knew what was a *fifteenth part*, which was always the same; whereas a subsidy raised on every particular man's lands or goods, was adjudged uncertain; and in that regard the *fifteenth* seems to have been a rate formerly laid upon every town; according to the land, or circuit belonging to it. *Camd. Brit.* 171.

There are certain rates mentioned in *Domesday*, for levying this tribute yearly; but since, though the rate be certain, it is not to be levied but by parliament. By 31 *Ed.* 3. c. 13, a *fifteenth* was granted, for pardon, &c. The 7 *Ed.* 6. c. 4, granted a subsidy and two *fifteenths* by the temporality, &c. And in the 1, 5, &c. *Eliz.* and 1, 3, and 18 *Jac.* 1, *fifteenths* and tenths were granted for maintaining the wars, &c.—See *Co. ell.* 1 *Com.* 309; and this Dict. title *Taxes*.

FIGHTING AND QUARRELLING, Is prohibited by statute, in a church, or church-yard, &c. on pain of excommunication, and other corporal punishment. *Stat.* 5 & 6 *Ed.* 6. c. 4. See title *Church*.

FIGHTWITE, *See*] A mulct for fighting, or making a quarrel to the disturbance of the peace.

FIGURES, It was moved to quash an indictment, because the year of our Lord in the caption was in figures. But per *Hale*, Ch. J. the year of the King is enough. *Mod.* 78. *pl.* 40: *Mich.* 22 *Car.* 2. *Thon:* *Sid.* 40: *Ac.* 19. *Str.* 88: 2 *Lov.* 102.

The *Stat.* 6 *Geo.* 2. c. 14, Allows the expressing numbers by figures in all writs, &c. pleadings, rules, orders and judgments, &c. in courts of justice, as have been commonly used in the said courts, notwithstanding any thing in the *Stat.* 4 *Geo.* 2. c. 26. See titles *Pleading*; *Error*; *Amendment*.

FILACER, FILAZER or FILIZER, *Filizarus*, from Lat. *Filum*] An officer of the court of *Common Pleas*, so called, as he files those writs whereon he makes out process. There are fourteen of these *filazers* in their several divisions and counties, and they make forth all writs and processes upon original writs, issuing out of Chancery, as well real, as personal and mixed, returnable in that court: and in actions merely personal, where the defendants are returned summoned, they make out *pones* or attachments; which being returned and executed, if the defendant appears not, they make forth a *disfringas*, and so *ad infinitum*, or until he doth appear; if he be returned *nihil*, then process of *capias* infinite, &c. They enter all appearances and special bails, upon any process made by them: and make the first *seire facias* on special bails, writs of *habeas corpus*, *disfringas nuper vicecomitem vel ballivum*, and all *superfedas*'s upon special bail: in real actions, writs of view, of grand and petit *cape*, of *withernan*, &c. also writs of *adjournment* of 2 term, in case of public disturbance, &c.

And until an order of court, 14 *Jac.* 1, they entered declarations, imparlances and pleas, and made out writs of execution, and divers other judicial writs, after appearance: but that order limited their proceedings to all matters before appearance, and the *prothonotaries* to all after. The *filazers* of the *Common Pleas* have been officers of that court before the *Stat.* 10 *H.* 6. c. 4, wherein they are mentioned: and in the *King's Bench*, of later times, there have been *filazers*, who make out process upon
original

FILE

original writs returnable in that court, on actions in general.

FILE, Filicium. A thread, string or wire, upon which writs, and other exhibits in courts and offices are fastened or *filed*, for the more safe keeping and ready turning to the same. A *file* is a record of the court; and the *filings* of process of a court, makes it a record of it. 1 *Lit.* 112. An original writ may be *filed* after judgment given in the cause, if sued forth before; declarations, &c. are to be *filed*. and affidavits must be *filed*, some before read in court; and some presently when read in court. *Ibid.* 113. Before *filings* a record removed by *certiorari*, the justices of B. R. may refuse to receive it, if it appears to be for delay, &c. and remand it back for the expedition of justice: but if the *certiorari* be once *filed*, the proceedings below cannot be revived. An indictment, &c. cannot be amended after *filed*. See this Dict. titles *Certiorari*: *Amendment*.

FIELD-ALE or FILKDALE; A kind of drinking in the *field*, by bailiffs of hundreds; for which they gathered money of the inhabitants of the hundred to which they belonged: but it has been long since prohibited. *Bract*: 4 *Inst.* 307.

FILICULUM, A ferny ground.—*Co. Lit.* 4.

FILIOIUS, Is properly a little son; a godson.—*Dugd. H. man.* 179.

FILLUM AQUÆ, The thread or middle of the stream where a river parts two lordships: *Et habent istas buttas utique ad fillum aquæ predictæ.* *Mon. Angl.* tom. 1. f. 390. *Fille du Mer* the high tide of the sea. *Rot. Parl.* 11 H. 4. It is the middle of any river or stream which divides counties, townships, parishes, manors, liberties, &c.

FINDERS, Mentioned in several ancient statutes, seem to be the same with those which we now call *Searchers* who are employed for the discovery of goods imported, or exported, without paying custom. See title *Customs*.

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THE LAW on this subject, of itself very extensive, is also closely implicated with that of *Recoveries*.—A definition of both terms is therefore here given, with some idea of the distinct nature of those assurances.—It might perhaps have been eligible to have brought together the law on both those subjects, but that was, to the present editor, more desirable than practicable. See therefore this Dict. title *Recovery*, for what relates exclusively thereto.

A **FINE.** *Finis* or *Finalis Concordia*; from the words with which it begins; and also from its effect in putting a *final* end to all suits and contentions. A solemn amicable agreement or composition of a suit, (whether that suit be real or fictitious,) made between the demandant and tenant, with the consent of the judges; and enrolled among the records of the court, where the suit was commenced; by which agreement freehold property may be transferred, settled and limited. See *Cruise on Fines*, 1st edit. 4, 89, 92.

Shepherd says, sometimes it is taken for “a final agreement or conveyance upon record for the settling and securing of lands and tenements;” and so it is designated by some to be, “an acknowledgement, in the king’s court, of the land or other things to be his right that doth complain:” and by others “a covenant made between parties and recorded by the justices:” and by others “a friendly, real, and final agreement amongst parties, con-

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cerning any land, or rent, or other thing whereof any suit or writ is hanging between them in any court:” and by others more fully “an instrument of record of an agreement concerning lands, tenements, or hereditaments; duly made by the king’s licence, and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the justices of the Common Pleas or others thereunto authorised, and engrossed of record in the same court; to end all controversies thereof, both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time.” *Shep. Touchst.* c. 3; and the authorities there-cited.

The most distinguishable properties of a Fine are, 1. The extinguishing dormant titles by *barring strangers*; unless they claim within five years. 2. Barring the *issue in tail* immediately. [But not barring the remainders or reversions, which depend on the estate tail barred; except where the tenant in tail has the *immediate reversion* in fee in himself. See *Cruise on Fines*, 2d edit. 176; 1 *Show.* 370: 1 *Salk.* 338: 4 *Mod.* 1.] 3. Binding *Femes Coverts*, see *post.* IV.—These constitute the peculiar qualities on account of which a Fine is most usually, if not always, resorted to, as one of the most valuable of the *Common Assurances* of the realm: being now in fact a *substituted* proceeding to transfer or secure real property by a mode more efficacious than ordinary conveyances. 1 *Inst.* 121 a note 1, 2:—for which see, at full length, Mr. *Hargrave’s* excellent Abridgement of the History of Fines and their purposes.

Fines being agreements solemnly made in the king’s courts were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all who should not claim within a year and a day. See *Phoe.* 157. Hence we may probably date the origin and frequent use of *Fines* as feigned proceedings. But this puissance of a Fine was taken away by Stat. 34 E. 3 c. 16: and this statute continued in force till Stat. 1 R. 3. c. 7. and 4 H. 7. c. 24; which revived the ancient law, though with some change; proclamations being required to make Fines more notorious, and the time for claiming being enlarged, from a year and a day to five years. See *post.* I. The force of Fines on the rights of strangers being thus regulated it has ever since been a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist with a right of entry for 20 years; and with a right of action for a much longer time. 1 *Inst.* *ubi supra* and see *post.*

A **RECOVERY**—In its most extensive sense is a restitution to a former right by the solemn judgment of a court of justice. In its general acceptation a *Common Recovery* is a judgment in a fictitious suit, brought against the tenant of the freehold, obtained in consequence of a default made by the person who is last vouched to warranty in such fictitious suit. *Course on Recoveries*, 1, 120, 121, 137.

The Common Recovery that is used for assurance of land is nothing else but *factio juris* or a certain form or course set down by law to be observed for the better assuring of lands and tenements to men. And this is somewhat after the example of Recovery upon title, which is without consent and contrary to the will of him against whom the

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same is had: for there is in this a colourable suit, wherein there is a demandant who is called the recoveror, and a tenant who is called the recoveree; and one that is called (or vouched) to warrant upon a supposed warranty, who is called the vouchee. *Shep. Touchst. c. 3.* and the authorities there cited.

Considered as a legal assurance or conveyance, it is a *Fidion of law*, adopted for the purpose of destroying that species of perpetuity which was created by the statute *de donis*; (13 E. 1. *st. 1 c. 1*;) and whereby all tenants in tail are enabled, by pursuing the proper form, to bar their estates-tail. 10 *Rep. 37*. And not only this, but it is also a bar to ALL remainders and reversions depending on such estate-tail so barred; and to all charges and incumbrances created by the persons in remainder and reversion. 1 *Rep. 62*. But a common recovery does not bar an executory devise unless the executory devisee comes in as a vouchee. *Fearne 305: Pigot 134: Cro. Jac. 590: Palm. 131*—And by *Stat. 21 H 8. c. 15*, no estate held by statute-merchant, staple, or elegit shall be avoided by means of a feigned recovery.—And see also this *Stat. and Stat. of Gloucester, 1 E. 1. c. 11*, as to termors for years.

DISTINCTIONS. Though a Recovery, generally speaking, is a more extensive species of conveyance than a Fine; to guard an estate against all claims and incumbrances, yet the operation of each is not seldom necessary in aid of the other. A Fine is therefore often levied for the purpose of creating a good tenant to the præcipe, on which the Recovery is suffered: and a Recovery is frequently suffered in order to operate as a discontinuance of an estate-tail, for the purpose of barring remainders or reversions depending on such estates-tail; and thus a conveyance by Fine and Recovery, if unreversed, bars all the world.

A Fine is technically said to be *levied*—A Recovery to be *suffered*.—Good writers however have but too frequently confounded the terms.

The Student may now pursue his enquires under the following heads:

- I. *Generally, of the Nature, several Kinds, and Effect, of a Fine.*
- II. *Further, of the various Sorts of Fines; and how a Fine operates.*
- III. *Of what Things a Fine may be levied.*
- IV. *By whom, and to whom it may be levied; and see post VI.*
- V. *Before whom, and in what Manner it may be levied.*
- VI. *Who may be barred by a Fine, and who not.*
- VII. *How a Fine may be reversed, for Error or Fraud; and of amending Fines.*

I. Under this head it will be necessary to explain, 1, The nature of a Fine. 2, Its several kinds. 3, Its force and effect.

1. A Fine is sometimes said to be a feoffment of record; *Co. Lit. 50*: though it might with more accuracy be called an acknowledgement of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal

notoriety. But, more particularly, a Fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties. *Co. Litt. 120*. In its original it was founded on an actual suit, commenced at law for recovery of possession of the land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

Fines are of equal antiquity with the first rudiments of the law itself; are spoken of by *Glanvil. l. 8. c. 1*, and *Bracton. l. 5, tr. 5. c. 28*, in the reigns of Henry II, and Henry III; as things then well known and long established: and instances have been produced of them even prior to the Norman invasion. *Plowd. 369*. So that the *Stat. 18 E. 1*, called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied, and carried on. And that is as follows:

First; The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, though a Fine may also be levied on a writ of *mesne*, of *quarrantia charter*, or *de consuetudinibus et servitiis*; (*Finch L. 278*;) by suing out a writ of *præcipe* called a writ of covenant: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value. 2 *Inft. 511*.—The suit being thus commenced, then follows:

Secondly; The *licentia concordandi*, or leave to agree the suit: for, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff; who accepting them, but having upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another Fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the king's *silva*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value. 3 *Rep. 39*: 2 *Inft. 511*: *Stat. 32 Geo. 2. c. 14*.

Thirdly comes the *concord*, or agreement itself, after leave obtained from the court; this is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the Fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgement must be made either openly in the Court of Common Pleas, or before the Lord Chief Justice of that court, or else before one of the judges of that court; or two or more commissioners in the country, empowered by a special authority called a

writ

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writ of *dedimus potestatem*; which judges and commissioners are bound by *St. 18 E. 1. §. 4.*, to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

The concord being the complete Fine, it shall be adjudged a Fine of that term in which the concord was made, and the writ of covenant returnable, *1 Salk. 341.* A concord cannot be of any thing but what is contained in the writ of covenant: and the note of the Fine remaining with the *Chirographer*, it hath been held, *est principale recordum. 3 Leon. 234.*

Though one concord will serve for lands that lie in divers counties; yet there must be several writs of covenant. *3 Inst. 21: Dyer 227.* A concord of a Fine may have an exception of part of the things mentioned therein: and if more acres are named, than a man hath in the place, or are intended to be passed; no more shall pass by the Fine than is agreed upon. *1 Leon. 81: 3 Bulst. 317, 318.*

By these acts all the essential parts of a Fine are completed: and if the cognizor dies the next moment after the Fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the Fine shall be carried on in all its remaining parts. *Comb. 71. See post. VII.*

Fourthly, comes the *note* of the Fine: which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement; this must be enrolled of record in the proper office, by direction of *St. 5 H. 4. c. 14.*

The fifth part is the *foot* of the Fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year and place, and before whom it was acknowledged or levied. Of this there are indentures made or engrossed at the Chirographer's office, and delivered to the cognizor and the cognizee, usually beginning thus, "*Hæc est finalis concordia*;" This is the final agreement;" and then reciting the whole proceeding at length. And thus the Fine is completely levied at common law.

By several statutes, still more solemnities are superadded, in order to render the Fine more universally public, and less liable to be levied by fraud or covin. And first, by *St. 27 E. 1. c. 1.* the note of the Fine shall be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas shall cease. By *Stat. 5 H. 4. c. 14: 23 Eliz. c. 3.*, all the proceedings on Fines, either at the time of acknowledgement, or previous, or subsequent thereto, shall be enrolled of record in the Court of Common Pleas. By *St. 1 Ric. 3. c. 7.* confirmed and enforced by *St. 4 Hen. 7. c. 24.*, the Fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; viz four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to one in each term by *St. 31 Eliz. c. 2*; and these proclamations are indorsed on the back of the record. It is also enacted by *St. 23 Eliz. c. 3.*, that the Chirographer of Fines shall, every term, write out a table of the Fines levied in each county in that term, and shall affix them in some open part of the Court of Common Pleas all the next term, and shall also deliver the contents of such table to the sheriff of every county,

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who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the Fine.

2. Fines, thus levied are of four kinds:

First, What, in law French, is called a Fine "*sur cognizance de droit, come ceo que il ad de son done*;" or, a Fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the best and surest kind of Fine, for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This Fine therefore is said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, *cognoscat*, the right to be in the plaintiff, or cognizee, as that which he hath, *de son done*, of the proper gift of himself, the cognizor.

Secondly, a Fine "*sur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery supposed; as the possession during the particular estate belongs to a third person. *Moor. 629.* It is worded in this manner, "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee." *West. Symb. p. 2. § 95.*

Thirdly a Fine "*sur concessit*," is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant. *West. p. 2. § 66.*

Fourthly, A Fine, "*sur done, grant, et render*," is a double fine, comprehending the Fine *sur cognizance de droit come ceo*, &c. and the Fine *sur concessit*: and may be used to create particular limitations of estate; and this to persons who are strangers, or not named in the writ of covenant; whereas the Fine *sur cognizance de droit come ceo*, &c. conveys nothing but an absolute estate, either of inheritance or at least of freehold. *Salk. 340.* In this last species of Fines, the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of Fine, *sur cognizance de droit come ceo*, &c. is the most used; as it conveys a clear and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a Fine executed; whereas the others are but executory. See *post. II.*

3 The force and effect of a Fine, principally depend, at this day, on the common law and the two statutes, *4 H. 7. c. 24:* and *32 H. 8. c. 36.* The ancient common-law, with respect to this point, is very forcibly declared by the *St. 18 E. 1. §. 4.* in these words, "And the reason, why such solemnity is required in passing a Fine, is this, because the Fine is to high a bar, and of so great force,

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and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the Fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the Fine levied; unless they put in their claim on the foot of the Fine within a year and a day." But this doctrine of barring the right by *non-claim*, was abolished for a time by 34 E. 3 c. 16. which admitted persons to claim, and falsify a Fine, at any indefinite distance. *Litt. § 441*; whereby as Sir Edward Coke observes, 2 *In. 581*, great contention arose, and few men were sure of their possessions, till the parliament held in 4 H. 7, reformed that mischief, and excellently moderated between the latitude given by the statute, and the rigour of the common law. For the statute then made (*Stat. 4 H. 7 c. 241.*) restored the doctrine of non claim, but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is barred, unless they make claim, by way of action or lawful entry, not within one year and a day, as by the common law, but within five years after proclamations made: except feme coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind: who have five years allowed to them and their heirs after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention, to have covertly, by this statute, extended Fines to have been a bar of estates-tail. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, which they were expressly declared *not* to be by the statute *de donis*; the *St. 32 H. 8. c. 36*, was thereupon made; which removes all difficulties, by declaring that a Fine levied by any person of full age, to whom, or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the Fine be levied by a woman after the death of her husband, of lands which were, by the gift of him, or his ancestors, assigned to her in tail for her jointure; or unless it be of lands entailed by Act of Parliament or letters patent, and whereof the reversion belongs to the crown. See *Stat. 11 Hen. 7. c. 20*.

From this view of the common law, regulated by these statutes, it appears, that a Fine is a solemn conveyance on record from the cognizor to the cognizee; and that the persons bound by a Fine are *Parties*, *Privies*, and *Strangers*.

The *Parties* are either the cognizors, or cognizees; and these are immediately concluded by the Fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme covert*, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband,) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate. See *post. IV*.

Though a wife may thus join her husband in either a Fine or Recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estates discharged of

dower; (See *Craik: Pigot*;) yet if a jointress after her husband's death levies a Fine or suffers a Recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the Fine or Recovery is void; and is also a forfeiture of her estate, by *Stat. 11 H. 7. c. 20*. See *post. IV*.

Privies to a Fine are such as are any way related to the parties who levy the Fine, and claim under them by any right of blood, or other right of representation. Such are the heirs general of the cognizor; the issue in tail since the statute of H. 8; the vendee; the devisee; and all others who must make title by the persons who levied the Fine. For the act of the ancestor shall bind the heir, and the act of the principal, his substitute, or such as claim under any conveyance made by him subsequent to the Fine so levied. 3 *Rep. 87*.

Strangers to a Fine are all other persons in the world, except only parties and privies. And these are also bound by a Fine, unless within five years after proclamation made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea; and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues. *Co. Lit. 372*. And if within that time they neglect to claim, or (by the *Stat. 4 Ann. c. 16.*) if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. See this Dict. title *Claim*.

But, in order to make a Fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers by a mere confederacy, might defraud the owners by levying Fines of their lands; for if the attempt be discovered, they can be *no sufferers*, as to the estate in question, but must only remain in *statu quo*; whereas if a tenant for life levies a Fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. *Co. Lit. 251*. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire, the estate is for ever barred by it. 2 *Lev. 52*. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in no wise belongs to him, his Fine is of no effect: and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt*." *Hob. 334*. And even if a tenant for years, who hath only a chattel interest and no freehold in the land, levies a Fine, it operates nothing, but is liable to be defeated by the same plea. 5 *Rep. 123*; *Hard. 401*. See *post. VII*.—Wherefore when a lessee for years is disposed to levy a Fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin. *Hard. 402*; 2 *Lev. 52*. See this Dict. title *Recovery*.

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In order to punish criminally such as thus put the estate of another to the hazard, as far as in them lies, the Stat. 21 Jac. 1. c. 26, makes it felony without benefit of clergy to acknowledge or procure to be acknowledged, any Fine, Recovery, Judgment, &c. in the name of any person not privy or consenting to the same.

II. FINES are generally divided into those with, and without, proclamations; that with proclamations, is termed a Fine according to the statutes 1 R. 3. c. 7: 4 H. 7. c. 24. And such a Fine, every Fine that is pleaded is intended [supposed] to be, if it be not shewn what Fine it is. 3 Rep. 86.

If tenant in tail levies a Fine, and dies before all the proclamations are made, though the right of the estate tail descends upon the issue, immediately on the death of the ancestor, yet if proclamations are made afterwards, such right shall be barred by the Fine, by the statutes 4 H. 7. c. 24; 32 H. 8. c. 36: 3 Rep. 84.

The Fine without proclamations is called a *Fine at the Common Law*, being levied in such manner as was used before the Stat. 4 H. 7. c. 24; and is still of the like force by the common law, to discontinue the estate of the cognisor, if the Fine be executed. A Fine also with or without proclamations is either executed or executory: A Fine executed is such a Fine as of its own force gives present possession to the cognisee, without any writ of seisin to enter on the lands, &c. as a Fine *sur cognissance de droit come ceo*; and in some respects a Fine *sur Release*, &c. is said to be executed. A Fine executory doth not execute the possession in the cognisee, without entry or action, but requires a writ of seisin; as the Fine *sur conuissance de droit tantum*, &c. unless the party be in possession of the lands; for, if he be in possession at the time of levying the Fine, there need not be any such writ, or any execution of the Fine; and then the Fine will enure by way of extinguishment of right, not altering the estate or possession of the cognisee, however it may better it. *Wess.* § 20.

Since the statute of uses, 27 H. 8, writs of possession are never sued out where Fines are levied to uses; for the statute executing the possession to the use, the cognisee is immediately in possession without attornment; and by Stat. 4 & 5 An. c. 16, attornment after a Fine is become unnecessary. *Booth*, 250: *P.g.* 49: *Cruise* 59.

Fines are likewise single or double; single, where an estate is granted by the cognisor to the cognisee, and nothing is thereby rendered back again from the cognisee to the cognisor. The double Fine is that which doth contain a grant or render back again from the cognisee, of the land itself; or of some rent, common, or other thing out of it, and by which remainders are limited, &c. *Wess.* §§ 21, 30. A Fine is also sometimes called a double Fine, when the lands lie in several counties.

Lands that are bought of divers persons may pass by one Fine, and then the writ of covenant must be brought by all the vendees against all the vendors, and they must every one of them warrant for himself and his heirs; and such a Fine is good. *Shep. Touchst.* c. 2. p. 19. And such joint Fines seem reasonable, when the several purchases are of small value, though they are *ex gratia*. See *Wess.* on Fines, 47; where an order of the Chancellor is inserted, authorizing the curfitor to stay the writ when there is more than one demandant and one disforçant, except coparceners, jointtenants and tenants in common. It is

now the practice to permit two separate purchases to be comprized in one Fine on an affidavit that the value of them together does not exceed 200 l.

The first kind of Fine *sur cognissance de droit come ceo*, &c. is a single Fine levied with proclamations, according to the Stat. 4 H. 7. c. 24. It is, as has been already said, the principal and surest kind of Fine: and this because it is said to be executed, as it gives present possession (at least in law) to the cognisee, so that he needs no writ of *hab. fac. seisinam*, or other means for execution thereof; for it admits the possession of the lands, of which the Fine is levied, to pass by the Fine, so that the cognisee may enter and the estate is thereby in him, to such uses as are declared in the deed to lead the uses thereof; but if it be not declared by deed to what use the Fine was levied, such Fine shall be to the use of the cognisor that levied the same. 2 *Inst.* 513. If the cognisee of a Fine levied of lands, pay money unto the cognisor at the time of the Fine levied, and there is no use declared of the Fine, the law will contrive the Fine to the use of the cognisee: and if there be no money paid by the cognisee, nor any use declared, the Fine shall enure to the cognisor that levied it. *Pasch.* 23 Car. B. R. Where a Fine is levied to the use of two persons in tail, &c. in consideration of marriage, though the deed to lead its uses doth not mention any marriage had between them, yet it hath been adjudged, that the estate-tail is executed before marriage; for the Fine doth carry the uses, and they are perfected by the Fine, notwithstanding the consideration is perfected afterwards; but without a Fine, the marriage must be had, before any use could arise. 1 *Leon.* 138.

If a feme covert alone declares the uses of a Fine intended to be levied by husband and wife of her land, and the husband alone declares other uses; it hath been held that both declarations of uses are void, and the use shall follow the ownership of the lands: But in another case it was determined that the uses declared by the wife were void; and the uses declared by the husband, good only against himself, during the coverture. If husband and wife levy a Fine of the lands of the wife, and he alone declares the uses, this shall bind the wife, if her dissent doth not appear; because otherwise it shall be intended that she did consent. 2 *Rep.* 56, 59. Though there be a variance between a deed declaring uses, and the Fine levied; yet, if nothing appears to the contrary, such Fine by construction of law shall be to the uses declared in the deed, and which is evidence thereof: and where a Fine varies from a former description, it has been held that a new deed made after, will declare the uses of the Fine. It is not absolutely necessary, to insert the word *Uses*, in the declaration of uses of Fines; for any words which shew the intent of the parties will be sufficient. 1 *Ld. Raym.* 289, 290.

A Fine *sur conuissance de droit come ceo*, &c. may not be levied to any person but one that is party to the writ of covenant; though a vouchee, after he hath entered into the warranty to the demandant, it is said, may confess the action, or levy a Fine to the demandant, for he is then supposed to be tenant of the land, though he is not a party to the writ; and yet a Fine levied by the vouchee to a stranger is void. No single Fine can be with a remainder over to another person not contained in it: But if A. levy a Fine to B. *sur conuissance de droit come ceo*, and

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B. by the same concord grants back the land again to **A.** for life, remainder to **E.** the wife of **A.** for her life, remainder to **A.** and his heirs; this will be a good Fine. *Plowd.* 248, 249.

The second fort of Fine *sur conuizance de droit tantum*, is said to be a Fine *executory*, and much of the nature of a Fine *sur concessit*; Though it is most commonly made use of to pass a reversion, it is also sometimes used by tenant for life, to make a release (in nature of a surrender) to him in reversion, but not by the word *surrender*; for it is said a particular tenant, as for life, &c. cannot surrender his term to him in reversion by Fine; but he may grant and release to him by Fine. *Plowd.* 268: *Dyer* 216. A Fine upon a release, &c. shall not be intended to be to any other use, but to him to whom it is levied. 3 *Leon.* 61.

The Fine *sur concessit*, used to grant away estates for life or years, is also *executory*, so that the cognisees must enter, or have a writ of *hab. fac. seisinam* to obtain possession; if the parties to whom the estate is limited, at the time of levying such Fine, be not in possession of the thing granted.

The Fine *sur done grant & render*, is partly *executed* and partly *executory*; and as to the first part of it, is altogether of the same nature with a Fine *sur conuizance de droit come ceo*; but as to the second part containing a grant and render back, it is taken in law to be rather a private conveyance or charter between party and party, and not as a writ of judgment upon record: and this render is sometimes of the whole estate, and sometimes of a particular estate, with remainder or remainders over; or of the reversion; and sometimes with reservations of rent and clause of distress, and grant thereof over by the same Fine. 5 *Rep.* 38.

A. B. and **C. D.** levied a Fine of lands, and the cognisee by the same Fine rendered back the land to **A. B.** in tail, reserving a rent to himself, &c. the rent and reversion; shall pass, though in one Fine; and it shall enure as several Fines. *Cro. Eliz.* 727.

It is said, a grant and render of land, cannot be immediately *in primo gradu* to a person who is no party to the writ; but mediately, or *in secundo gradu*, it may. 3 *Rep.* 514: *Bro.* 108. The Fine with grant and render, differs from the Fine *sur conuizance de droit come ceo*, &c. as that must be levied of the land in the original; but the grant and render may be of another thing than is expressed in the original: though to make a good grant and render, the land rendered must pass to the cognisee by the Fine; for he cannot render what he hath not. 3 *Rep.* 98, 510.

A man may not by this Fine reserve to himself a less estate by way of remainder than the fee. and the render of a rent (if any be) must be to one of the parties to the Fine and not to a stranger. *Dyer* 33, 69: 2 *Rep.* 39. To make a lease for years, &c. by Fine with a render; the lessee must acknowledge the land to be the right of the lessor that is seised thereof; and then such lessor grants and renders the same back again to the lessee, for a certain number of years, reserving rent, &c. and this is a good Fine: but if the lessor be tenant in tail, then to bind him, he and the lessee are to acknowledge the tenements the right of **A. B.** who is to render the same Fine to lessee for years, the remainder to the lessor and his heirs, &c. 44 *Ed.* 3. 45: 2 *Leon.* 206.

A Fine and Render is a conveyance at common law, and makes the cognisor, on the render back, a new purchaser; by which, lands arising on the part of the mother, may go to the heirs on the part of the father, &c. 1 *Balk.* 337.

A Fine and Deed to lead the uses are to be considered as one conveyance; and therefore the Fine operates according to the declaration of uses. *Doug.* 45: 2 *Wils.* 220.

All sorts of Fines in general may enure as a confirmation of a former estate, which was defeasible before. 1 *Sand.* 261. So a Fine may enure by way of extinguishment; therefore, if tenant in tail makes a lease, or other estate to **A.** and afterwards levies a Fine to **B.** the lease, or other estate, shall be indefeasible; for his right during such former estate was extinct by the Fine. *R. Jon.* 60: *Cro. Jac.* 689. See this Dict. title *Estates*.

Where a Fine and Recovery is of so many acres in **S.** the party interested shall have his election where and in what parts of the estate the Fine and Recovery should operate. *Blany (Ld.) v. Mabon*; *Bro. P. C.*

A Fine does not ascend, but only comprises the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses; that the very lands comprehended in the Fine, and intended to pass by it, may be precisely ascertained. 1 *Cruise*, cap. 7.

Fine by **E.** to the use of himself for life, remainder to his wife that should be at the time of his death, for life; remainder to the son of **E.** in tail. **E.** took to wife **A.** A Fine levied by **E.** and **A.** his wife, who afterwards survived him, and other uses declared, is no bar to her, because it was uncertain who would be the person; but had the person been certain, there perhaps, notwithstanding it was but a possibility, it might have been a bar; per *Walmsley, J.* *Cro. Eliz.* 826. pl. 31.

III. A FINE may be levied of every species of real property, as of an house, or messuage, manor, castle, office, rent, &c. and in general it may be laid down as a certain rule, that a Fine may be levied of every thing, whereof a *præcipe quod reddat* lies; &c. or of any thing, whereof a *præcipe quod faciat* lies; as customs, services, &c.; or whereof a *præcipe quod permittat*, or *præcipe quod teneat* may be brought. 2 *Infl.* 513.

As Fines may be levied of things in possession, so they may be levied of a remainder, or reversion, or of a right *in futuro*. 3 *Rep.* 90.

So now, since the *Stat.* 32 H. 8. c. 7, (see title *Tithes*,) it may be levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal. Of a chantry. So it may be of a seignory. Of all services; as homage, tealty, &c. *West.* Of common of pasture. Of a corody. Of an office; as of the custody of a forest. Of a boiary. Of two pools and a fishery in the water of **D.** Of an annuity. See *West Symb.* 6, 7: *Shep. Touchst.* c. 2.

A Fine may be, and usually is, levied of a share in the *New River Water*, by the description of so much land covered by water; and when a Fine and Recovery of such share is necessary, in regard the *New River* runs through the several counties of *Hertford*, *Middlesex* and *London*, there must be three several Fines and Recoveries. 2 *P. Wms.* 128.

Where money is agreed to be laid out in lands to be settled in tail, a Fine cannot be levied of the money, but a decree of a court of Equity can bind it, as much as a Fine

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a Fine alone could have bound the land if it had been bought and settled. 1 *P. Wms.* 130: 2 *Atk.* 453: 3 *Atk.* 447: 1 *Vez.* 146: and See 1 *P. Wms.* 471, 485: 1 *Bro. C. P.* 223.

Fines may be levied of all things in esse, tempore finis, which are inheritable; but not of things uncertain; or of lands held in tail by the king's letters patent; or of land restrained from sale by act of parliament, or of lands in right of a man's wife, without the wife. 5 *Rep.* 225. *West.* § 25. Nor of common without number. *Cruise*, 121.

A Fine may be levied of a rent charge, or of a chief rent; and if a person who has a rent-charge, levies a Fine of the land, out of which the rent-charge issues, it will bar the rent-charge though the Fine be levied of the land, and not of the rent-charge. *Cruise*, c. 7; and the authorities here cited.

A Fine may be levied of an undivided moiety, or fourth part of a manor, as well as of the whole. 3 *Rep.* 88. But where a Fine is levied of a manor, nothing but a real manor will pass, and not a manor by reputation only. *Cruise*, c. 7.

The word *tenement* is not a sufficient description of any thing whereof a Fine is to be levied: for a tenement may consist of an advowson, a house or land of any kind: and therefore a Fine levied of a tenement is void, or at least voidable by writ of error; but a Fine of a *messuage* or *tenement* would probably be now held good. *Cruise*, c. 7. See title *Ejectment*.

And altho' it any kind of contract may be made and expressed by a Fine, as by a deed, and therefore it may be so made that one of the parties shall have the land, and the other a rent out of it; and that one shall have it for a time, and another for another time; also a lease for years, or a jointure for a wife, may be made; and a gift in tail, and a remainder over, may be limited and created thereby. 1 *Rep.* 76.

IV THE KING, and all persons who may lawfully grant by deed, may levy a Fine; but not infants, idiots, lunatics, &c. 7 *Rep.* 32. A corporation-sole may levy a Fine of land which he has in his corporate capacity; but bishops, deans, and chapters, parsons, &c. are restrained from levying of Fines to bind their successors. But a Fine cannot be levied by a corporation aggregate; for it cannot act but by attorney, and it cannot make co-nuissance by attorney. All persons that may be grantees, or that may take by contract, may take by Fine; though in cases of infants, feme covert, persons attainted, aliens, &c. who, it is said, may take by Fine, before the ingrossing of the Fine, there goes a writ to the justices of C. B. *quod permittant finem levare. Lit.* 669. Tenant in fee-simple, fee tail general, or special, tenant in remainder or reversion, may levy a Fine of their estates; so may tenant for life, to hold to the cognisee for life of tenant for life; but a person who is tenant, or hath an interest only for years, cannot levy a Fine of his term to another. 3 *Rep.* 77: 5 *Rep.* 124.

It is not necessary to be in possession of the freehold, in order to levy a Fine; but if any one entitled to the inheritance, or to a remainder in tail levies a Fine, it will bar his issue, and all heirs who derive their title through him. *Hob.* 333.

A Fine by a man *non compos*, though it ought not to be levied, binds for ever when it is levied. So a Fine by a

man attainted for treason, or felony, binds all but the king, or the lord of the fee. *West. Symb.* 3. a: See 2 *Wilf.* 220. So a Fine by an infant, or feme covert without her husband, binds till it be avoided. Vide *Com. Dig. tit. Baron and Feme*, (P. 1.) *Enfant*, (B. 2.).—See 2 *Black. Rep.* 1205, a Fine acknowledged *de bene esse* by a feme covert, whose husband was abroad, before the Lord Chief Justice then in Court.

If commissioners take a Fine of an infant, &c. the court will grant an attachment against them; and upon examination and inspection, the Fine shall be vacated. *R. Skin.* 24.

Lands assured for dower, or term of life, or in tail, to any woman by means of her husband, or his ancestors, cannot be conveyed away from her by Fine, &c. without her act; but if a woman and her husband levy a Fine of her jointure, she is barred of the same; though if the jointure be made after coverture, when the wife hath an election to have her jointure, or dower on the husband's death, it is said this will be no bar of her dower in the residue of the land of the husband. *Dyer*, 358: *Leon.* 185. See titles *Dowry*: *Jointure*.

No Fine of the husband alone, of the lands of the wife, shall hurt her, but that she or her heirs, or such as have right, may avoid it; but if she joins with him, it shall bind her and her heirs. Women covert ought to be cautious in levying Fines with their husbands of their own lands; and if a married woman under age levies a Fine of her lands she cannot reverse it during her husband's life, nor after his death, if she be of full age when he dies; but if the husband dies during her minority, she may. *Dyer* 359: *Wood's Inst.* 243. A married woman ought not to be admitted alone without her husband to levy a Fine; and if she be received, the husband may avoid the Fine by entry; but if she do not, it is good to bar her and her heirs, except she be an infant at the time of the Fine levied; the husband and wife together may dispose of her land, &c. 12 *Rep.* 122. If baron and feme levy a Fine, the feme within age, she may be brought into court by *habeas corpus*, and if it be found by inspection, that she is under age, it hath been adjudged, where the baron and feme brought a writ of error, that as to both, *quod finis revocetur.* 1 *Leon.* 116, 117: 3 *Salk.* 168.

Husband and wife, tenants in special tail, the husband only levies a Fine, this bars the issue in tail; but it remains in right to the wife as to herself, and to all the estates and remainders depending upon it, and all the consequences of benefit to herself and others, so long as she lives, as if the Fine had not been levied. *Hob.* 257, 259. If a husband make a feoffment of the wife's land, upon condition; which is broken, and the feoffee levies a Fine, and the husband and wife die having issue, and five years pass; the heir is barred to enter as heir to the father upon the condition, but he shall have five years after the death of his father, as heir to his mother. *Plowd.* 367. When the husband and wife join in a Fine of the wife's lands, all the estate passeth from her, and he is joined only for conformity; so that if the Fine levied by husband and wife in such a case be reversed, she shall have restitution. 2 *Rep.* 57, 77. A husband and his wife covenanted to levy a Fine of the lands of the wife, to the use of the heirs of the body of the husband on the wife, remainder to the husband in fee; both dying without issue, it was held that the heir of the wife had the title, because the

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the limitation, to the heirs of the body of the husband, was merely void, there being no precedent estate of freehold for life, &c. to support it as a remainder. 2 Salk. 675: 4 Mod. 253.

As to *femes covert*, the books which say, that a Fine shall not bind a woman under coverture unless she be examined, must not be understood as if it were in her power to reverse the Fine for want of her examination, but they are to be understood in this sense, that the Judge ought not to receive a Fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice; but if such a Fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of his duty, yet the Fine shall stand, and neither the feme nor her heirs shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. 2 New Abr. 527: See 1 Inst. 171 a. in the note already referred to; in which arguments are brought to prove (apparently with great force and justice) that the common notion, of a Fine binding *femes covert* merely by reason of the secret examination of the wife by the judges, is incorrect. If the secret examination by itself was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to *fines covert* equally with a Fine. But it is clearly otherwise; and except in the case of conveyances by custom there must be a *suit pendens* for the freehold, and inheritance; or the examination, being extrajudicial, is ineffectual. This mode of binding *femes covert* by the judgment of the court in a real action, appears to have arisen from admitting them and their husbands jointly to defend actions brought against the feme for her estate, the adverse judgment on which was final against the feme.—When the transition was made to the case of friendly suits, the form of secret examination was introduced to avoid any undue influence of the husband. That the examination of a feme in other cases does not bind her to the alienation of her property, See 2 Inst. 673: Keilw. 4—20.—The just explanation therefore of the subject seems to be, that the pendency of a real action for the freehold of the land, in consequence of previously taking out an original writ, (without which preliminary, even at this day a Fine is a nullity,) should be deemed the primary cause of a Fine's binding a feme covert; and that her secret examination on taking the acknowledgement of the Fine, is only a secondary cause of this operation of Fines; See this Dict. title *Baron and Feme* VIII.

If a widow having an estate in dower accept of a Fine, and by the same Fine render back the land for 100 years, &c. this is a forfeiture of her estate within the Stat. 11 H. 7. c. 20. See ante l. 3.

A. seised in fee levied a Fine to himself for life, remainder to his wife in tail-male for her jointure: had issue male; husband and wife levied a Fine and suffered a recovery.—After the death of the husband and wife issue male entered by force of the Stat. 11 H. 7. and held lawful. This case is out of the letter, though within the remedy of the statute, for the neither levied the Fine, &c. being sole, or with any after-taken husband but by herself with the husband who made the jointure. Co. Litt. 365 b. See further *Vin Abr.* Jointress I. K. *Bac Abr.* Discontinuance (D); as to what shall be deemed a forfeiture

within the stat. 11 H. 7. c. 20; and who shall take advantage of it.

If tenant for life grants a greater estate by Fine than for his own life, it is a forfeiture: and if there be *tenant for life*, and *remainder for life*, and the *tenant for life* levy a Fine to him in remainder and his heirs, both their estates are forfeited; the tenant for life by levying the Fine, and the remainder-man for life by accepting it. 2 Lev. 209. Where a Fine is levied by tenant for life, for a greater estate, the Fine may be good; but it is a forfeiture of the estate of tenant for life, whereof he in remainder, &c. may take present advantage and enter: and when a person enters for a forfeiture, all estates are avoided. Dyer 111. Tho' if such a tenant for life levy a Fine *in grant et release* to the cognisee for the life of tenant for life; or by a Fine grant a rent out of the land for a longer time, the Fine is good, and there will be no forfeiture of the estate of tenant for life: so likewise if a Fine be levied of lands by tenant for life to a stranger, who thereby acknowledges all his right to be in the tenant for life, and releases to him and his heirs. 27 Ed. 1. 1: 44 Ed. 3. 36.

If there be tenant in tail upon condition not to alien, or discontinue the lands, &c. if he doth, the donor to re enter; and his issue levy a Fine of the land, this is a forfeiture of the estate. 1 Leon. 292. An estate being settled on husband and wife for life, remainder to first and other sons in tail, with remainders over; after the birth of their eldest son, they by release and Fine, mortgaged the lands: on a bill exhibited against the son to redeem, &c. he pleaded the marriage settlement of his father and mother, whereby they were but tenants for life, and that his Fine was a forfeiture of their estate; and so it was adjudged. *Preced. Canc.* 591. But it is said where a wife by settlement has only a trust for life, if she joins with her husband in a mortgage in fee and Fine of the lands; this trust is not forfeited, as it would be in case of a legal estate. 1 P. Wms. 147.

As to Fines levied by an *infant*, though strictly speaking all contracts made by infants are in their own nature void, because a contract is an act of the understanding, which during their infancy, they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them: now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a Fine, which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error, and this must be brought during his minority, that the court of B. R. may by inspection determine the age of the infant; but the judges may in such cases inform themselves by witnesses, church-books, &c. 2 New Abr. 526: Co. Litt. 380 b: *Moor* 76: 2 Rol. Abr. 15: Bro. tit. *Error*: Bro. tit. *Fines*, 74, 79: 2 Inst. 482: 2 Bulst. 320: 12 Co. 122. See this Dict. title *Infant* and the stat. 7 Ann. c. 19, there cited.

With regard to *idiots* and *lunatics*, it is necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly, but their heirs and executors may avoid such acts *in pais* by pleading the disability; because,

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because, if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself. 4 Co. 124: 12 Co. 124; Co. Lit. 247; Bro. tit. *Fait*, 62; Cro. Eliz. 398, 622; F. N. B. 202.

But neither the lunatic himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a Fine, it shall stand against him and his heirs; for though the judge ought not to admit of a Fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence in the law, presumes the confessor, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it. 4 Co. 124: 12 Co. 124: 2 Inst. 483; Bro. tit. *Fines*, 75; Co. Lit. 247. See this Dict. title *Idiots and Lunatics*.

By the Common-law if an infant or idiot has by any neglect or contrivance been permitted to levy a Fine, his declaration of the uses thereof will be good, so long as the Fine remains in force; and if the Fine is never reversed his declaration of the uses will be binding and conclusive on him and his heirs for ever. because the law will not presume that a Fine, which is a solemn act on record has been levied by a person labouring under such disabilities; and therefore until the Fine which is the principal is annulled, the declaration of the uses thereof will remain good. Thus stands the Common-law on this point, but as the Court of Chancery has in many instances, compelled persons who had obtained estates under a Fine in a fraudulent manner to reconvey them to those who were really entitled thereto; so that Court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a Fine levied by an idiot to bar his heirs; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description. *Cruse* c. 15. and see post VII.

V. FINES are now levied in the court of *Common Pleas* at *Westminster*, on account of the solemnity thereof, ordained by the Stat. 18 Ed. 1. pt. 4; before which time they were sometimes levied in the *Exchequer*, in the *County-Courts*, *Courts Baron*, &c. They may be acknowledged before the Lord Chief Justice of the *Common Pleas*, as well in, as out of, court, and two of the justices of the same court, have power to take them in open court: also justices of assize may do it by the general words of their patent or commission; but they do not usually certify them without a special writ of *dedimus potestatem*. 2 Inst. 512. *Dyer* 224. The Chief Justice of C. P. may, by the prerogative of his place, take cognisance of Fines in any place out of the court; and certify the same without any writ of *dedimus potestatem*. But the Chief Justice of England cannot, nor any other of the justices, except the Chief Justice of C. P. who hath this special authority by custom and not by any statute. 9 Co. *Read*.

The King by patent or commission, with a *non obstante*, may give power to A. and B. justices of assize in a circuit, when A. is not a judge of either of the benches, only a serjeant at law, &c. to take the cognisance of all fines jointly and severally; and upon such a commission, the cognisance of a Fine taken by A. will be good, without any *dedimus potestatem* sued out before, or after it. *Jenk. Gent.* 277.

Fines may be, and are levied in the city of *Chester*, by stat. 43 Eliz. c. 15.

In the county palatinate of *Chester*, by stat. 2 & 3 E. 6. c. 28.

In the county palatinate of *Lancaster* stat. 37 H. 8. c. 19.

In that of *Durham* by stat. 5 Eliz. c. 27: And in the courts of great sessions in *Wales* by stat. 34 & 35 H. 8. c. 26. § 40.

The tenure of *Ancient Demesne* being a species of privileged villenage, the tenants thereof could not sue or be sued for their lands in the King's courts of Common-law, but had the privilege of having justice administered to them in the court of the manor by *petit writ of droit le* directed to the bailiffs of the King's manors or to the lord of the manor whereof the lands were held. In consequence of this principle no Fine could be levied by a tenant in ancient demesne in the court of Common Pleas; but as such tenants were allowed to commence actions in the court of the manor, they were also permitted to compound their suits; by which means Fines have at all times been levied of lands held in ancient demesne upon little writs of right close in the court of the manor. These Fines work a discontinuance; and the reason is because the freehold is recovered in the action; every recoveror being supposed to recover a fee simple; and the recovery of the fee simple must work a discontinuance. 1 *Cruse* 93 b: edition 1786.

Fines are also taken by commissioners in the country, empowered by *dedimus potestatem*; the writ of *dedimus* doth surmise, that the parties who are to acknowledge the Fine are not able to travel to *Westminster* for the doing thereof: these commissions, general and special, issue out of the Chancery. By the *Common law* all Fines were levied in court; but the Stat. of *Carlisle*, 15 Ed. 2, allows the *dedimus potestatem* to commissioners, who may be punished for abuses, and the Fines taken before them set aside: and it is said an information may be brought by him in reversion against commissioners, who take the caption of a Fine, where a married woman, &c. is an infant. 3 *Lev.* 36.

In the levying of Fines in court, a pleader shall say *Sir justice congeit accordet*, &c. i. e. he desires leave to accord or agree: and when the sum for the King's Fine is agreed, after proclamation and crying the peace the pleader shall repeat the substance of the Fine, &c. See Stat. *de Finibus*, 18 Ed. 1. pt. 4.

Touching the form of Fines, it is to be considered upon what writ or action the concord is to be made: and there must first pass a pair of indentures between the cognisor and cognitee, whereby the cognisor covenants to pass a Fine to the cognitee of such things, by a time limited; and these indentures preceding the Fine, are said to lead the uses of the Fine. But by the stat. 4 Ann. c. 16, the uses of a Fine, &c. may be declared after the Fine levied, and be good in law. Upon this the writ of *covenant* is brought by the cognitee against the cognisor, who then yields to pass the Fine before the judge, and so the acknowledgement being recorded, the cognisor and his heirs are presently concluded, and all persons (strangers not excepted) after five years past; and if the writ, whereon the Fine is grounded, be not a writ of *covenant*, which is usual, but of *warrantia chartæ*, or a writ of right, or of customs and services, &c. then the writ is to be served upon the party that is to acknowledge the Fine; and he appearing doth it accordingly. *West.* § 23; *Dyer* 179.

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It is the statute *de finibus* 18 E. 1. *st.* 4, which directs that a *final concord* cannot be levied in the King's court, without original writ. And when a Fine is passed, it is to be in the presence of the parties, who are to be of full age, and good memory; and if a feme covert be one, she is to be privately examined if she consent freely; for if she doth not, the Fine cannot be levied. By *stat.* 1 R. 3. *c.* 7, when a Fine is ingrossed and read and proclaimed in the court of C. B. a transcript is to be sent to the justices of assize, and another to the justices of the peace of the county where the land lieth, to be openly proclaimed at their several sessions, which being certified, concludes all persons; but quere whether this is not superfluous by the *Stat.* 4 H. 7. *c.* 24, which declares that the proclamations in court being made, the Fine shall be final? See *ante* I.

The day and year of acknowledging a Fine, and warrant of attorney for the suffering a recovery, are to be certified with the concord; and an office is erected for the *issuance* of writs for Fines, &c. the fees whereof are limited and appointed by *stat.* 23 Eliz. *c.* 3.

VI. See GENERALLY as to the effect of a Fine *ante* I. 3.—More particularly,

Interests in estates which may be barred by Fine, are either *interests* by *common law*, or by *custom*; as copyholds, &c. And if I have a fee simple, and am disseised, and the disseisor levies a Fine with proclamations, and I do not claim within five years after, I and my heirs (allowance being made for impediments) are barred for ever. *Plowd.* 353; 3 *Rep.* 79. If a man purchase lands of another in fee, and after, finding his title to be bad, and that a stranger hath right to the land, levies a Fine thereof with intent to bar him; and he suffers five years to pass without claim, &c. he is barred of his right for ever: and in these cases none shall be relieved in equity. 3 *Rep.* *Doff. & Stud.* 83. 155.

Feme covert have five years after the death of their husbands, to avoid the Fine of the husband of the wife's lands; and also to claim their dower; and if they do not make their claim in that time by action or entry, they are barred by statute. *Dyer* 72. 2 *Rep.* 93.

An *infant* shall have five years after he comes of age, although he was in his mother's womb at the time of the Fine levied. *Plowd.* 359. And an infant is allowed time, during his minority, to reverse his own fine and prevent the bar; and if not reversed during that time, their Fines will be good. *Aff. pl.* 53.

Strangers out of the realm at the time of the Fine levied, shall have five years after their return to prevent the bar; and so if they were in *England* when the Fine was levied, and within five years are sent in the King's service by his commandment. *Plowd.* 360. A person in *Scotland* or *Ireland* shall be said to be out of the realm. 4 H. 7. *c.* 24.

Lunatics, &c. shall have five years after the cure of their maladies, though the infirmity happen after the Fine levied, if before the last proclamation. *Plowd.* 367: *Dyer* 3.

And they who have *dumers defects* have five years after the last infirmity removed; but if the impediments are once wholly gone, and afterwards the party relapses into the like again, the five years shall begin immediately after the first removal; and if the party dies,

his heir shall not have a new five years. *Plowd.* 375: *Dyer* 233.

If a *feme covert* dies during the coverture, being no party to the Fine, &c. or if an *infant* being party to the Fine, and having present right, dies in his infancy: if a *person beyond sea* when the Fine was levied, never return &c. a *person in prison* dies whilst therein; or if one *non compos*, &c. dies such in all these cases, their heirs are not limited to any time. 2 *Inst.* 519, 520. Five years are given after a remainder falls; and five years after the forfeiture of tenant for life. *Plowd.* 374.

A *future interest* of another person, cannot be barred by Fine and non claim, until five years after it happens; as in case of a *remainder* or *reversion*. 2 *Rep.* 93: *Rayn.* 151. And where there is no present nor future right in land, &c. only a *possibility* at the time of levying the Fine, a person may enter and claim when he pleases. 10 *Rep.* 49. Also when there is only *right* to a rent, &c. issuing out of lands, and not the land in the Fine, the persons that have it are not barred at all. 5 *Rep.* 124.

No Fine bars any estate in *possession* or *reversion*, which is not *divested*, or put to a *right*. 9 *Rep.* 106. He that at the time of a Fine levied had not any title to enter shall not be immediately barred by the Fine: but this is in case of an *interest* not turned to a *right*, where a man is not bound to claim; and not in the case of tenant in tail, barring his issue. See *stat.* 32 H. 8. *c.* 36.

When an estate is put to a *right*, and there comes a Fine and non-claim, it is a perpetual bar. *Carter* 82, 162. A Fine, *sur grant et render* was levied, and a *fine facias* brought and judgment given, and also writ of seisin awarded, but not executed: and afterwards a second Fine was levied and executed, and five years passed; it was the opinion of the court that the second Fine barred the first. *Murch's Rep.* 194: 2 *Nelf. Abr.* 864.

If a man *attainted of treason* or *felony*, levy a fine of his land, this, as to the King, and lord of whom the land is held, is void, and no bar to their title of forfeiture: but as to all others it is a good bar. 2 *Shep. Abr.* 241. One levied a fine, and then was outlawed for treason and died; the heir reversed the outlawry, and it was held the wife should have her dower, if she bring her action within five years. *Moor* *c.* 876. A Fine is levied by lessee for life, &c. who continues the possession, and pays the rent; it shall not bind the lessor, who shall have five years claim after the determination of the lessee's estate, &c. 3 *Rep.* 77, 78. If one doth levy a Fine of my land, while I am in possession, this will not hurt me; nor where a stranger levies a Fine of my lands let to a tenant, if the tenant pays me his rent duly: And if there is tenant in tail, or for life, remainder in tail, &c. and the first tenant in tail or for life, bargains and sells the land by deed enrolled, and levies a Fine to the bargainee, the remainderers are not bound; for the law adjudges them always in possession. 9 *Rep.* 106.

Lessees who pretend title to the inheritance of the lands, cannot by Fine bar the inheritance. 3 *Rep.* 77. But if a lease is made for years, and the lessor before entry of the lessee levies a Fine with proclamations, and the lessee doth not make his claim within five years, the lessee is barred, and no relief can be had for him; for though the lessee for years cannot levy a Fine, yet he shall be barred by a Fine levied by the tenant of the land, &c. 5 *Rep.* 124. If a person hath a remainder depending on

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an estate for years, and the termor is disseised, and a Fine is levied and five years pass, &c. the termor and reversioner are barred: because the termor might presently have entered, and he in remainder had an aliene. *Wesl.* § 183. In case a person enters upon, and puts out a copyholder, and the lord doth levy a Fine of the lands, if the copyholder suffer five years to pass after the disseisin and Fine, without making any claim, the interest of the copyholder and his lord are hereby barred for ever: And if a copyholder makes a feoffment in fee upon good consideration, and the feoffee levies a Fine with proclamations, and five years pass, the lord is barred; but if a copyholder himself levies a Fine, and five years do pass, the lord is not barred, for the copyholder not having a freehold, the Fine will be void. *Wood's Inst.* 247, 248.

A Fine of *cestui que trust* shall bar and transfer a trust, as it would an estate at law, if it were on a good consideration. *Chan. Rep.* 49. And it is said that such a Fine with proclamations and five years non-claim will bar the remainder of a trust estate. 1 *Vern.* 226. And Fines of *cestui que use* are as good as if levied of immediate possessions, &c. 2 *Nelf. Abr.* 860.

Where the ancestor is barred by the Fine, there for the most part the heir is barred also. 9 *Rep.* 105. Although the issue in tail be within age, out of the realm, &c. when a Fine is had and the proclamations passed, the estate tail shall be barred. 3 *Rep.* 84. The tenant in tail, to him and the heirs male of his body, hath three sons, the second levies a Fine in the life of the father, and the father dies; here the eldest is not barred. But if the elder die without issue, living the second, it is a bar to the third. *Hob.* 333: *Jenk. Cent.* 96. Tenant in tail discontinues: the discontinuer levies a Fine with proclamations, and five years pass without claim in the life of tenant in tail: In this case the issue may have a *formedon*, and shall not be barred; for his father could not claim. It is otherwise where he is disseised, and the disseisor levies such Fine; there the tenant in tail may claim, &c. *Jenk. Cent.* 192.

A tenant for life, and he that is next in remainder in tail join in a Fine; it is a good bar to the issue in tail for ever, so long as that estate-tail shall continue. 10 *Rep.* 96.

If one makes his title as heir by another, and not by him that levied the Fine, he is not barred. Also he that is privy in blood only, and not in estate, is not within the statutes to be barred by a Fine: as if lands are given to a man and the heirs female of his body, and he hath a son and a daughter, and the son levies a Fine, and dies without issue, this is no bar to the daughter; for notwithstanding she be heir to his blood, yet she is not heir to the estate, nor need make her conveyance to it by him; but if her father had levied the Fine, it would have been otherwise. *Trin.* 21 *Jac.* See *Cro. Jac.* 689.

A Fine, &c. cannot destroy an executory estate, which depends upon contingencies, as it is uncertain whether there will ever be an estate in being for the Fine to work upon; but a Fine and Recovery will bar an estate in remainder, as that is an estate vested. 1 *Lill. Abr.* 617. See title *Recovery*. Estates by statute merchant, statute-staple, and *elegit*, may be barred, if a Fine is levied, and those that have right suffer five years to pass without claim, &c.

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5 *Rep.* 124. If a Fine be levied of lands in ancient demesne it doth not bar by the statute of non-claim, *Lut.* 781.—See ante V.

In the case of *Bourne v. Hunt*, where tenant in tail of lands in ancient demesne levied a Fine, in the court of ancient demesne for three lives with warranty; then levied a second Fine with warranty to the use of himself and his heirs; and then bargained and sold to one and his heirs, the following points were determined: 1st. That a Fine may be levied in courts of ancient demesne.—2dly. That such Fines are no bar to the issue in tail, but that they work a discontinuance: 3dly. That the discontinuance determined with the three lives, and that the second Fine made no discontinuance. 4thly. That the issue in tail have twenty years to make their entry after the expiration of the lease for lives.—See 1 *Com. Rep.* 93: (*Rose's* ed.) Bro. P. C.

As *Deans, Bishops, Parsons, &c.* are prohibited by statute to levy Fines, and may not have a writ of right; they are not barred by five years non claim, and their non-claim will not prejudice their successors. *Plowd.* 238, 375.

By the ancient Common-law, he that had right was to make his claim, &c. within a year and a day of the Fine levied and the execution thereof, or he was barred for ever: But this bar is now gone; and if Fine without proclamations according to the Common law be now levied, he that hath right may make his claim or entry, at any time to prevent the bar. *Co. Lit.* 254, 262.

Where a Fine may be a bar as to some lands, and not as to other lands, See *F. N. D.* 98. A Fine was levied, and five years passed without bringing a writ of error; and it was held a good bar within the *Stat.* 4 *H. 7. c.* 14: *Cro. Jac.* 333. But it has been adjudged that where five years pass, that shall not hinder, where the Fine is erroneous. 2 *Nelf. Abr.* 838.

Although a bill in equity is not such an action as will avoid a Fine, if the subject matter of the suit be of legal jurisdiction, yet still in some instances the filing a bill in a Court of equity, will prevent the bar arising from a Fine and non claim: and in cases of this kind the court will direct a trial at law, with an order that the defendant shall not set up a Fine in bar of the plaintiff's claim: upon the same principles that such court sometimes directs that the defendants in a suit at law shall not plead the statute of Limitations. 1 *Cruise* 329. See *Pinke v. Thornycroft*, 1 Bro. C. R. 289. Bro. P. C.

A. seised in fee levied a Fine to himself for life, remainder to his wife in tail-male for her jointure; had issue male; husband and wife levied a Fine and suffered a recovery.—After the death of the husband and wife issue-male entered by force of the *Stat.* 11 *H. 7.*; and held lawful. This case is out of the letter, though within the remedy of the statute, for she neither levied the Fine, &c. being sole, or with any after-taken husband, but by herself with the husband who made the jointure. *Co. Litt.* 375 b —See further *Vin. Abr. Jointress* 1. K. *Bac. Abr. Discontinuance* (D); as to what shall be deemed a forfeiture within the *Stat.* 11 *H. 7. c.* 20; and who shall take advantage of it.

VII. FINES MAY BE REVERSED for error, so as the writ of error be brought in twenty years, &c. and not afterwards

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by *Stat. 10 and 11 IV. 3. c. 14.* Which 20 years are to be computed from the time of the Fine levied, and not from the time the title accrued. 2 *Str.* 1257.

No person can bring a writ of error to reverse a Fine, or any judgment, that is *not intitled to the land*, of which the Fine was levied; for the courts of law will not turn out the present tenant, unless the *demandant* can make out a *clear title*, *possession always carrying with it the presumption of a good title till the right owner appears*; besides, where the plaintiff in the writ of error cannot make out a title, he can receive no damage by the Fine, which the writ of error always supposes to be done, tho' it should be erroneous; and therefore it is no less than trifling with the courts of justice, to seek relief when he cannot make it appear that he has received any injury. 1 *Roll. Abr.* 747: *Dyer* 90: 3 *Lev.* 36.

But if there be several parties to an erroneous Fine, they shall *all join* with the party that *is to enjoy the land*, tho' they themselves cannot have any thing. 1 *Roll. Abr.* 747: *Dyer* 89.

There must be an *actual entry* to avoid a Fine. The delivery of a declaration in ejectment does not amount to an entry sufficient for this purpose; even though the defendant appears to it, and confesses lease entry and ouster; for there must be an actual entry made *animo clamandi*, whereas in ejectment there is only a fictitious or supposed entry for the purpose of making a demise. *Berrington v. Parkhurst*, Bro. P. C. 2 *Sir.* 1. 1086. See 1 *Pent.* 42: 3 *Burr.* 1897: *Doug.* 483, 5.—But no entry is necessary where the Fine is levied without proclamations; for the *stat. 4 H. 7. c. 24.* does not extend to such a Fine, and it may be avoided at any time within 20 years. 2 *Willf.* 45.—The entry, when necessary, must be made by the person who has a right to the lands or by some one appointed by him. 1 *Inst.* 258 a.

Nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit it. 1 *Roll. Abr.* 757.

If there be error in proclamations it shall be taken as a good Fine at common law. 3 *Rep.* 86. A Fine may stand though the proclamations according to the statute are irregular, for Fines are matters of record and remain in substance and form as they were before. *Plowd.* 265.

Then it is, that in a writ of error to reverse a Fine, the plaintiff cannot assign that the conusor died before the time of the *dedimus per statum* because that contradicts the record of the conveyance taken by the commissioners, which evidently shews, that the conusor was then alive, because they took his conveyance after they were armed with the commission and the *dedimus* issued. *Dyer* 89 b: 1 *Roll. Abr.* 757: *Cro. Eliz.* 469.

But the plaintiff in error may say, that *after the conveyance taken, and before the certificate thereof returned, the conusor died*; because this is consistent with the record. 1 *Roll. Abr.* 757.

By the chirograph of a Fine the caption appeared to be on the 23d of *December*, whereas in fact the Fine was not acknowledged till the 2d of *March* following, and this was offered to be proved. But the court refused to admit the evidence, being of opinion, that no proof of

the time of acknowledging a Fine ought to be admitted contrary to, or against the chirograph thereof: and that the record which is the chirograph of a Fine, cannot be falsified till it is vacated or reversed. *Say and Seal* *Ld.* v. *Lloyd.* 1 *Salk.* 341: 10 *Mod.* 40: *Bro. P. C.*

If there is any difference between the record of the Fine, which remains in the possession of the chirographer, deemed the *principale recordum*, and the record which remains with the *custos brevium*, the latter shall be amended, and made according to the former. 3 *Leon.* 183.

If a lessee for years, or a disseissee, or one that hath right only to a reversion or remainder, levy a Fine to a stranger that hath nothing in the land, this Fine will be void or voidable as to the stranger; and he that hath cause to except against it, may shew that *the freehold and seisin was in another at the time of the Fine levied*, and that *partes finis nihil habuerunt tempore levationis finis*, and by this avoid the Fine: and yet a disseisor, who hath a fee-simple by wrong in him, may levy a Fine to a stranger that hath nothing in the land, like unto one that is rightfully seised of land in fee, &c. and it will be a good Fine. *Plowd.* 353: 3 *Rep.* 87. If the *cognisor* of a Fine hath nothing in the land passed, at the time of the Fine levied, the Fine may be avoided: But where the *cognisor* or *cognisee* is seised of an estate of freehold, whether by right or by wrong, the Fine will be a good Fine in point of estate. 41 *E. 3. c. 14.*: 22 *H. 6. c. 43.*

Fines are not reverfible for *rafure*, interlineation, misentry, &c. or any want of form; but it is otherwise if of substance. *Stat. 23 Eliz. c. 3.* A Fine shall not be reversed for small variance, which will not hurt it; nor is there occasion for a precise form in a render upon a Fine, because it is only an *amicable assurance* upon record. 5 *Rep.* 38. If a Fine be levied of lands in a wrong parish, though the parish in which they lie be not named, it will be a good Fine, and not erroneous, being an amicable assurance: and a Fine of a close may be levied by a *heir comus* in a town, without mentioning the town, vill, &c. *Godb.* 440: *Cro. Jac.* 574: 2 *Mod.* 47. If there be want of the original, or no writs of covenant for lands in every county; or if there is any notorious error, in the suing out a Fine, or any fraud or deceit, &c. writ of error may be had to make void the Fine. *Co. Lit.* 9. *Cro. Eliz.* 469. So if either of the parties dies before finished, &c. And if the cognisor of a Fine die before the return of the writ of covenant, (though after the caption of the Fine) it is said it may be reversed. 3 *Salk.* 168.

If either of the parties cognisors die after the king's silver is entered, the Fine shall be finished, and be good. *Cro. Eliz.* 469.

If the king's silver is not entered before the conusor's death, the Fine may be reversed for error. 3 *Mod.* 140. But in 2 *Ld. Raym.* 850, it is said, if a Fine be acknowledged before commissioners in the country in the long vacation, and before the next term the conusor dies; though no writ of covenant was sued, nor king's silver entered; yet the Common Pleas will permit the conusor to enter the Fine as of Trinity Term preceding. See further *Fin. Abr. Fine. F. b. 6.* In the case of *Watts v. Binkett*, however, where the conusor died before the return of the writ of the covenant, the Fine was set aside after it had been completed, because the Poll Fine or king's silver, due at the return of the writ of covenant, and not before, became due and was paid after the death of the conusor. 1 *Willf. part. 1. p. 115.*

A writ

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A writ of error may be brought in *B. R.* to reverse a Fine levied in *C. B.* and the transcript only, not the very record of the Fine, is removed in these cases: But if the court of *B. R.* adjudge it erroneous; then a *certiorari* goes to the chirographer to certify the Fine itself, and when it comes up it is cancelled. *1 Salk. 341*: And where on a writ of error in *B. R.* to reverse a Fine in *C. B.* the Fine was affirmed; a writ of error *en am vobis restituere* hath been allowed to lie. *Ibid. 357*. The court of *B. R.* will not reverse a Fine without a *sci. fac.* returned against the tertenant; because the cognisees are but nominal persons. *Ibid. 339*. Though a Fine may be set aside, by pleading that neither of the parties had any thing in the estate, at the time of levying the Fine; yet those that are privy to the person that levied the Fine, are enlopped to plead this plea. *3 Rep. 88*. In pleading a Fine or recovery to uses, the deed need not be set forth; but the pleader is to say, that the Fine, &c. was levied to *sub uses*, and produce the deeds in evidence to prove the uses. *8 W. 3 B. R.*

Fines may be avoided where they are obtained by fraud, covin, or deceit, though there be no error in the process; and that may be done either by writ of disceit or averment, setting forth the fraud or covin. *Cro. Eliz. 471*.

Thus if a Fine be levied of land in ancient demesne, the lord shall have a writ of disceit against the conusor and the tenant, and by that avoid the Fine. *F. N. B. 98 a. Moor. 6*. See ante, V. VI.

If a Fine be levied to secret uses to deceive a purchaser, and the conusor pleads the Fine in bar, the purchaser may aver the fraud in avoidance of the Fine, by *27 Eliz. cap. 4*; and such averment is not contrary to the record. because it admits the Fine, but sets it aside for the covin and fraud in obtaining it. *3 Co. 8 a*: *Plowd. 49 a*.

So if a Fine be levied upon an *usurious contract*, it may be avoided by *accriment*, because such Fine being levied for ends the law has prohibited, the law will not encourage any evasion out of the act, nor suffer such *usurious contracts* to be supported by the solemn acts of the courts of justice against the intention of the act. *3 Co. 80*.

A fraudulent obtaining of a Fine, or irregularity therein, cannot be relieved against in *Chancery*; but the relief must be sought in the court where the Fine was levied, though the officers may be examined and punished, if they did it *criminaliter*. And where one was personated on levying a Fine, it was not set aside in equity, but a reconveyance ordered of the land. *Prec. Ch. 150, 151*. For though the court of *Chancery* does not set aside a Fine so fraudulently obtained, nor send the party aggrieved to the court of *C. P.* to get it reversed, yet it considers all those who have taken an estate by such a Fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a reconveyance of the lands; on the general ground of laying hold of the ill conscience of the parties to make them do that which is necessary for restoring matters to their situation. *1 Cruise 314*: See *Talb. 101*: *1 Eq. Ab. 259*: *1 Ves. 289*: *2 Vern. 307*.

In some cases the court will vacate a Fine upon motion to prevent the parties the trouble and expence of a writ of error. *3 Lev. 36*: *2 Wilf. 115*. In *Hubert's case* (*Cro. Eliz. 521*.) where one levied a Fine in the name of another, nor privy nor consenting thereto, the Fine was declared void by a *writ* on the roll; and the Lord Keeper in that case said he had always noted this difference—If one of my name levy a Fine of my land, I may well confess

and avoid this Fine by shewing the especial matter, for that stands well with the Fine. But if a stranger who is not of my name levies a Fine of my land in my name, I shall not be received to aver, that I did not levy the Fine, but another in my name; for that is merely contrary, to the record: and so it is of all recognizances and other matters of record; but I conceive when the fraud appears to the court, as here, they may well enter a *writ* on the roll, and so make it no Fine; although the party cannot avoid it by averment during the time that it remains as a record.—The offence of levying a Fine in another's name is punished with death by the *stat. 2 Jac. 1. c. 26*, before mentioned. See ante *1, 3. ad fin.* If a Fine be levied by a person who got possession under a forged deed, equity will decree against the Fine. *2 Ark. 380*.

A record of a Fine may be amended, (if the king's silver is paid) for misprision of the clerk. *5 Rep. 43*.

While the parties are alive the court will not grant leave for the amendment of a Fine, in the christian name of the plaintiff, for that amounts to making a new Fine. *2 Blac. Rep. 816*.—Neither while the parties are alive will they permit the Fine to be amended in the term. *2 Blac. Rep. 788*: *3 Wilf. 249, 250*.

Where the deed to lead the uses is general, and it appears only by affidavit that the intent was to levy the Fine of a greater number of acres than it mentions, the court will not permit an amendment to increase the number of acres. *2 Blac. Rep. 102.3*.

When Fines may be set aside in equity, see ante; and *1 Eq. Ab. 258*: *2 Eq. Ab. 474*.—When avoided for fraud or aided when defective; *Com. Dig. Chancery, (3 N): 1. Ves. 289*. More fully how Fines may be avoided or reversed, and by whom; *Com. Dig. Fine (H)*; *Pleader, (3 B.) 9*: *Vin. Abr. Fine. D. 11*: *Rac. Abi. Fines, 11*.

For further matter relative to Fines in general, see *3 Com. Dig.* and *Viner's Abi. tit. Fines*; *Sheph. Touchst. c. 2*: *Cruise on Fines*: and this Dict. title *Recovery*.

As to deeds to lead or declare the uses of a Fine, &c. See this Dict. title *Recovery*.

FINE ADNULLANDO LEVATO DE TENEMENTO QUOD FUIT DE ANTIQVO DOMINICO. A writ directed to the justices of *C. B.* for disannulling a Fine levied of lands in ancient demesne, to the prejudice of the lord. *Reg. Orig. 15*. See title *Fine*.

FINES FOR ALIENATIONS; Were Fines paid to the king by his tenant in chief, for licence to alien their lands according to the *Stat. 1 Ed. 3 c. 12*; But these are taken away by the *Stat. 12 Car. 2. c. 24*, abolishing all teneues but free and common socage.

The premiums given on renewal of leases, are also termed Fines; and there are Fines for alienations of copyholds paid to the Lord. See titles *Lease*; *Copyhold*.

FINES, FOR OFFENCES. Fine, in this sense, is amends, pecuniary punishment, or recompence for an offence committed against the king and his laws, or against the lord of a manor: In which case a man is said *finem facere de transgressionem cum rege*, &c. *Reg. Jud. f. 25. a*: *Cowell*.

It seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of the civil causes, and the Fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment which was only in *terrorem*, changed into pecuniary, whereby they found their own advantage.

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This begat this distinction between the greater and the lesser offences; for in the *crimina majora* there was at least a Fine to the king, which was levied by a *capitulum*; but upon the lesser offences there was only an amercement, which was assessed, and for which a *distingas*, or action of debt lay. 2 *New Ab.* 502.

The discretionary *Fines* (and discretionary length of imprisonment) which the courts of justice are enabled to impose, may seem an exception to the general rule, that the punishment of every offence is ascertained by the law. But the general nature of the punishment, is in these, as in other cases fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances.

The quantum in particular of pecuniary Fines, neither can nor ought to be ascertained by an invariable law. Our statute law therefore has not often ascertained the quantity of Fines, nor the common law, ever; it directing certain offences to be punished by Fine in general, without specifying the certain sum; which is fully sufficient, when we consider that however unlimited the power of the Court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the Bill of Rights *St. 1 W. & M. 2. c. 2*, has particularly declared, that excessive Fines ought not to be imposed, nor cruel and unusual punishments inflicted: and the same statute further declares, that all grants and promises of Fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of Rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby, many times, undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit. 2 *Inst.* 48.

The reasonableness of Fines in criminal cases has also been usually regulated by the determination of *Magna Charta c. 14*, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti, et pro magno delicto, secundum magnitudinem delicti; salvo contentamento suo: et mercator eodem modo, salva mercandis sua; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule, that obtained even in Henry II's time, (*Glan. l. 9. cc. 8, 11.*) and means only, that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the landholder his contentment or land; to the trader his merchandize; and to the countryman his wainage or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (*sic in misericordia*) shall be set, *ponatur*, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *assessment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the *Stat. West. 1. c. 18*, and then the judges estreated them into the Exchequer. *F. N. B.* 76. But in the court-leet and court-baron it is still performed by assessors or suitors sworn to *assess*, that is, tax and mo-

derate the general amercement according to the particular circumstances of the offence and the offender: the assessor's oath is conceived in the very terms of *Magna Charta. Fitzb. Surv. c. 11*. Amercements imposed by the superior courts on their own officers and ministers were assessed by the judges themselves, but when a pecuniary mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a Fine. 8 *Rep.* 40. And the ancient practice was, when any such Fine was imposed, to inquire by a jury *quantum inde regi dare valeat per annum, salva sustentatione sua et uxoris, et liberorum suorum* *Gilb. Exch. c. 5*. And since the disuse of such inquest it is never usual to assess a larger Fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such Fine as might amount to imprisonment for life. And this is the reason why Fines in the King's court are frequently denominated Ransoms, because the penalty must otherwise fall upon a man's person unless it be redeemed or ransomed by a pecuniary Fine. *Mirr. c. 5. § 3: Lamb. Err. 575*.—According to an ancient maxim, *qui non habet in crumena suam in corpore*. Yet where any statute speaks both of Fine and ransom, it is holden that the ransom shall be treble to the Fine at least. *Dyer 232*.—See 4 *Comm.* 378—380.

I. Who may fine and amerce, and for what.

II. How Fines, &c. may be mitigated and aggravated; as also how they may be recovered, and to whom they are payable.

I. Where a statute imposes a Fine at the will and pleasure of the king, that is intended of his judges, who are to impose the Fine. 4 *Inst.* 71. Courts of record only can fine and imprison a person, (except as after-mentioned). And such a court may fine for an offence committed in court in their view, or by confession of the party recorded in court. 1 *Lill. Ab.* 621. A man shall be fined and imprisoned for all contempts done to any court of record, against the commandment of the king's writ, &c. 9 *Rep.* 60.

If a person is arrested coming to the courts of justice to answer a writ, the offender doing it shall be fined for the contempt: But there has been a difference made where it is done by the plaintiff in the writ, and a stranger, who it is said shall not be fined. 9 *H. 6. c. 55: 1 Danv.* 469.

If an officer of the court neglects his duty, and gives not due attendance; a clerk of the peace doth not draw an indictment well in matter of form, or return thereof, upon a *certiorari* to remove the indictment in *B. R.*; if a sheriff, &c. make an insufficient return of a *habeas corpus* issuing out of *B. R.* &c. or if justices of the peace proceed on an indictment after a *certiorari* issued to remove the indictment; the court may fine them. 1 *Lill.* 620. When a juror at the bar will not be sworn, he may be fined. 7 *H. 6. c. 12*. And if one of the jury depart without giving his verdict; or any of the jury give their verdict to the court before they are all agreed, they may be fined. 8 *Rep.* 38: 40 *Ass.* 10.

Also the sheriff in his torn, and the steward of a court-leet, have a discretionary power, either to award a Fine, or amercement for contempt to the court; as for a suitor's refusing to be sworn, &c. and the steward of a court-leet may

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may either amerce or fine an offender, upon a presentment for an offence not capital, within his jurisdiction. 66: *Kitchin* 43, 51.

It is said, that some courts may imprison, but not fine, as the constables at the petit sessions. 11 *Co.* 44: 1 *Roll. Rep.* 74: 11 *Co.* 43 *b.* ~~After~~ Some courts cannot fine or imprison, but amerce, as the county, hundred, &c. 11 *Co.* 43 *b.* But some courts can neither fine, imprison, nor amerce; as ecclesiastical courts held before the Ordinary, archdeacon, &c. or their commissaries, and such who proceed according to the Canon, or Civil Law. 11 *Co.* 44 *a.*

Every court of record may enjoin the people to keep silence under a pain; and impose reasonable Fines, not only on such as shall be convicted before them of any crime, on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court. 11 *H.* 6. 12 *b.*: 1 *Roll. Abr.* 219: 8 *Co.* 38: 11 *Co.* 43: *Cro. Eliz.* 581: 1 *Sid.* 145.

If a dead body in prison, or other place whereon an inquest ought to be taken, be interred, or suffered to lie so long, that it putrify, before the coroner hath viewed it, the gaoler, or township shall be amerced. 1 *Keb.* 278: 2 *Harc. P. C.* If any homicide be committed, or dangerous wound given, whether with or without malice, or even by misadventure, or in self-defence, in any town, or in the lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced; and if out of a town, the hundred shall be amerced. 3 *Inst.* 53: 4 *Inst.* 183: *Cro. Car.* 252: 3 *Leon.* 207: 2 *Inst.* 315: *Dyer* 210.

Besides Fines imposed for offences, it seems, that regularly there was a Fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod fit in misericordia pro falso clamore*. 8 *Co.* 39: *F. N. B.* 75.

Hence when the plaintiff takes out a writ, the sheriff, before the return of it, was formerly obliged to take pledges of prosecution, which, when Fines and amercements were considerable, were real and responsible persons, and answerable for those amercements; but being now so very inconsiderable, that they are never levied, they are only formal pledges entered, viz. *John Doe* and *Richard Roe*. 1 *Saund.* 227. See this Dict. tit. *Bail*.

In all actions, where the judgment is against the defendant, it was to be entered with a *misericordia*, or a *capiatur*; and herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in misericordia*, without assessing any sum in certain, which was afterwards assessed by the coroners in the proper county; but if it were in action of trespass, the court set the Fine, and levied it by a *capiatur*. 8 *Co.* 60: 1 *Roll. Abr.* 212, 219: *Cro. Eliz.* 844: *Cro. Jac.* 255: Therefore,

In actions *quare vi et armis*, as trespass, and the like; if judgment pass against the defendant in a court of record, he shall be fined. 8 *Rep.* 59. But in actions which have not something of force, or fraud, or deceit to the court; if the defendant come the first day he is called, and tender the thing demanded to the plaintiff,

he is not to be fined. 4 *Rep.* 49: 8 *Rep.* 59, 60, 99: 3, *Aff.* 9: 22 *Aff.* 82: 1 *Danv. Abr.* 471: 1 *Vent.* 116.

All *capiatur* Fines are taken away by Stat. 4 & 5 *W. & M. c.* 12. See title *Capias pro Fine*.

II. A Fine may be mitigated the same term it was set, being under the power of the court during that time; but not afterwards. *T. Raym.* 376. And Fines assessed in court by judgment upon an information, cannot be afterwards mitigated. *Cro. Car.* 251. If a Fine certain is imposed by statute on any conviction, the court cannot mitigate it; but if the party comes in before conviction, and submits to the court, they may assess a less Fine; for he is not convicted, and perhaps never might. The court of *Exchequer* may mitigate a Fine certain, because it is a court of equity, and they have a privy seal for it. 3 *Salk.* 33.

If an excessive Fine is imposed at the sessions, it may be mitigated at the King's Bench. 1 *Vent.* 336. A defendant being indicted for an assault, contested it, and submitted to a small Fine; and it was adjudged that in such a case he may produce affidavits to prove on the propleitor, that it was *son assault*, and that in mitigation of the Fine; though this cannot be done after he is found Guilty. 1 *Salk.* 55. If a person is found Guilty of a misdemeanor upon indictment, and fined, he cannot move to mitigate the Fine, unless he appear in person; but one absent may submit to a Fine, if the clerk in court will undertake to pay it. 1 *Vent.* 203, 207: 1 *Salk.* 55: 2 *Harc.* 446.

It is a common practice in the court of *B. R.* to give a defendant leave to speak with the prosecutor, i. e. to make satisfaction for the costs of the prosecution, and also for damages sustained, that there may be an end of suits; the court at the same time shewing, on that account, an inclination to set a moderate Fine on behalf of the King. *Wood's Inst.* 653. And in cases where costs are not given by law, after a prosecutor has accepted costs from the defendant, he cannot aggravate the Fine; because having no right to demand costs, if he takes them, it shall be intended by way of satisfaction of the wrong. 2 *H. P. C.* 292. See this Dict. title *Costs*.

All Fines belong to the King, and the reason is, *because the courts of justice are supported at his charge*; and where-ever the law puts the King to any charge for the support and protection of his people, it provides money for that purpose. *Bract.* 129. When a person is fined to the King, notwithstanding the body remains in prison, it is said the King shall be satisfied the Fine out of the offender's estate. 4 *Leon. c.* 393.

By the Common-law, the King, or Lord may, at their election, distrain, or bring an action of debt for a Fine or amercement. *Cro. Eliz.* 581: *Saund.* 93: *Raft. Ent.* 151, 553, 606: 2 *H.* 4 24 *b.*: 10 *H.* 6. 7: *Raym.* 68. But with respect to fines, set in inferior courts, every jury, or declaration of this kind ought expressly to shew, that the offence was committed within the jurisdiction of the court, for if it were not, all the proceedings were *coram non jure*, and a court shall not be presumed to have jurisdiction where it doth not appear to have one. *Hob.* 129: *Raft. Ent.* 553: *Co. Ent.* 572. Also it is advisable to allege, that the offence was committed, as well as presented, and to shew the names of the presentors and the assessor in setting forth a presentment or

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or affectment, and also to shew that proper notice was given of holding the court. But for this, See *Hæc*. P. C.

Of common right, a distress is incident to every Fine and amercement, in a torn or leet, for offences within the jurisdiction thereof; but if the offence were only the neglect of a duty created by custom, and of a private nature, it is clear, that *there must be a custom to warrant a distress*, and perhaps such custom is also necessary, though the duty be of a public nature. 2 *Hæc*. P. C.

Also the Sheriff, or Lord may for such Fines or amercements distrain the goods of the offender even in the highway, or in land not holden of the lord, unless such land be in the possession of the crown. 1 *Rel. Abr.* 670: 2 *Inf.* 104. But such Fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levied and couchant upon the lands of the offender. *Osborn* 146: *Nat.* 20.

A joint award of one Fine against divers persons is erroneous; it ought to be several against each defendant, for otherwise one who hath paid his part might be continued in prison till the others have paid theirs, which would be in effect to punish for the offence of another. 2 *Hæc* P. C. Fines to the King are *assessed* into the *Exchequer*.

FINES TO THE KING; *Exchequer Roy.*] Under this head are included fines for *original suits*. On originals on trespass on this case, where the damages are laid above 40*l.* a Fine is paid, *viz.* from 40*l.* damages to 100 marks, (6*l.* 13*s.* 4*d.*) 6*s.* 8*d.* From 100 marks to 100*l.* the Fine is 10*s.* From 100*l.* to 200 marks, 13*s.* 4*d.* From 200 to 250 marks, 16*s.* 8*d.* From 250 to 300 marks or 200*l.* it is 1*l.* Fine; and so for every 100 marks more, you pay 6*s.* 8*d.* and every 100*l.* farther 10*s.* Every 100*l.* pays 10*s.* Fine. *R. H. C. H. & M.* Fines are also paid for original writs in *debt*; for every writ of 40*l.* debt, 6*s.* 8*d.* and if it be of 100 marks, but 6*s.* 8*d.* and for every 100 marks 6*s.* 8*d.* &c. also for every writ of *plea of land*, if it be not a writ of right patent, which is for the yearly value of 5 marks, 6*s.* 8*d.* and so according to that rate. 19 *H. 6.* 44: 7 *H. 6.* 33: *Nat. Bi.* 212. See title *Fines of Lands*.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. A writ to inhibit officers of courts to take Fines for fair pleading. *Reg. Orig.* 179.

FINE CAPIENDO PRO TERRIS, &c. A writ lying where a person upon conviction of any offence by jury, hath his *lands and goods* taken into the King's hand, and his body is committed to prison; to be remitted his imprisonment, and have his lands and goods redelivered him, on obtaining favour for a sum of money, &c. *R. g. Orig. 1st 12.*

FINE PRO REDIS FINEA CAPIENDA, A writ that lies for the rescue of one imprisoned or a *redissein*, on payment of a reasonable Fine. *Reg. Orig.* 22.

FINE FORCE, Is where a person is *forced* to do that which he can no ways help; so that it seems to signify an absolute necessity or constraint not avoidable. *Old Nat. Bi.* 68: *Stat.* 3; *H. 8.* c. 12.

FINEABLE, To fine, or pay a fine upon composition, and making satisfaction, &c. The same with *fine facere*. mentioned in *Le. H. 1.* c. 53. And in *Brompton*, p. 1105 and in *Hæc*, p. 83.

FIRE.

FINITIO, Death, so called; because *vita finitur morte*. *Blount.*

FINORS OF GOLD AND SILVER, Are those persons who purify and separate gold and silver, *scilicet* in coarser metals, by fire and water. They are not to alloy it; or sell the same, save only to the master of the mint, goldsmiths, &c. *Stat.* 4 *H. 7.* c. 2.

FIRDFARE AND FIRDWITE; See *Ferdfare* and *Ferdwite*.

FIRDERINGA, A preparation to go into the army. *Leg. H. 1.*

FIRE and FIRE COCKS. By *Stat.* 14 *Geo.* 3. c. 78, (the last building act,) Churchwardens in *London* and within the bills of mortality, are to fix *fire cocks*, &c. at proper distances in streets, and keep a large engine and hand engine for extinguishing fire, under the penalty of 10*l.* § 75. And to prevent fires, workmen in the city of *London*, &c. must erect party-walls between buildings of brick or stone, of a certain thickness, &c. under penalties, inflicted by various sections of the act. On the breaking out of any fire, all the constables and beadle shall repair to the place with their ladders, and be assisting in putting out the same, and causing people to work, § 85. No action shall be had against any person in whose house or chamber a fire shall accidentally begin. § 86. See this Dict. title *Hæc*, and also *Stat.* 6 *Ann.* c. 31, now said to be made perpetual. 1 *Inst.* 530 in n. 7.

By the said *Stat.* 14 *Geo.* 3. c. 78, Rewards for assistance are payable to the first turncock 10*s.*—To the first engine not exceeding 30*s.*—The second not exceeding 20*s.*—The third 10*s.*—To be paid by the churchwardens or overseers, but not without the approbation of an alderman or justice of the peace.—The churchwardens, &c. to be repaid by the inhabitant if the fire begins in a chimney. §§ 76, 77, 78—Insurance offices may lay out the insurance in rebuilding the premises, if the party suffering does not give security to do so: or in case of disagreement, not settled within 60 days. § 83.

Firemen exempt from being impressed § 82.—Penalty on servants firing houses by negligence, 100*l.* or 18 months imprisonment § 84. Restrictions on boiling turpentine, 2; *Geo.* 3. c. 77. See this Dict. tit. *Disou*; *Burning*; *Aljon*.

FIREBARE, Sax.] A beacon or high tower by the sea side, wherein are continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy. See title *Beacon*.

FIREBOTE, Fuel for firing for necessary use, allowed by law, to tenants out of the lands, &c. granted them. See *Eltoners*.

FIRE ORDEAL, See title *Ordeal*.

FIRE-WORKS. No person whatsoever shall make, sell, &c. squibbs, rockets, serpents, &c. or cases, moulds, &c. for making such squibbs, and every such offence shall be adjudged a common nuisance, and persons making or selling squibbs shall forfeit 5*l.*

Persons throwing or firing squibbs, &c. or suffering them, &c. to be thrown or fired from their houses incur a penalty of 20*s.* Likewise persons throwing, casting or firing, or aiding or abetting in the throwing, casting or firing of any squibbs, rockets, serpents, or other fire-works, in or into any public street, house, shop, river, highway, road or passage, incur the like penalty of 20*s.* and on non-payment may be committed to the house of correction. *Stat.* 9 & 10 *W.* 3. c. 7.

This

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This statute does not take from any person injured, by throwing of squibbs, &c. the remedy at Common-law; but they may maintain a special action on the case, for recovery of full damages.

FIRMA, *Victualia* or provisions; also rent, &c. See title *Farm*.

FIRMA ALBA, Rent of lands let to farm, paid in silver, not in provision for the lord's house. See *Alba Firma*.

FIRMA NOCTIS, A custom or tribute anciently paid towards the entertainment of the King for one night, according to *Domesday*—Comes Meriton T. R. E. *reddebat firmam unius noctis*, &c. i. e. provision or entertainment for one night, or the value of it. *Temp. Reg. Edw. Confess.*

FIRMAM REGIS, Anciently *pro villâ regia*, *scu regis manerio*. *Spelm.*

FIRMATIO, *Firmationis Tempus*. Doe season, as opposed to buck season. 31 H. 3. *Firmatio* signifies also a supplying with food. *Leg. Inq. cap. 34.*

FIRMURA, *Fice firmage*, *W. de Cress* gave to the monks of *Blyth*, a mill, *cum libera firmura* of the dam of it. *Reg. de Blyth*. This has been interpreted liberty to scour and repair the mill dam, and carry away the soil, &c. *Blount*.

FIRST-FRUIT, *Primitiæ*.] The profits after avoidance, of every spiritual living for the first year, according to the valuation thereof in the King's books. These were given in ancient times to the Pope throughout all christendom; and were first claimed by him in England of such foreigners as he bestowed benefices on here by way of provision; afterwards they were demanded of the clerks of all spiritual patrons, and at length of all other clerks on their admission to benefices: but upon the throwing off the Pope's supremacy in the reign of Hen. VIII. they were translated to, and vested in, the King; as appears by the *Stat. 26 H. 8. c. 3*; and a new *valor beneficiorum*, was then made by which the clergy are at present rated. This *valor beneficiorum* is what is commonly called, The King's books: a transcript of which is given in *Ellon's Thesaurus* and *Bacon's Liber Regis*. And for the ordering thereof, there was a court erected, 32 H. 8, but dissolved soon after.

Though by *Stat. 1 Eliz. c. 4*, these profits are reduced again to the crown, yet the court was never restored; for all matters formerly handled therein, were transferred to the *Exchequer*, within the survey of which court they now remain.

By *Stat. 26 H. 8*, the Lord Chancellor, Bishops, &c. are empowered to examine into the value of every ecclesiastical benefice and preferment in their several dioceses; and clergymen entered on their livings before the *First fruits* are paid or compounded for, are to forfeit double value. But *Stat. 1 Eliz. c. 4*, ordains, that if an incumbent on a benefice do not live half a year, or is ousted before the year expire, his executors are to pay only a fourth part of the *First fruits*; and if he lives the year, and then dies, or be ousted in six months after, but half the *First fruits* shall be paid; if a year and a half, three quarters of them; and if two years then the whole; or not otherwise. The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishoprick: other Dignitaries in the church pay theirs in the same manner as rectors and vicars. By the *Stat. 27 H. 8 c. 8*, no tenths are to be paid for the first year, as then the *First*

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fruits are due, and by several statutes of Anne, if a benefice be under 50*l.* *per annum* clear yearly value, it shall be discharged of the payment of *First-fruits* and tenths.

This Queen also restored to the church what had at first been thus indirectly taken from it, not by remitting the tenths and *First-fruits* entirely, but by applying these superfluities of the larger benefices to make up the deficiencies of the smaller; for this purpose she granted a charter, confirmed by *Stat. 2 Ann. c. 11*, whereby all the revenue of the *First-fruits* and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings, under 50*l.* a year. This is usually called *Queen Anne's bounty*, which has been still further regulated by subsequent statutes; though it is to be lamented that the number of such poor livings is so great, that this bounty, extensive as it is, will be slow, and almost imperceptible in its operation; the number of livings under 50*l.* certified by the bishops at the commencement of the undertaking being 5597; the revenues of which, on a general average, did not exceed 23*l.* *per ann.* See 1 *Comm.* 285, 6. *cum notis ib.*

FISH, FISHERIES AND FISHING.

MANY acts of parliament have been made to regulate domestic and foreign fisheries, and the sale of fish.—The following is a very general abridgment of them.

By *Stat. 1 Eliz. c. 17*, (made perpetual by *St. 3 Car. 1. c. 4*.) No fisherman shall use any net or engine, to destroy the fry of fish: and persons using nets for that purpose, or taking salmon or trout out of season, or any fish under certain lengths, are liable to forfeit 20*s.* and justices of peace, and the lords of leets have power to put the acts in force. By *Stat. 2 H. 6. c. 15*, No person may fasten nets, &c. across rivers to destroy fish, and disturb passage of vessels, on pain of 5*l.*—By *Stat. 31 H. 8. c. 2*, None shall fish in any pond or mote, &c. without the owner's licence, on pain of three months imprisonment. Under *Stat. 22 & 23 Car. II. c. 25*, and 4 *W. & M. c. 23*, No person shall take any fish in any river, without the consent of the owner, under the penalty of 10*s.* for the use of the poor, and treble damage to the party grieved, leviable by districts of goods; and for want of distress, the offender is to be committed to the house of correction for a month: also nets, angles, &c. of poachers may be seized, by the owners of rivers, or by any persons by warrant from a justice of peace, &c. See tit. *Game*; and *pois. Fishing, right of*.

By *St. 5 Geo. 3 c. 14*, Persons stealing or destroying fish in fish ponds, or receiving stolen fish, are to be transported for seven years. See tit. *Black Act*.—And a forfeiture of 5*l.* to the owner of the fishery, is made payable by persons taking or destroying (or attempting to do) any fish in any river or other water within any inclosed ground being private property.

The *Stat. 4 & 5 Ann. c. 21*, was made for the increase and preservation of salmon in rivers in the counties of *Southampton* and *Wilt*; requiring that no salmon be taken between the 1st of *August* and 12th of *November*, or under size, &c. And by *Stat. 1 Geo. 1. c. 18*, (altered as to the river *Ribble*, by *Stat. 23 Geo. 2. c. 26*.) Salmon taken in the rivers *Severn*, *Dee*, *Wye*, *Hart*, *Ouse* &c. are to be 18 inches long at least: or the persons catching them shall forfeit 5*l.*; and sea fish sold must be of the length

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length following, viz. Bret and turbot 16 inches, brill and pearl 14, codlin, bass and mallet 12, sole and place 8, flounders 7, whiting 6 inches long, &c. on pain of forfeiting 20s. to the poor, and the fish. By Stat. 9 Geo. 2. c. 33, Persons that import any fish, contrary to the 1 Geo. 1. c. 18, for better preventing *fresh* fish taken by *foreigners* being imported into this kingdom, &c. shall forfeit 100*l.* to be recovered in the courts at *Westminster*, one moiety to informers, and the other to the poor; and masters of smacks, hoys, boats, &c. in which the fish shall be imported, or brought on shore, forfeit 50*l.*

Besides the above, thus particularized, the following statutes relate to the same subject.—*Westm.* 2. (13 E. 1.) c. 47, and 13 R. 2. c. 19, as to *Salmon* and their fence months—31 E. 3. *β.* 2. c. 1. and 35 E. 3. (*Ordin. of Herring*) as to forestalling *Herrings*.—31 E. 3. *β.* 2. c. 2, selling of herrings at *Tarmouth*—*Id.* c. 3. as to *Stuck fish* and *Salmon*.—17 R. 2. c. 9, appoints justices to be conservators of rivers.—14 H. 6. c. 6, as to foreigners selling fish.—22 E. 4. c. 2: 11 H. 7. c. 23, as to *pickled* salmon and herrings.—2 & 3 E. 6. c. 6, forbids the granting licences to fish in foreign parts.—5 Eliz. c. 5, as to toll of fish—39 Eliz. c. 10, (continued by 3 Car. 1. c. 4, and 16 Car. 1. c. 4, though repealed by 43 Eliz. c. 9,) as to aliens fishing.—1 Jac. 1. c. 23, as to trespass by herring fishers.—3 Jac. c. 12, wears—13 & 14 Car. 2. c. 28, as to *pilehard* fishery.—15 Car. 2. c. 16,—Packing herrings.—*Newfoundland* fishery—30 Car. 2. c. 9, *Severn* fishery.—4 Ann. c. 15, *Stover* fishery.—2 Geo. 2. c. 19, *Oyster* fishery in *Melway* (and see tit. *Oysters*)—9 Geo. 2. c. 33, *Lobster* fishery on the coast of *Scotland*.—11 Geo. 3. c. 27: 15 Geo. 3. c. 43, *Salmon* fishery in the *Tweed*.—16 Geo. 3. c. 36, *Cornwall* pilehard fishery, and see also Stat. 31 Geo. 3. c. 45.

Various statutes have been made as to the particular supply and sale of fish in *London* and *Westminster*, viz.

Stat. 17 R. 2. c. 9, Appoints the Mayor of *London* conservator of the *Thames*—Stats. 10 & 11 W. 3. c. 4: 9 An. c. 26: 3 Geo. 2. c. 27, and 2 Geo. 3. c. 15; for regulating *Bilingsgate* market; 'The Water bailiff's duty; and the Fishmongers' Company.—A long and particular Stat. 22 Geo. 2. c. 49, to establish an open fish-market in *Westminster* has not, it is believed, been ever put in force.—Stat. 30 Geo. 2. c. 21, regulates the fishery in the *Thames* and *Midway*, and Stat. 24 Geo. 2. c. 44, was passed to protect officers in their duty, under the several statutes against forestallers of fish, &c.—Finally the Stats. 29 Geo. 2. c. 39, and 33 Geo. 2. c. 27, were made to regulate the sale of fish at the first hand in the fish-markets in *London* and *Westminster*; and to prevent salesmen of fish buying fish to sell again on their own account; and to allow bret and turbot, brill, and pearl, although under the respective dimensions mentioned in 1 Geo. 1. c. 18, to be imported and sold: and to punish persons who shall take or sell any spawn, brood, or fry of fish, unfishable fish, or fish out of season, or meats under the size of five inches.

By this latter act every master of a vessel is to give a true account of the several sorts of fish brought alive to the *Nore* in his vessel, and if after such arrival, he shall wilfully destroy or throw away any of the said fish, not being unwholesome or unmarketable, &c. he is liable to be committed to the house of correction, and kept to hard labour for any time not exceeding two months nor less than one. And see farther Stat. 2 Geo. 3. c. 15, for the better supplying the cities of *London* and *Westminster*

with fish, by means of fish machines, and to reduce the exorbitant price thereof; and to protect and encourage fishermen.

• For so much concerning the several nations of *America* as relate to the commerce and navigation of the country, See title *Navigation—Art V.*

The *Newfoundland* Fisheries are at present regulated under Stats. 10 & 11 W. 3. c. 24, 25: 15 Geo. 3. c. 31: 20 Geo. 3. c. 26: 28 Geo. 3. c. 35: 29 Geo. 3. c. 53.

Greenland Fishery. 4 & 5 W. & M. c. 17: 1 An. *β.* 1. c. 16: 26 Geo. 3. c. 41: 29 Geo. 3. c. 53.—the two latter continued by 31 Geo. 3. c. 43, and 32 Geo. 3. c. 22.

Southern Whale Fishery. 26 Geo. 3. c. 50: 28 Geo. 3. c. 20: 29 Geo. 3. c. 53.

British Herring Fishery. 25 Geo. 3. c. 81: 27 Geo. 3. c. 10.

Scotch Fisheries. 13 Geo. 1. c. 30: 29 Geo. 2. c. 23: 26 Geo. 3. c. 106.

FISHING, RIGHT OF, AND PROPERTY OF FISH. It has been held, that where the lord of the manor hath the soil on both sides the river, it is a good evidence that he hath the right of fishing, and it puts the proof upon him who claims a free fishery; but where a river ebbs and flows, and is an arm of the sea, there it is common to all, and he who claims a privilege to himself must prove it; for if trespass is brought for fishing there, the defendant may justify that the place where, is an arm of the sea, in which every Subject of our lord the king hath and ought to have free fishery.

In the *Severn*, the soil belongs to the owners of the land on each side; and the soil of the river *Thames*, is in the king, &c. but the fishing is common to all. 1 *Mol.* 105. He who is owner of the soil of a private river, hath a separate or several fishery; and he that hath *free-fishery* hath a property in the fish, and may bring a possessory action for them; but *communis piscaria* is like the case of all other commons. 2 *Salk.* 637.

There are three sorts of Fisheries or *Piscaries*. Free Fishery; Several (or separate) Fishery; and Common of Piscary.

Common of Piscary is a liberty of fishing in another man's water. 2 *Comm.* 34. See tit. *Common*. A *Free Fishery*, or exclusive right of fishing in a public river, is a royal franchise: this differs from a *Several Fishery*; because he that has a *several fishery* must also be (or at least derive his right from) the owner of the soil. It differs also from a *common of piscary*, in that the free fishery is an exclusive right, the common of piscary is not so; and therefore in a *free fishery* a man has property in the fish before they are caught: in a *common of piscary*, not till afterwards. 2 *Comm.* 39, 40; which see. As to a *free fishery* no new franchise can at present be granted of it, by the express provision of *Magna Charta*, c. 16; and the franchise must be at least as old as the reign of *Hen. II.* 2 *Comm.* 417. One that has a close pond in which there are fish, may call them *pisces suos* in an indictment, &c. But he cannot call them as *bona & catalla*, if they be not in trunks. There needs no privilege to make a fish pond; as there doth in case of a warren. *Mod. Ca.* 183. See further this Dict. title *Game*.

FISHERMEN. By Stat. 9 Ann. c. 26, There shall be a master, wardens and assistants of the *Fishmongers' Company* in *London*, chosen yearly at the next court of the Lord Mayor and Aldermen after the tenth of *June*, who are

are constituted a court of assistants: and they shall meet once a month at their common hall, to regulate abuses in fishery, register the names of fishermen, and mark their

FISHGATE. A dam or wear in a river, made for the taking of fish, especially in the rivers of *Ouse* and *Humber*.

FISH ROYAL, *Whale* and *Sturgeon* which the King is intitled to when either thrown on shore or caught near the coasts. *Plowd.* 315. See tit. *Kings*.

FLACO, A place covered with standing water. *Mon. Angl. tom. 1. p. 209.*

FLAX, See *Hemp*.

FLECTA, A feathered or fledged arrow; a *flect arrow*.

FLEDWITE OR **FLIGHTWIFE**, from Sax. *Flyb*, *Fuga*, et *Wite*, *Multa*] In our ancient law signified a discharge from amerciaments, where a person having been a fugitive came to the peace of our Lord the King of his own accord, or with licence. *Rassal*.

FLEET, Sax. *Fleet*, i. e. *Flota*, a place of running-water, where the tide or *float* comes up.] A prison in *London*, so called from a river or ditch that was formerly there, on the side whereof it stood. To this prison men are usually committed for contempt to the King and his laws, particularly against the courts of justice; or for debt, when persons are unable or unwilling to satisfy their creditors: there are large rules, and a *Warden* or *Keeper* belonging to the *Fleet Prison*, &c. By *Stat. 1 Geo. 2. c. 32*, the then *Warden* of the *Fleet* was disabled to hold any office, for his notorious oppressions of the prisoners; and the King was empowered to grant the said office to such person as he should think fit, &c. See titles *Geol: Gaol: Prison*.

FLEET-DITCH. The Corporation of *London* were enabled by *Stat. 6 Geo. 2. c. 22*, to fill up *Fleet Ditch*, and make the soil level with the streets: and the fee is vested in the Mayor and Commonalty. And at the time of building *Blackfriars Bridge* the ditch was arched over, and so filled up to the foot of the bridge, that the ground became level with *Fleet-street*.

FLEET OF SHIPS, See title *Navy*.

FLEM, *Flema*, from Sax. *Flean*, to kill or slay.] An outlaw; and by virtue of the word *Flemaflare* were claimed *bona felonum*; as may be collected from a *quo warranto*, *Temp. Ed. 3.*

FLEMENEFRET, FLEMENESFRINTHE, FLYMENAFRYN THE] The receiving or relieving of a fugitive or outlaw. *Leg. Int. c. 29, 47: LL. H. 1. c. 10, 12.*

FLEMESWITE, Sax.] *Fleta*, interprets it *habere cattalla fugitivorum*. *Lib. 1. c. 47.*

FLETA. The title of an ancient law-book, supposed to have been written by a Judge who was confined in the *Fleet* prison. *temp. E. 1. Nicolson's Historical English Library 225.*

FLIGHERS, Maits for ships, *Mon. Angl. tom. 1. p. 799.*

FLIGHT, For crimes committed, See *Fugam fecit*.

FLOOD-MARK: The mark which the sea makes on the shore, at flowing water and the highest tide: it is also called *High water Mark*.

FLORENCE, An ancient piece of *English* gold coin: every pound weight of old standard gold was to be coined into fifty *Florences*, to be current at six shillings each; all which made in tale fifteen pounds, or into a proportionate number of half *Florences* or quarter pieces; by indenture of the *Mint*, 18 Ed. 3.

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FLORIN, A foreign coin; in *Spain*, 4 s. 4 d. *Germany*, 3 s. 4 d. and *Holland*, 2 s.

FLOTA NAVIUM, A fleet of ships.—*Rot. Francia*, 6 R. 2. m. 21.

FLOTAGES, Such things as by accident swim on the top of great rivers; the word is sometimes used in the commissions of *Water Bailiffs*.

FLOTSAM, Is where a ship is sunk or cast away, and the goods are floating upon the sea. 5 Rep. 106: *Flotsam*, *Jetsam* and *Lagan* are mentioned together; *Jetsam* being where any thing is cast out of the ship when in danger, and the ship notwithstanding perisheth; and *Lagan* is when heavy goods are thrown over board before the wreck of the ship, which sink to the bottom of the sea, but are tied to a cork or buoy in order to be found again. 5 Rep. 106. The King shall have *FLOTSAM*, *JETSAM* and *LAGAN*, when the ship is lost, and the owners of the goods are not known; but not otherwise. *F. N. B. 122.* Where the proprietors of the goods may be known, they have a year and a day to claim *FLOTSAM*. 1 Keb. 657. *FLOTSAM*, *JETSAM*, &c. any person may have by the King's grant, as well as the Lord Admiral, &c. See 1 Comm. 292. and this Dict. title *Wreck*.

FOCAGE, *Focagium*.] *House-bote* or *Fire bote*.

FOCAL, A right of taking wood for firing: *Mon. Angl. tom. 1. p. 779.*

FODDER, Sax. *Foda*, i. e. *Alimentum*] Any kind of meat for horses, or other cattle: among the *Feudists* it was used for a prerogative of the Prince, to be provided with corn and other meat for his horses, by his subjects, in his wars or other expeditions. *Hotom de verb. Feudal*.

FODERTORIUM, Provision or fodder, to be paid by custom to the King's purveyor. *Capitular. MS.*

FOENUS NAUTICUM, *Bottomry*; See that title; and title *Insurance*.

FOESA, Fr. *Foisson*.] Grass, herbage. *Mon. Angl. tom. 2. p. 506.*

FOGAGE, *Fogagium*.] Fog or rank after-grass, not eaten in summer. *LL. Forestar. Scot. c. 10.*

FOTTERERS, Vagabonds. *Blount*. See *Faitours*.

FOLC-LANDS, Sax.] Copyhold lands; so called in the time of the Saxons, as charter lands were called *Bocland*, *Kitch. 174.* *Folkland* was *terra vulgi* or *popularis*, the land of the vulgar people, who had no certain estate therein, but held the same under the rents and services accustomed or agreed, at the will only of their Lord the *Town*; and it was therefore not put in writing, but accounted *predium rusticum* & *ymbile*. *Specim. of Feuds, cap. 5.* See this Dict. titles *Copyhold*; *Tenure*.

FOLC-MOTE, OR **FOLK MOTE**, Sax.] *Fulgemor*, *Conventus populi*.] Is compounded of *Folk*, *populus*, and *mote* or *gemote*, *convenire*; and signified originally, as *Sommer* in his *Saxon Dictionary* says, a general assembly of the people to consider of, and order matters of the commonwealth: See *Leg. Edw. Confess. cap. 35.* *Spelman* says the *felmote* was a sort of annual parliament, or convention of the Bishops, Thanes, Aldermen and Freemen, upon every *May-day* yearly; where the laymen were sworn to defend one another, and the King, and to preserve the laws of the kingdom, and then consulted of the common safety. But Dr. *Brady* infers from the laws of our *Saxon* Kings that it was an interior court, held before the King's Reeve or Steward, every month to do *Folk right*, or com-

pose smaller differences, from whence there lay appeal to the superior courts. *Brady's Gloss.* p. 48. *Squire* seems to think the *Folcmote*, not distinct from the *shire mote*, or common general meeting of the county. *Engl. Sax. Gov.* 155 n.

Manwood mentions *folkmote* as a court holden in London, wherein all the *folk* and people of the city did complain of the Mayor and Aldermen, for misgovernment within the said city; and this word in *Stowe's* time continued in use among the *Londoners*; and denoted *celor* ex tota civitate c. c. c. *Stowe's* S. c. c.

According to *Kent*, the *folkmote* was a common council of all the inhabitants of a city, town or borough, convened often by sound of bell to the *Mote Hill* or *Huse*; or it was applied to a larger congress of all the freemen within a county, called the *shire-mote*, where formerly all knights and military tenants did fealty to the King, and elected the annual sheriff on the first of October; till this popular election, to avoid tumults and riot, devolved to the King's nomination. After which the *City Folkmote* was swallowed up in a select committee or *Common Council*, and the *County Folkmote*, in the *Sheriff's Town* and *Messis*. The word *Folkmote* was also used for any kind of popular or public meeting; as of all the tenants at the *Court-Leet* or *Court Baron*, in which signification it was of a less extent. *Paroch. Antiq.* 120—See further this Dict. title *Parliament*.

FOLDAGE AND FOLD COURSE, A liberty to fold sheep, &c. See *Fallage*; *Fallfee*.

FOLGARI, Menial servants; *Bract. lib. 3. tract. 2. c. 10*. House keepers by the Saxons were called *Husfostene*, and their servants or followers, *Filgheres* or *Filgeres*. *LL. Hen. 1. c. 9*.

FOOL, A Natural; one so from the time of his birth. See title *Idiots and Lunatics*.

FOOT or **A FINE**. See title *Fine*.

FOOT-GELD. From Sax. *Fot*, *Pes*; and Geldan, *solvere*. *Ped. redemptio*.] An amercement for not cutting out and expediting the balls of great dogs' feet in the forest: to be quit of *foot-geld* is a privilege to keep dogs within the forest unslayed, without punishment. *Manwood*, par. 1. p. 86. See title *Fine*.

FORAGE, Fr. *Fourage*.] Hay and straw for horses, particularly for the use of horse in an army.

FORAGIUM, Straw when the corn is thrashed out. *Corvel*.

FORBALK, *Forbalka*.] Lying forward or next the highway. *Pr. Bl. nris Contin. Hist. Cleveland*, p. 116.

FORBARR, To bar or deprive one of a thing for ever. *Sc. Bur. 9 R. 2. c. 2: 6 H. 6. c. 4*.

FORBATULUS, The aggressor slain in combat.

FORBATOR OF ARMOUR, *Forbator*.] *Si quis forbator armatus fuerit, ad purgandum*, &c. *LL. Richard. MS. c. 22*.

FORCE, *Vis*.] Is most commonly applied in *injuria faciem*, the evil suit, and signifies any unlawful violence. It is defined by *W. & A.* to be an offence, by which violence is used to things or persons; and he divides it into *simple* and *compound*, *simple force*, is that which is so committed that it hath no other crime accompanying it; as if one by force do only enter into another man's possession, with out doing any other unlawful act: *mixed or compound force*, is when some other violence is committed with such a fact, which of itself alone is criminal; as

where any one by force enters into another man's house, and kills a man, or ravishes a woman, &c. And he makes several other divisions of this head. *W. & A. Symbol. par. 2. sect. 65*. Lord Coke says, there is also a *force* implied in law; as every trespass, *replevin*, or disseisin, implieth it; and an *actual force*, with weapons, number of persons, &c. where threatening is used to the terror of another. *Co. Litt. 25*. By law any person may enter a tavern; and a landlord may enter his tenant's house to view repair, &c. But if he that enters a tavern, commits any force or violence; or he that enters to view repairs, breaketh the house, &c. it shall be intended that they entered for that purpose. *8 Rep. 146*. All force is against the law; and it is lawful to repel force by force: there is a maxim in our law, *quod alius bonum et justum est, si per vim vel fraudem petatur, malum et iniustum est*. *3 Rep. 78*. Where a crime in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. *4 Comm. 181*. See title *Murder*.

FORCIBLE ENTRY AND DETAINER.

An Offence against the public peace which is committed by violently taking or keeping possession of lands and tenements, with menaces, arms and force, and without the authority of the law; whereby he who hath right of entry is barred or hindered. See *4 Comm. 148*. At Common law, any one who had a right of entry into lands, &c. might regain possession thereof by force; but this liberty being much abused, to the breach of the public peace, it was found necessary that it should be restrained. By *Stat. 5 R. 2. st. 1. c. 8*, all forcible entries are punished with imprisonment and ransom at the King's will. And by *Stat. 15 R. 2. c. 2: 8 H. 6. c. 9: 31 Edw. 3. c. 11: 21 Jac. 1. c. 15*, upon any forcible entry or forcible detainer after peaceable entry, into any lands (or benefices of the church) one or more Justices of the peace taking such power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol till he makes fine and ransom to the King. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of: and if the same be found by that jury, then besides the fine on the offender, the justices shall make restitution, by the sheriff, of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished and remedied by them; and the same may be done by indictment at the general Sessions. But this provision does not extend to such an endeavour to maintain possession by force, where they themselves or their ancestors have been in peaceable enjoyment of the lands, &c. for three years immediately preceding. *4 Comm. 148*. And this may be alleged in way of restitution, and restitution is to be stayed till that be tried, if the other will traverse the same, &c. *Dalt. 312*. See *F. Raym. 85: 1 Sid. 149: Salk. 260*.

Indictment for forcible entry must be laid of *liberum tenementum*, &c. to have restitution by *stat. 15 R. 2. c. 2: 8 H. 6. c. 9: &c.* But by *Stat. 21 Jac. 1. c. 15*, Justices of peace may give like restitution of possession to tenants for years, tenant by *elegit*, statute staple, &c. and copyholders, as to freeholders, since which statute the estate of the person ousted must be stated, for perhaps he is only tenant at will. *Serb. 1 Salk. 260: R. 1 Sid. 107*. See farther

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farther as to what shall be a good indictment, *Com. Dig.* title *Forcible Entry* D 4.)

Having said thus much generally, we may proceed more fully to enquire,

I. *What shall be deemed a Forcible Entry and Detainer under the foregoing Statutes.*

II. *What Remedy is provided in such Cases.*

I. By Stat. 5 R. 2. c. 8, "None shall make any entry, into any lands or tenements, (or benefice of holy church Stat. 15 R. 2. c. 2; or other possessions, Stat. 8 H. 6. c. 9. § 2,) but where entry is given by the law; and in such case not with strong hand or with multitude of people, but only in peaceable and easy manner; on pain of imprisonment and ransom at the King's will.

When one or more persons armed with unusual weapons violently enter into the house or land of another; or where they do not enter violently, if they forcibly put another out of his possession; or if one enters another's house, without his consent, although the door be open, &c. these are all forcible entries punishable by law. *Co. Lit.* 257. So when a tenant keeps possession of the land at the end of his term against the landlord, it is a forcible detainer. And if a lessee takes a new lease of another person, whom he conceives to have better title, and at the end of the term keeps possession against his own landlord, this is a forcible detainer. *Co. Jac.* 19. Also persons continuing in possession of a defeasible estate after the title is defeated, are punishable for forcible entry; for continuing in possession afterwards, amounts in law to a new entry. *Co. Lit.* 2, 6, 257. And an infant or feme-covert may be guilty of forcible entry within the statutes in respect of violence committed by them in person; but not for what is done by others at their command, their commands being void. *Co. Lit.* 257, 357.

If a man have two houses next adjoining, the one by a defeasible title, and the other by a good title; and he uses force in that he hath by the good title to keep persons out of the other house, this is a forcible detainer. 2 *Shep. Abr.* 203. A man enters into the house of another by the windows, and then threatneth the party, and he for fear doth leave the house, it is a forcible entry: so if one enter a house when no person is therein, with armed men, &c. *Mor. Cas.* 185. If a person after peaceable entry, shall make use of arms to defend his possession, &c. it will be forcible detainer: a man puts another out of his house by force, if he then puts in one of his servants in a peaceable manner, who keeps out the party, &c. it will be a forcible entry, but not a detainer; but if himself remaineth there with force, this makes a forcible detainer. If I hear that persons will come to my house to beat me, &c. and I take in force to defend myself, it is no forcible detainer; though where they are coming to take lawful possession only, it is otherwise. 2 *Shep.* 203.

This offence may be committed of a rent, as well as of a house or land: as where one comes to distrain, and the tenant threatens to kill him, or forcibly makes resistance, &c. 2 *Shep.* 201. But forcibly entry cannot be of a way or other easement; or of a common or office. 1 *Hawk. P. C.* So no man can be guilty of forcible entry, for entering with violence into lands or houses in his own sole possession at the time of entry; as by breaking open doors &c. of his house detained from him by one who has the

bare custody of it; but jointenants, or tenants in common, may be guilty of forcible entry, and holding out their companions. A person is not guilty of a forcible detainer, by barely refusing to go out of a house, and continuing therein in despite of another. And no words alone can make a forcible entry, although violent and threatening, without force used by the party. 1 *Lill. Abr.* 514.

A forcible entry may be committed by a single person as well as by 20, and all who accompany a man when he makes a forcible entry shall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Hawk. P. C.* c. 64.

The same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also. And a detainer may be forcible whether the entry were forcible or not. 1 *Hawk. P. C.* c. 64.

If a Justice of peace come to view a force in a house, and they refuse to let him in; this of itself will make a forcible detainer in all cases; but it must be upon complaint made. *Dalt.* 312.

II The Remedy may be, by action; or by Justices of peace upon view; or by indictment or inquisition.

By Stat. 8 H. 6. c. 9. § 6, "If any person be put out or disseised of any lands or tenements in forcible manner, or put out forcibly and after holden out with strong hand, the party grieved shall have assize of novel disseisin, or writ of trespass against the disseisor; and if he recover, (or if any alienation be made to defraud the possessor of his right, which is also declared by the statute to be void,) he shall have treble damages, and the defendant shall also make fine and ransom to the King."

But in an action on this statute if the defendant make title which is found for him, he shall be dismissed without any enquiry concerning the force; however punishable he may be for that at the King's suit. 1 *Hawk. P. C.* *Dalt.* c. 129.

If in trespass or assize upon this statute the defendant is condemned by *non sum informatus*; he shall pay treble damages and treble costs: a judgment, and affirmed in error. For the words of the statute give them where the recovery is by verdict, or otherwise in due manner. *Jenk. Cent.* 197.

The party grieved if he will lose the benefit of his treble damages and costs may be aided and have the assistance of the Justices at the general Sessions by way of indictment on this same statute. Which being found there, he shall be restored to his possession by a writ of restitution granted out of the same court to the sheriff. *Dalt.* c. 129.

Indictment of forcible entry lies not only for lands, but for tithes; also for rents; but not against a lord entering a common with force, for which the commoner may not indict him, because it is his own land. *Co. Car.* 201, 486.

For a more speedy remedy the party grieved may complain to any one Justice or to a mayor, sheriff or bailiff, within their liberties; and it is provided by Stat. 15 R. 2. c. 2: & H. 6. c. 9, that after complaint made to such Justice, &c. he shall within a convenient time at the costs of the party grieved take sufficient power of the county, and go to the place where such force is made, and if he shall find such force, shall cause the offenders to be arrested, and make a record of such force by him viewed; and the offenders so arrested shall be put in the next gaol, there to

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abide convict by the record of the same justice until they have made fine and ransom to the King.

As to restitution to the party injured, it is enacted by the said *stat. 8 H. 6. c. 9.*, though that the persons making such entry be present, or else departed before the coming of the Justice, he may notwithstanding in some town next to the tenements so entered, or in some other convenient place, have power to enquire by a jury of the county as to the persons making such forcible entry and detainer; and the Justice may make his precept to the sheriff, who is to summon the jury. And if such forcible entry or detainer be found before such Justice, then the said Justice shall cause to re-settle the lands and tenements so entered or holden, and shall restore the party put out to the full possession of the same. And by the *stat. 31 Eliz. c. 11.*, if on an indictment of forcible entry, &c. it is found against the party indicted, he shall pay such costs and damages as the Judges or Justices shall assess.

Under the above *Stat. 15 R. 2. c. 2.* any Justice of the peace upon view of the *force*, may make a record of it, and commit the offender. And this, without a writ directed to him to execute the statutes: and upon any information without a complaint of the party. So every Justice may take the sheriff, an *offse committatus*, to restrain, or he may break open a house to remove the *force*. *Dalt. c. 44.* The record made by a Justice upon view, shall be a conviction, and is not traversable, and ought to be certified to B. R. or the next assizes, or quarter sessions. And if a defect appears, in the conviction, to B. R. it shall be quashed. *1 Sid. 156.* See *8 Co. 121.* The Justices have power to fine on view: but are not bound to do it on the spot, but may take a reasonable time to consider. See *Str. 794: Ld. Paym. 1515.*

The Justices, on forcible detainer, may punish the force upon view, and fine and imprison the offenders; *Sid. 156.* And it hath been held, that in forcible entry and detainer, the jury are to find *all or none*; and not the detainer, without the forcible entry. *1 Vent. 25.*

An indictment will lie at Common law for a forcible entry, though generally brought on the above statutes. But it must shew on the face of it sufficient actual force. *3 Burr. 1702, 1732.*

An indictment for a forcible detainer, ought to shew, that the entry was peaceable, *Cro. Jac. 151.*

Indictments for forcible entry must set forth, that the entry was *in manu forti*, to distinguish this offence from other trespasses *vi et armis*; and there are many niceties to be observed in drawing the indictment, otherwise it will be quashed. *Cro. Jac. 451: Dalt. 298.* There must be certainty in this indictment; and no repugnancy, which is an incurable fault. An indictment of forcible entry was quashed, for that it did not set forth the estate of the party: so where the defendant hath not been in possession peaceably three years before the indictment, without laying before the indictment found, &c. And force shall not be intended when the judgment is generally laid, for it must be always expressed. *2 Nels. Abr. 867, 869.*

The Justice may make restitution, (after inquisition found) to the party ousted, by himself, or by his precept to the sheriff. *T. Raym. 85: Carib. 496.* So restitution shall be made upon an indictment at the quarter sessions. *H. P. C. 140.*

An indictment of forcible entry may be removed from before Justices of peace into the court of B. R. *coram rege*, which court may award restitution. *11 Rep. 65.* And

the justices before whom such indictment was found, may, after traverse tendered, certify or deliver the indictment into the King's Bench, and refer the proceeding thereupon to the justices of that court.

So justices of jail delivery, upon an indictment before them. So re-restitution shall be, after an ill restitution awarded. *Sar. 68: Cro. Jac. 151.* So restitution shall be to a disseisor ousted by the force of the disseisee. To a lessee, though the lessor, who was disseised, thereby opposes it. To a copyholder though his lord opposes it. vide *Dalt. c. 132* — *Contrà before Stat. 21 Jac. c. 15.* See *Dy. 142 a. in marg.*

A copyholder cannot be disseised, because he hath no freehold in his estate; but he may be expelled. And a copyhold tenant may be restored, where he is wrongfully expelled; but if the indictment be only of disseisin, as he may not be disseised, there can be no restitution but at the prayer of him who hath the freehold. *22 Ju. 81: Cro. Jac. 41.* Possession of the termor is the possession of him in reversion: and when a lessee for years is put out of possession by force, restitution must be to him in reversion, and not to the lessee; and then his lessee may re-enter. *1 Leon 327.* A termor may say that he was expelled, and his landlord in reversion disseised: or rather that the tenant of the freehold is disseised, and he, the lessee for years, expelled. *4 Mol. 248: 2 Nels. Abr. 869.* If a disseisee within three years makes a lawful claim, this is an interruption of the possession of the disseisor, *H. P. C. 139.* Though it has been adjudged, that it is not the title of the possessor, but the possession for three years, which is material. *Sid. 149.* Since the *Stat. 5 R. 2. §. 1. c. 8.*, if one be seised of lands, and another having good right to enter, doth accordingly enter *manu forti*, he may be indicted notwithstanding his right, &c. *3 Salk. 170.* For a forcible detainer only it is said there is no restitution; the plaintiff never having been in possession. *1 Vent. 23: Sid. 97, 99.*

No restitution shall be awarded to an *advowson*, common, rent, &c. for it shall only be to land. *Dalt. c. 44.* Nor, where he, who used force has the possession by operation of law: as if a disseisee enters, and afterwards, by force, ousts his disseisor, the possession shall not be restored; for it was reverted in the disseisee by his entry. *Dalt. c. 132.* Nor, if a lessor enters by force, upon the lessee, for a forfeiture; nor to any other than him who was ousted by force, or to his heir. *Salk. 587.* Or any abator, after the death of the ancestor. *Dalt. c. 132.* Nor if the party tenders a traverse to the inquisition. *1 Sid. 287.* Upon a *certiorari* delivered to remove an indictment, it shall be stayed. *H. P. C. 141.* Or, if the indictment appears insufficient. *H. P. C. 140.* And in such case restitution granted may be stayed before execution. *H. P. C. 140.* So restitution shall not be, after a conviction by a Justice upon his view. *1 Pent. 301.* Nor by justices of assize, gaol delivery, or justices of peace; if the indictment was not found before them, *H. P. C. 140 Dalt. c. 44, 131.* So restitution shall not be, unless immediately; not four or five years afterwards. *Carib. 496.*

A record of justices of peace of forcible entry, is not traversable; but the entry and force, &c. may be traversed in writing, and the justices may summon a jury for trial of the traverse. *1 Salk. 353.* The finding of the force being in nature of a presentment by the jury, is traversable; and if the justices of peace refuse the traverse, and

and grant restitution, on removing the indictment into *B. R.* there the traverse may be tried; and on a verdict *for* the party, &c. a *restitution* shall be granted. *Sid* 287: *2 C. c. 8*. If *no force* is found at a trial thereof before justices, *restitution* is not to be granted; nor shall it be had till the force is tried; nor ought the justices to make it in the absence of the defendant, without calling him to answer. *1 Hawk P. C. c. 64*.

No other justices of peace but those before whom the indictment was found, may either at sessions, or out of it, award restitution; the same justices may do it in person, or make a precept to the sheriff to do it, who may raise the power of the county to assist him in executing the same. *1 Hawk P. C. c. 64*. And the same justices of peace may also supersede the restitution, before it is executed; on insufficiency found in the indictment, &c. But no other justices, except of the court of *B. R.* A *certiorari* from *B. R.* is a *superfetas* to the restitution; and the justices of *B. R.* may sit aside the restitution after executed, if it be against law, or irregularly obtained, &c. *1 Salk. 154*. If justices of peace exceed their authority, an information may be brought against them. A conviction for *forcible entry* before a fine is set, may be quashed on motion; but after a fine is set, it may not; the defendant must bring writ of error. *1 Salk. 450*.

If a plaintiff proceeds not criminally by indictment for *forcible entry*, but commences a civil action on the case, on *Stat* 8 Hen 6 c 9, the defendant is to plead *Not guilty*; or *may plead any special matter, and traverse the force*; and the plaintiff in his replication must answer the special matter, and not the traverse; and if it be found against the defendant, he is convicted of the force of course; whereupon the plaintiff shall recover treble damages and costs. *3 Salk 169*.

A reverentor cannot bring action of *forcible entry*, because he cannot be expelled, though he may be dispossessed. *D. c. 141*. The words in the writ to maintain the action are, that the defendant *expulit & dissipavit*, &c. yet it is said that every dissipation implies an expulsion in *forcible entry*. *Cro. Jac. 31*.

Though *forcible entry* is punishable either by indictment or action; the action is seldom brought, but the indictment often. But in many cases it may be much more for the benefit of the party to bring the action.

If a *Forcible entry* or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry hath before been made of the force. *D. c. 44*.

See further on this subject. *1 Hawk P. C. c. 64*, at length and *Burn's Justice*, title *Forcible Entry*.

FORCIBLE MARRIAGE, See this Dict. titles *Marriage*, *C. c. 12 an*.

FORD [*orda*] A shallow place in a river. *Mon. Ang. tom* 1 657 See title *Ferry*.

FOR D A, from Sax *fore*, before, and *dæle*, a part or portion.] A butt or head land, shooting upon other bounds.

FORCE CAPUM, from Sax *fore*, a te, and *ceapen*, i. e. *to bargain*, *em*.] P a empion. *Chron. Brum. ton col.* 857 858. *1 A. Leired. c. 23*.

FORBIDDEN, But out of excluded; as the bringing the equity of redemption on mortgages, &c. See title *Mortgage*.

FOREGOERS. 'The King's Purveyors; They were so called from their going before to provide for his household 36 Ed. 3. 5

FOREIGN, 1 r. *foreign*, Lat. *forinsecus, extraneus*.] Strange or outlandish, of another country, or society; and in our law, is used adjectively being joined with divers substantives in several senses. *K. t. b. 126*

FOREIGN ATTACHMENT, See title *Attachment*, *foreign*.

FOREIGN COURT At *Lemster* (anciently called *Leominster*) there is the borough and the *foreign court*; which last is within the jurisdiction of the manor, but not within the liberty of the bailiff of the borough. so there is a *foreign court* of the honour of *Gloucester*. *Claus. 8 Ed. 2*. *Foreign bought and sold* was custom within the city of *London*, which, being found prejudicial to the sellers of cattle in *Smithfield*, was abolished.

FOREIGN KINGDOM; FOREIGN LAWS AND CUSTOMS. A Foreign Kingdom is one under the dominion of a *foreign prince*; so that *Ireland*, or any other place, subject to the crown of *England*, cannot with us be called *foreign*; though to some purposes they are distinct from the realm of *England*. If two of the king's subjects fight in a *foreign kingdom*, and one of them is killed, it cannot be tried here by the common law. but it may be tried and determined in the court of the *Consul and Merchant*, according to the *lex loci*; or the fact may be examined by the Privy Council, and tried by commissioners appointed by the king in any county of *England*, by statute 33 H. 8. c. 23. 3 Inst. 48. One *Hutchinson* killed Mr. *Culson* abroad in *Portugal*, for which he was tried there and acquitted, the exemplification of which acquittal he produced under the Great Seal of that kingdom; and the king being willing he should be tried here, referred it to the judges, who all agreed, that the party being already acquitted by the laws of *Portugal*, could not be tried again for the same fact here. 3 K. b. 785

If a Stranger of *Holland*, or any *foreign kingdom*, buys goods at *London*, and gives a note under his hand for payment, and then goes away privately into *Holland*, the seller may have a certificate from the Lord Mayor, on proof of sale and delivery of the goods: upon which the people of *Holland* will execute a legal process on the party. 4 Inst. 38. Also at the instance of an ambassador or consul, such a person of *England*, or any criminal against the laws here, may be sent from a *foreign kingdom* hither. Where a bond is given, or contract made in a *foreign kingdom*, it may be tried in the King's Bench, and laid to be done in any place in *England*. Hol 11 2 Inst. 322.

An agreement made in *France*, on two French persons marrying, touching the wife's fortune, has been decreed here to be executed, according to the laws of *England*; and that the husband surviving should have the whole; but relief was not given for a certain sum, and the rest to be governed by the custom of *Paris*. *Preced. Chanc.* 20, 208.

A and B. being inhabitants of the United States of *America*, while those States were colonies of *Great Britain*, and before the rebellion of them as colonies, B executes a bond to A—During the rebellion, after the declaration of independence by the *American Congress*, but before the independence of *America* was acknowledged by *Great Britain*, both parties are attained, their property confiscated, and vested in the respective States of which they were

were inhabitants, by the legislative acts of those States then in rebellion, and a fund provided for the payment of the debts of *B.* Afterwards the independence of *America* is acknowledged by *Great Britain*. Under all these circumstances *A.* may maintain an action on the bond against *B.* in *England*.

Judgment of the court of King's Bench (affirming the judgment of *C. P.*) *Adm. and Bro. P. C.*

Though all these judgments appear unanimous, the two former, and perhaps all three of them, were given in one measure upon different grounds. But it appears upon the two first decisions to be a principle not judicially controverted, that "the *positive laws* of one country cannot be taken notice of, to affect the laws and rights of citizens (or subjects of such country, becoming citizens,) of another; the penal laws of foreign countries being strictly local, and affecting nothing more than they can reach, and can be seized by virtue of their authority." See 3 *Term Rep.* 733. 5: 1 *H. Black. Rep.* 175.

In the case of *Dudley v. Pitt*, the court having no doubt about the law, and thinking that it would lead to the discussion of improper topics, *would not permit the question to be argued*. That was the case of a covenant in a conveyance of lands in *America*, made during the time of the rebellion, (*April*, 1780) "that the grantor had a legal title, and that the grantee might peaceably enjoy, &c. without the least interruption, &c. of the grantor and his heirs, or of any other person whomsoever." The court were of opinion that this covenant was not broken by the States of *America* seizing the lands, as forfeited, for an act done previous to the conveyance, notwithstanding the subsequent acknowledgment of independence. 3 *Term Rep.* 584.

FOREIGN OPPOSER, or *Apposer*. See *Exchequer*.

FOREIGN PLANTATIONS; AND DOMINIONS OF THE CROWN. As to the former of these, see this Dict. tit. *Plantations*. As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase or other acquisition, as the territory of *Hanover* and his majesty's other property in *Germany*; as these do not in any wise appertain to the crown of these kingdoms they are entirely unconnected with the laws of *England*, and do not communicate with this nation in any respect whatsoever. The *Engl. Leg.* Legislature, warned by past experience, wisely interdicted in the act of Settlement, which vested the crown in the present family, the following clause, "That in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of *England*, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of *England*, without consent of Parliament." *Stat.* 12 *Ch. 13. W.* 3. c. 3.

FOREIGN PLEA. A plea in objection to a judge, where he is refused as incompetent to try the matter in question, because it arises out of his jurisdiction. *Kitch.* 75: *Stat.* 4 *Hen. 8. c. 2*. If a plea of issuable matter is alleged in a different county from that wherein the party is indicted or appealed, by the common law, such pleas can only be tried by juries returned from the counties wherein they are alleged. But by the *Stat.* 23 *H. 8. c. 14. § 5*, all foreign pleas triable by the country, upon an indictment for petit treason, murder or felony, shall be forthwith tried without delay, before the same justices before whom the party shall be arraigned, and by the

jurors of the same county where he is arraigned, notwithstanding the matter of the pleas is alleged to be in any other county or counties: though as this statute extends not to treason, nor appeals, ~~it is said a foreign issue therein must still be tried by the jury of the county wherein alleged~~ 3 *Inst.* 17: *H. P. C.* 255: 2 *Mart. P. C. c.* 40. § 6, 7. In a foreign plea in a civil action the defendant ought to plead to that place where the plaintiff alleges the matter to be done in his declaration; and the defendant may plead a foreign plea whether the matter is transitory, or not transitory; but in the last case he must swear to it. *Sid.* 2, 4: 2 *Nel.* 871. When a foreign plea is pleaded, the court generally makes the defendant put it upon oath, that it is true; or will enter up judgment for want of a plea. See 5 *Mod.* 335. Foreign answer is such an answer as is not triable in the county where made; and foreign matter is that matter which is done in another county. See further titles *Pleading*; *Indictment*.

FOREIGN SERVICE, is that whereby a mesne lord holds of another, without the compass of his own fee: or that which the tenant performs either to his own lord, or to the lord paramount out of the fee. *Kitch.* 2, 9. See *Bract. lib.* 2. c. 16. *Feudal tenures* seems also to be used for knight's service, or service uncertain, *Parkin.* 650.—*Saunders's Feudal Service. Mon. A.* tom 2. p. 637.

Felonies in foreign, *Foreign States*, are restrained and punished by *stat.* 3 *Jac.* 1. c. 4; which makes it felony for any person whatever to go out of the realm, to serve any foreign Prince or State, without having first taken the oath of allegiance before his departure. And it is felony also for any Gentleman, or person of higher degree, or who hath borne office in the army, to go out of the realm to serve such foreign Prince or State, without previously entering into a bond with two sureties, not to be reconciled to the See of Rome, or enter into any conspiracy against his natural Sovereign. See the *stat.* § 18. 19.—By *stat.* 9 *Geo. 2. c. 30*, enforced by *stat.* 29 *Geo. 2. c. 17*, if any subject of *Great Britain* shall enlist himself, or if any person shall procure him to be enlisted in any foreign service, or detain or embark him for that purpose without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy; but if the person so seduced, shall within 15 days discover his seducer, he shall on conviction of the seducer be indemnified.—By *stat.* 29 *Geo. 2. c. 17*, it is enacted that to serve under the *French King*, as a military officer shall be felony without benefit of clergy: and to enter into the *Scotch* brigade in the *Dutch* service without previously taking the oaths of allegiance and abjuration shall incur a forfeiture of 500*l.* See further this Dict. titles *Alliance*; *Contempt*; *Treason*.

FOREIGNERS. See *the Alien*.

FOREJUDGER, *forfeudgatus*.] A judgment whereby a person is deprived of or put by, the thing in question. *Bract. lib.* 4. To be forejudged the court, is when an officer or attorney of any court is expelled the same for some offence, or for not appearing to an action, on a bill filed against him. See title *Attorneys at Law*.

Form of a Forejudger of an Attorney.

BE it remembered, that on the day of, &c. this same term, A. B. came here into this court, by, &c. his attorney, and exhibited to the justices of our Sovereign Lord the King, his bill against C. D. Gent. one of the attorneys of the Common

FORE

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Common Bench of our said Sovereign Lord the King, personally present here in court; the tenor of which bill follows in these words, that is to say, To the justices of our sovereign Lord the King, J. A. B. by, &c. his attorney, complains of C. D. one of the justices, &c. for that whereas, &c. (setting forth the whole bill) The pledges for the prosecution are John Doe and Richard Roe. Whereupon the said C. D. being solemnly called, came not, therefore he is forejudged from exercising his office of attorney of this court, for his contumacy, &c.

FORESCHOKE, Drelshum.] Forester; in one of our statutes, it is specially used for lands or tenements leased by a lord, for want of services performed by the tenant, and quietly held by such lord *beyond a year and a day*; now the tenant, who seeth his land taken into the hands of the lord, and possessed so long, and doth not pursue the course appointed by law to recover it, doth in presumption of law *disavow or forsake* all the right he hath to the same: and then such lands shall be called *foreschoke*. See *Stat 10 Ed. 2 c. 1*.

FOREST.

FORESTA, SALTUS.] A great or vast wood, lo us silvestris & saltus. Our law writers define it thus; *Foresta est locus ubi fera inhabitant vel includuntur*; others say it is called *Foresta, quasi ferarum statio, vel tuta mansio ferarum*. *Manw. l.* in his *Forst Laws*, gives this particular definition of it: A *Forest* is a certain territory or circuit of woody grounds and pastures, known in its bounds and privilege, for the peaceable being and abiding of wild beasts, and fowls of forest, chase and warren, to be under the king's protection for his princely delight: replenished with beasts of venary or chase, and great coverts of vert for succour of the said beasts; for preservation whereof there are particular laws, privileges and officers belonging therunto. *Manw. part 2. c. 1*.

Forests are of that antiquity in *England*, that (except the *New Forest* in *Hampshire*, erected by *William* called *The Conqueror*, and *Hampton Court*, erected by *King Hen. VIII.* (see *stat 31 H. 8. c. 5*.) it is said there is no record or history doth make any certain mention of their erections and beginnings; though they are mentioned by several writers; and in divers of our laws and statutes. *4 Inst. 319*. Our ancient historians tell us, that *New Forest* was raised by the destruction of twenty-two parish churches, and many villages, chapels and manors, for the space of thirty miles together; which was attended with divers judgments, as they are termed, on the posterity of *King Will. I.* who erected it; for *William Rufus* was there shot with an arrow, and before him *Richard* the brother of *Hen. I.* was there killed; and *Henry*, nephew to *Robert*, the eldest son of the *Conqueror*, did hang by the head of the head in the boughs of the forest like unto *Abraham Blount*.

Besides the *New Forest*, there are sixty eight other *Forests* in *England*; thirteen chases, and more than seven hundred parks: the four principal *Forests* are *New Forest* on the *Sea*, *Shinewood Forest* on the *Trent*, *Dian Forest* on the *Severn*, and *Windso Forest* on the *Thames*. The way of making a *Forest* is thus. Certain commissioners are appointed under the Great Seal of *England*, who view the ground intended for a *Forest*, and fence it round with metes and bounds; which being returned into the Chancery, the King causes it to be proclaimed throughout the county where the land lieth, that it is a *Forest*, and to be

governed by the laws of the *Forest*, and prohibits all persons from hunting there without his leave; and then he appointeth officers fit for the preservation of the vert and venison, and so it becomes a *Forest* on record. *Manw. c. 2*. Though the King may erect a *Forest* on his own ground and wastes, he may not do it in the ground of other persons, without their consent; and agreements with them for that purpose ought to be confirmed by parliament. *4 Inst 300*.

Proof of a *Forest* appears by matter of record; as by the eyes of the justices of the *Forest*, and other courts, and officers of *Forest*, &c. and not by the name in grants. *12 Rep. 22*. As parks are inclosed with wall, pale, &c. so *Forest* and chates are inclosed by metes and bounds; such as rivers, highways, hills; which are an inclosure in law; and without which there cannot be a *Forest*. And in the eye of the law, the boundaries of a forest go round about it as if it were a brick wall, directly in a right line the one from the other, and they are known either by matter of record, or prescription. *4 Inst. 317*. Bounds of a *Forest* may be ascertained by commission from the Lord Chancellor; and commissioners, sheriffs, officers of *Forests*, &c. are empowered to make inquests thereof. *Stat. 16 & 17 Car. 1. c. 16*. Also the boundaries of forests are reckoned a part of the forest; for if any person kill or hunt any of the King's deer in any highway, river, or other inclusive boundary of a *Forest*, he is as great an offender as if he had killed or hunted deer within the *Forest* itself. *4 Inst 318*.

By the grant of a *Forest*, the game of the *Forest* do pass; and beasts of the *Forest* are the hart, hind, buck, doe, boar, wolf, fox, hare, &c. The seasons for hunting whereof are as follow, viz. that of the hart and buck begins at the Feast of *St. John Baptist*, and ends at *Holy-wood day*; of the hind and doe, begins at *Holy-wood*, and continues till *Candlemas*; of the boar, from *Christmas* to *Candlemas*; of the fox, begins at *Christmas*, and continues till *Lady-day*; of the hare, at *Michaelmas*, and lasts till *Candlemas*. *Dyer 169: 4 Inst. 316*.

Not only game, &c. are incident to a *Forest*, but also a *Forest* hath divers special properties. 1. A *Forest* truly and strictly taken, cannot be in the hands of any but the King; for none but the King hath power to grant commission to any one to be a justice in eye of the forest, but if the King grants a *Forest* to subject, and granteth further that upon request made in Chancery, he and his heirs shall have justices of the *Forest*, than the subject hath a *Forest* in law. *4 Inst. 314: Cro. fac. 155*.

The second property of a forest is the Courts; as the Justice-seat, the *Swanmote*, and court of attachment. The third property is the officers belonging to it; as first, the justices of the *Forest*, the warren or warden, the verderers, foresters, avouers, regarlers, keepers, bailiffs, beadles, &c. See title Attachment of the *Forest*.

As to the Courts. The most especial court of a *Forest* is the *Swanmote*, which is no less incident to it than a court of purpours is to a fair: and, if this fail, there is nothing remaining of the *Forest*, but it is turned into the nature of a Chase. *Manw. c. 21: Crompt. sur. 146*.

The court of Attachment or woodmote in *Forests*, is kept every forty days; at which the *Foresters* bring in the attachment de viridi et venatione, and the presentments thereof, and the verderers do receive the same, and inroll them; but this court can only inquire, not convict.

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vict. The court of *Swainmote* is holden before the verderors as judges, by the steward of the swainmote, thrice in the year: the swains or freeholders within the *Forest* are to appear at this court, to make inquests and juries; and this court may inquire *de promotione Forestiariorum et aliorum ministrorum Forestie, et de eorum oppressionibus populo nostro illatis*, and also may receive and try presentments certified from the court of Attachments, against offences in venison. And this court may inquire of offences, and convict also, but not give judgment, which must be at the justice-seat. 4 Inst. 289.

The Court of *Pegs*, or Survey of Dogs is holden likewise every third year, for expeditation, or lawing of deers, by cutting off the skin three claws of the fore feet, to prevent their running at or killing of deer. No other dogs but mastiffs are to be thus lawed or expeditated, for no other were permitted to be kept within the precincts of the *Forest*, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house. 4 Inst. 303.

The principal court of the *Forest* is the Court of the *Chief Justice in Eyre*, or *Justice at*, which is a court of record, and hath authority to hear and determine all trespasses, pleas, and causes of the *Forest*, &c. within the *Eyre*, as well concerning vert and venison, as other causes whatsoever; and this court cannot be kept oftener than twice in a year. As before other Justices in *Eyre*, it must be summoned forty days at least before the sitting thereof; and on writ of summons is to be directed to the sheriff of the county, and another writ *Quia si forester, Dux Regis et ejus locum tenenti, &c.* Which writ of summons consists of two parts: *First*, to summon all the officers of the *Forest*, and that they bring with them all records, &c. *Secondly*, All persons who claim any liberties or franchises within the *Forest*, and to shew how they claim the same. It may also proceed to try presentments in the inferior courts of the *Forest*, and to give judgment upon conviction of the Swainmote. And the Chief Justice may therefore after presentment made, or indictment found, but not before, issue his warrant to the officers of the *Forest* to apprehend the offenders. *Stats. 1 E. 3. c. 8. 7 R. 2. c. 4.*—This court being a court of record, may fine and imprison for offences within the *Forest*, and therefore if there be erroneous judgment at the justice seat, the record may be removed by writ of error into *B. R.* or the Chief Justice in *Eyre* may adjourn any matter to that court. 4 Inst. 291, 5, 313.

These Justices in *Eyre* were instituted by Henry II. A. D. 1184: and their courts were formerly held very regularly; but the last court of Justice-seat of any note, was that holden in the reign of Charles I. before the Earl of *Holland*; the rigorous proceedings at which are reported by Sir *W. Jones*. After the Restoration, another was held, *pro forma* only, before the Earl of *Oxford*. but since the era of the Revolution in 1688, the *Forest* laws have fallen into total disuse, to the great advantage of the Subject. See 3 *Comm* 73—Much therefore of what follows is matter rather of curiosity than use.

There is but one Chief Justice of the *Forests* on this side *Trent*, and he is named *Judiciarius Itinerans Forestarum, &c. citra Trentam*; and there is another, *Capitalis Justiciarius*; and he is *Justiciarius Itinerans omnium Forestarum ultra Trentam, &c.* who is a person of greater dignity, than knowledge in the laws of the *Forest*; and

therefore when Justice seats are held, there are associated to him such as the King shall appoint, who, together with him determine *omnia placita forestie, &c.* 4 Inst. 315.—By *Stat. 32 H. 8. c. 35*, Justices of the King's *Forests* may make deputies.

A Justice in *Eyre* cannot grant licence to sell any timber, unless it be *pendente curia*, or after a writ of *ad quod damnum*: and it hath been resolved by all the judges, that though Justices in *Eyre*, and the King's officers within his *Forest*, have charge of venison, and of vert or green-lue, for the maintenance of the King's game, and all manner of trees for covert, browse and pannage; yet when timber of the *Forest* is sold, it must be cut and taken by power under the *Great Seal*, or the *Exchequer Seal*, by view of the *Foresters*, that it may not be had in places inconvenient for the game: and the Justice in *Eyre*, or any of the King's officers in the *Forest*, cannot sell or dispose of any wood within the *Forest* without commission; so that the Exchequer and the officers of the *Forest* have *divisum imperium*, the one for the profit of the King, the other for his pleasure. All no officer of the *Forest* can claim windfalls, or dotard trees, for their perquisites, because they were once parcel of the King's inheritance; but they ought to be sold by commission, for the King's benefit. See on *Stat. 3 vol. p. 304, 5.*

If any officers cut down wood, not necessary for browse, &c. they forfeit their offices. 9 *Rep.* 30. The lord of a *Forest* may by his officers enter into any man's wood within the regard of the *Forest*, and cut down browsewood for the deer in winter. A prescription for a person to take and cut down timber-trees in a *Forest*, without view of the *Foresters*, it is said may be good: but of this *questio*, without allowance of a former case, &c. If a man hath wood in a *Forest*, and hath no such prescription, the law will allow him to fell it, so as he does not prejudice the game, but leave sufficient vert; but it ought to be by writ of *ad quod damnum, &c.* 4 Inst. *C. 15. Jac.* 155. And every person in his own wood in a *forest* may take *hays* *bote* and *hay* *bote*, by view of the *Foresters*; and so may freeholders by prescription, copyholders by custom, &c. 1 *Ed. 3. st. 2. c. 2.* The wood taken by view of the *Foresters*, ought to be presented at the next Court of Attachment, that it was by view, and may appear of record.

Fences, &c. in *Forests* and chases, must be with low hedges, and they may be destroyed, though of forty years continuance, if they were not before. *Cro. Jac.* 156. He whose wood is in danger of being spoiled, for want of repairing fences by another, ought to request the party to make good the hedges; and if he refuse, then he must do it himself, and have action on the case against the other that should have done it. 1 *Jones* 777.

A person may have action at Common-law for a trespass in a *Forest*, as to wood, &c. to recover his right. *Sid.* 296.

The Chief Warden of the *Forest* is a great officer, next to the Justices of the *Forest*, to bail and discharge offenders; but he is no judicial officer; and the constable of the castle where a *Forest* is, by the *Forest* law is Chief Warden of the *Forest*, as of *Windsor Castle, &c.*

A Verderor is a judicial officer of the *Forest*, and chosen in full county, by the King's writ: his office is to observe and keep the assises or laws of the *Forests*, and view, receive, and inroll, the attachments and presentments of all

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trespasses of the *Forest* of vert and venison, and to do equal right and justice to the people: the *Verderors* are the chief judges of the *Sanct* court; although the Chief Warden, or his deputy, usually sits there. 4 *Inft.* 29.

The *Regarder* is to make regard of the *Forest*, and to view and inquire of offences, concealments, defaults of *Foresters*, &c. Before any justice seat is holden, the *Regarders* of the *Forest* must make their regard, and go thro' and view the whole *Forest*, &c. They are ministerial officers, constituted by letters patent of the King, or chosen by writ to the sheriff. 4 *Inft.* 291.

A *Forester* is, in legal understanding, a sworn officer ministerial of the *Forest*, and is to watch over the vert and venison, and to make attachments and true presentments of all manner of trespasses done within the *Forest*: a *Forester* is also taken for a *Woodward*: this officer is made by letters patent, and it is said the office may be granted in fee, or for life. 4 *Inft.* 293. Every *Forester*, when he is called at a court of justice seat, ought upon his knees to deliver his horn to the Chief Justice in Eyre; so every Woodward ought to present his huchet to my Lord.

A *Riding Forester* is to lead the King in his hunting. 1 *Jon.* 2-7. The office of *Forester*, &c. though it be a fee simple, cannot be granted or assigned over without the King's licence. 4 *Inft.* 316. If a *Forester* by patent for life, is made justice of the same forest *pro hac vice*, the *forestership* is become void; for these offices are incompatible, as the *forester* is under the correction of the justice, and he cannot judge himself. 1 *Inft.* 313.

An *Agister's* office is to attend upon the King's woods and lands in a *Forest*, receive and take in cattle, &c. by agiltment, that is to depasture within the forest, or to feed upon the pannage, &c. And this officer is constituted by letters patent. 4 *Inft.* 293. Persons inhabiting in the forest may have common of herbage for beasts commonable within the Forest; but by the Forest law, sheep are not commonable there, because they bite so close that they destroy the vert; and yet it has been held, that *sheep* may be commonable in Forests by prescription. 3 *B. & J.* 213.

There may be a prescription for common in a Forest at all times of the year; though it was formerly the opinion of our judges, that the *fence month* should be excepted. 3 *Le. O.* 127. A Forest may be *disafforested* and laid open; but right of common shall remain. *Poph.* 93. He that hath a grant of the herbage or pannage of a park, or Forest, cannot take any herbage or pannage, but of the surplusage over and above a competent and sufficient pasture and feeding for the game; and if there be no surplusage, he that hath the herbage and pannage cannot put in any beasts; if he doth, they may be driven out. *Read. on Stat.* vol. 3. 305. None may gather nuts in the Forest without warrant.

A *Ranger* of a Forest is one whose business is to chase the wild beasts from the *purlicus* into the Forest, and to present offences within the purlicue, and the Forest, &c. And though he is not properly an officer in the Forest, yet he is a considerable officer of, and belonging to it.

The *Beadle* is a forest officer, that warns all the courts of the Forest, and executes process, makes all proclamations, &c. 4 *Inft.* 313.

There are also *Keepers* or *Bailiffs* of walks in Forests and chases, who are subordinate to the Verderors, &c. And

these officers cannot be sworn on any inquests, or juries out of the Forest. If any man hunts beads within a Forest, although they are not beads of the Forest, they are punishable by the Forest law, because all hunting there, without warrant is unlawful. 4 *Inft.* 314.

If a deer be hunted in a Forest, and after he is by hunting it is driven out of the Forest, and the *Forest* takes the chase, and the owner of the ground where driven kills the deer there; yet the *Forester* may enter into the lands and retake the deer: for property in the deer is in this case by pursuit. 2 *Leon.* 201. He that hath any manner of licence to hunt in a Forest, chase, park, &c. must take heed that he do not abuse his licence, or exceed his authority; for if he do, he shall be accounted a trespasser *ab initio*, and be punished for that fact as if he had no licence at all. *Mansw.* 280, 288.

Every lord of parliament, sent for by the King, may, in coming and returning, kill a deer or two in the King's Forest or chase through which he pass's; but it must not be done privily, without the view of the Forester, if present; or, if absent, by causing one to blow a horn, because otherwise he may be a trespasser, and seem to steal the deer. *Chart. Forest.* c. 11: 4 *Inft.* 308.

Law Forest is a private law, and must be pleaded. 2 *Leon.* 209. But it hath been observed, that the laws of the Forest are established by act of parliament, and for the most part contained in *Charta de Foresta*, 9 H. 3 *fit.* 2. c. 2: 34 *Ed. 1.* ff. 5.

By the law of the Forest, receivers or trespassers in hunting or killing of deer, knowing them to be such, or any of the King's venison, are principal trespassers; though the trespass was not done to their use or benefit, as the Common-law requires; by which the subsequent agreement amounts to a commandment: but if the receipt be out of the bounds of the Forest, they cannot be punished by the laws of the Forest, being not within the Forest jurisdiction, which is local. 4 *Inft.* 317.

If a trespass be done in a Forest, and the trespasser dies, it shall be punished after his death in the life-time of the heir, contrary to the Common-law. *Hue and cry* may be made by the Forest law for trespass, as to venison; though it cannot be pursued but only within the bounds of the Forest. 4 *Inft.* 294. And for not pursuing hue and cry in the Forest, a township may be fined and amerced. In every trespass and offence of the Forest in vert or venison, the punishment is, to be imprisoned, ransomed, and bound to the good behaviour of the Forest, which must be executed by a judicial sentence by the Lord Chief Justice in Eyre of the Forest.

If any Forester find any person hunting without warrant, he is to arrest his body, and carry him to prison, from whence he shall not be delivered without special warrant from the King, or his justices of the Forest, &c. But by *Stat.* 1 *Ed.* 3. c. 8, Persons are bailable if not taken in the manner, as with a bow ready to shoot, carrying away deer killed, or smeared with blood, &c. Though if one be not thus taken, he may be attached by his goods. 4 *Inft.* 289.

The Warden of the Forest shall let such to mainprise until the *eyre* of the Forest; or a writ may be had out of the Chancery to oblige him to do it; and if he refuse to deliver the party, a writ shall go to the sheriff to attach the Warden, &c. who shall pay treble damages to the party grieved and be committed to prison, &c. *Stat.*

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1 *Ed. 3. c. 8.* No Officer of the Forest may take or imprison any person without due indictment, or *per main curere*, with his hand at the work; nor shall constrain any to make obligation against the assise of the Forest, on pain to pay double damages, and to be ransomed at the King's will. *Stat. 7 R. 2. c. 4.*

A Forester shall not be questioned for killing a trespasser, who (after the peace cried unto him) will not yield himself; so as it be not done out of some former malice. *Stat. 21 Et. 1. §. 1.* But if trespassers in a Forest, &c. kill a man who opposes them, although they bore no malice to the person killed, it is murder; because they were upon an unlawful act, and therefore malice is implied. *Kel. Ab. 548.* And if murder be committed by such trespassers, all are principals. *Kel. 87.*

If a man comes into a Forest in the night-time, the Forester cannot justify beating him before he makes resistance; but if he resists, he may justify the battery. Persons may be fined for concealing the killing of deer by others; and so for carrying a gun, with an intent to kill the deer; and he that steals venison in the Forest, and carries it off on horseback, the horse shall be forfeited, unless it be that of a stranger ignorant of the fact. Where heath is burnt in a Forest, the offenders may be fined: and if any man cuts down bushes and thorns, and carries them away in a cart, he is fineable, and the cart and horses shall be seized by the Forest laws. But a man may prescribe to cut wood, &c. And every freeman within the Forest may on his own ground make a mill-dyke, or arable land, without inclosing such arable; but if it be a nuisance to others, it is punishable. *Clart. Forest. c. 11: 12 Rep. 22.* And if any having woods in his own ground, within any Forest, or chase, shall cut the same by the King's licence, &c. he may keep them several and inclosed, for seven years after selling. *Stat. 22 4 c. 7.*

By *Charta de Foresta*, 9 H. 3. stat. 2. c. 2, No man shall loose ale or member for killing the King's deer in a Forest, &c. but shall be fined; and if he have nothing to pay the fine, he shall be imprisoned a year and a day; and then be delivered, if he can give good security not to offend for the future; and if not, he shall abjure the realm: Before this statute, it was felony to hunt the King's deer. 21 *Ed. 1. c. 10.* To hunt in a Forest, park, &c. in the night, disguised, if denied or concealed, upon examination before a justice of peace, it is felony: but if confessed, it is only fineable. *Stat. 1 H. 7. c. 7.* *Keper,* &c. may seize instruments used in unlawful cutting of trees. *Stat. 4 Geo. 3. c. 31.*

The cruel and insupportable hardships which the Forest laws created to the Subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feudal rigours and the other exactions introduced by the Norman family. And accordingly we find, in history the immunities of *Charta de Foresta* as warmly contended for, and extorted from the King with as much difficulty, as those of *Magna Charta* itself. By this charter confirmed in parliament many Forests were disafforested or stripped of their oppressive privileges; and regulations made in the regimen of such as remained. And by a variety of subsequent statutes together with the long acquiescence of the Crown without exerting the Forest laws, this prerogative is become no longer a grievance to the subject. *Comm.*

FORESTALLING.

See further as to the Forest law titles *Black Act: Deer-Stealing: Game: Chase: King: Park: Purlieu: Drift of the Forest, &c.*

FORESTAGIUM, Duty payable to the King's Foresters. *Chart. 18 Ed. 1.*

FORESTALLING, *Forestillamentum*, from the Sax. *fore*, before, & *stal a stall.*] To intercept on the highway. *Spelman* says, it is *viæ obstructio, vel itineris interceptio*; with whom agrees *Coke on Lit. fol. 161.* And, according to *Fleta*, forestalling significat *obstructionem viæ vel impedimentum transiûs et fugæ avertiorum, &c. lib. 1. c. 24.* In our law, forestalling is the buying or bargaining for any corn, cattle or other merchandise, by the way, as they come to fairs or markets to be sold, before they are brought thither; to the intent to sell the same again, at a higher and dearer price.

All endeavours to enhance the common price of any victuals or merchandise, and practices which have an apparent tendency thereto, whether by spreading false rumours, or buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, &c. are highly criminal by the Common-law; and all such offences anciently came under the general appellation of *forestalling*. 3 *Inst. 195, 196.* And so jealous is the Common law of practices of this nature, which are a general inconvenience and prejudice to the people, and very oppressive to the poorer sort, that it will not suffer corn to be sold in the sheaf before thrashed; for by such sale the market is in effect forestalled. 3 *Inst. 197: H. P. C. 152.*

Forestalling, Ingrossing, and Regrating, are offences generally classed together as of the same nature and equally hurtful to the Public. *Ingrossing* seems derived from the words *in* and *gross* great or whole; and *regrating* from *re*, again, and *grater* *Fr.* to scrape, from the dressing or scraping of cloth or other goods in order to sell the same again.

Several statutes were from time to time made against these offences in general, and also specially with respect to particular species of goods according to their several circumstances; all of which from the 5 & 6 *Ed. 6. c. 14*, downwards, and all acts for enforcing the same are repealed by *stat. 12 Geo. 3. c. 71*; by the preamble of which it should seem that the remedy was found worse than the disease. But these offences still continue punishable upon indictment at the Common law by fine and imprisonment.

The offence of *forestalling* the market is an offence against public trade. This was described by the said *Stat. 5 & 6 Ed. 6. c. 14*, to be the buying or contracting for any cattle, merchandize or victual coming in the way to the market or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there; any of which practices makes the market dearer to the fair trader.

Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market; and selling it again in the same market, or within 4 miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

Ingrossing was also described to be the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again. This must be

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of course injurious to the Public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.

The above descriptions given by the statute serve as a guide for the indictment of these offences at Common-law, and are therefore here preserved.

The total ingrossing of any commodity, with intent to sell it at an unreasonable price is an offence indictable and fineable at Common law. *Cro. Car.* 232.

Salt has been held to be within the provisions against forestalling, as a necessary victual; but not *hops*, nor *apples* or other fruits. See *stat. 2 & 3 E. 6. c. 19*, which seems yet in force; prohibiting butchers, brewers, bakers, poulterers, cooks and fruiterers, from conspiring not to sell victuals, but at certain prices, on penalty of 10*l.* for the first offence, 20*l.* for the second, 40*l.* for the third, &c. and if such conspiracy be made by any company, or body corporate, the corporation shall be dissolved.

See further 1 *Hack. P. C. c. 80*; and this Dict. titles *Bricks and Tiles*; *Cattle*; *Monopoly*.

FORETOOTH. Stinking out the foretooth is a *Majhem*. See title *Majhem*.

FORFANG or **FORFENG**, from the Sax. *Furc*, *ante* & *fangen*, *pender*. *Antecapio vel Præventio*] The taking of provision from any one in fairs or markets, before the King's *Procurators* are served with necessaries for his majesty. *Chart. Hen. 1. Hesp. Sanct. Barth. Lond. Anno 1133.*

FORFEITURE.

FORISTACTURA, from the Fr. *Forfait*] The effect, or penalty, of transgressing some law. For an ingenious discussion to prove the propriety and policy of such punishment, see Mr. Charles Yorke's "*Considerations on the Law of Forfeitures*" corrected and enlarged 8vo. 1775. —See also this Dict. title *Tenus* III. 10.

Forfeiture is defined by *Blackstone* to be a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompence for the wrong, which either he alone or the publick together with him hath sustained. 2 *Comm.* 267.

Lands, tenements and hereditaments may be forfeited in various degrees and by various means. Forfeitures may therefore be divided into *civil* and *criminal*. The latter will be presently considered more at large under this title.

Civil Forfeitures arise either by alienation contrary to law; as in *mortmain*; for which see this Dict. under that title; to *Aliens* see title *Alien*; or by particular tenants when they are greater than the law entitles them to make. This latter alienation divests the remainder or reversion and is also a forfeiture to him whose right is attacked thereby. 1 *Inst.* 251.

Forfeiture in civil cases may also accrue by non-presentation to a benefice, when it is called a *Lapse*; See this Dict. tit. *Advowson*. By *Simony*; See that title. By non-performance of *Conditions*; See title *Condition*.—By *Waste*; See that title.—By breach of copyhold customs; See title *Copyhold*; or lastly by *Bankruptcy*; See that title.

FORFEITURE.

- I. Of Forfeitures in Civil Cases.
- II. Of Forfeitures in Criminal Cases; and herein,
 - 1. Generally for what Crimes such Forfeitures are inflicted; and to what Time they bear relation
 - 2. More particularly; what Estates are subject to Forfeiture.
 - 3. When Forfeitures may be seized.

I. As to alienations by particular tenants; if tenant for his own life aliens, by feoffment or fine, for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a Forfeiture of his own particular estate to him in remainder or reversion. *1 Inst.* § 415. For this there seem to be two reasons; First, because such alienation amounts to a renunciation of the feudal connection and dependence; it implies a refusal to perform the due renders and services to the lord, in respect of which fealty is constantly due, and it tends to the consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is lost upon discovery, the particular estate should be taken and taken from him, who has shewn to manifest an inclination to make an improper use of it: The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. 2 *Comm.* 274.

Another reason assigned for these Forfeitures is, that the act done is incompatible with the estate which the tenant holds, and against the implied condition on which he holds it. As in the case of a tenant for life or years enfeoffing a stranger in fee simple, this is a breach of the condition which the law annexes to his estate, viz. that he shall not attempt to create a greater estate than he himself is entitled to. 1 *Inst.* 215. So if tenant for life, or years, or in fee, commit felony, this is a breach of the implied condition annexed to every feudal donation that they should not commit felony. 2 *Comm.* 153.

The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold, or of chattel interests: But if tenant in tail aliens in fee, this is no immediate forfeiture to the remainder-man, but a mere discontinuance of the estate-tail, which the issue may afterwards avoid by due course of law: for he in remainder or reversion hath only a very remote, and barely possible interest therein, until the issue in tail is extinct. See this Dict. tit. *Discontinuance*.

But in case of such Forfeitures, by particular tenants, all legal estates by them before created, (as if tenant for 20 years grants a lease for 15,) and all charges by them lawfully made on the lands shall be good and available in the law. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself hath created. 1 *Inst.* 233: 2 *Comm.* 275.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *Disclaimer*; as to which See this Dict. title *Disclaimer*.

FORFEITURE II.

If Tenant, for life, in dower, by the curtesy, or after possibility of issue extinct, or lessee for years, tenant by statute-merchant, staple, or *ch. p.* of lands or tenements that lie in *feoffory*, shall make any absolute or conditional assent in fee, gift in tail, lease for any other life than his own, &c. or levy a fine *per concessum de dno cono eio*, &c. or suffer a common recovery thereof; or being impleaded in a writ of right brought against him, join the *verdict* upon the mortgage, or admit the reversion to be in another; or in a *perpetuo clamat*, claim the fee simple; or if lessee for years being outlet, bring an assize *de le libero tenemento*, &c. — by either of these things, there will be a *Forfeiture* of estate. *Plow. 15*; *1 Kep. 15*; *8 Rep. 144*; *Co. Lit. 251*; *Dier. 152*; *324*; *1 Bull. 219*.

But where the land granted by tenant for life, or years, is not well conveyed, or the thing does not lie in *feoffory*, as a rent, common, or the like, he will not *forfeit* his estate: and therefore if a *feoffment*, gift in tail, or lease for another's life, made by the tenant for life, is not good, for want of words in making it, or due execution in the livery and seisin, this shall not produce a *Forfeiture*. *2 Rep. 35*.

When tenant in tail makes leases, not warranted by the statute; a copyholder commits waste, refuses to pay his rent, or do suit of court; one to whom an estate is granted upon conditions, does not perform the same; in all these cases *Forfeitures* are incurred. *1 Rep. 15*.

Entail for a *Forfeiture* ought to be by him, who is next in reversion, or remainder after the estate forfeited. As, if tenant for life or years commits a *Forfeiture*, he who has the *reversion*, or remainder, ought to enter; though he has the fee, or only an estate-tail. *1 Col. 857*; *145*; *50*; *858*; *15*.

It shall be a dispensation of the *Forfeiture*, if he in reversion, or remainder be a party to the estate made, and accept it; as, if a husband, seized in right of his wife for life, leases to him in reversion for his own life. *1 Rol. 850*; *110*.

Also *Offices* may be *forfeited* by neglect of duty, &c. See title *Office*.

II. 1. The true reason, and only substantial ground, of any *FORFEITURE FOR CRIMES*, consist in this: that all property is derived from Society, being one of those civil rights conferred on individuals in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. It therefore a member of any national community, violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the State may very justly repossess that portion of property, or any part of it which the law has been assigned him. Hence in every offence of a citizen against the laws of *England* have existed a total confiscation of the revenues of personal estate; and in many cases of property in others only a temporary loss of the civil rights, as of a citizen or of landed property; and have vested them both in the King, as the person supposed to be offended, being the one visible magistrate in whom the sovereignty of the State resides. *1 Comm. 299*.

The offences which incur a *Forfeiture* of lands and tenements are principally the following. *1 Treas. 2 Feoff. 3* *Writ. de Feoff. 4* *Procur. 5* *Drawing a* *treason* *de facto*, or *placitum* *de facto* in the presence of the King's courts of justice; *6* *Placit. de Roussey*; or non-observance of certain laws enacted in restraint of papists.

Forfeiture in criminal Cases is two-fold; of real and personal estates. First as to *Real Estates*.

By Common-law on attainder of high treason a man forfeits to the King all his lands and tenements of inheritance whether fee-simple or fee tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed or at any time afterwards: to be for ever vested in the Crown. And also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. *Co. Lit. 392*; *3 Inst. 19*; *1 Hal. P. C. 240*; *2 Hawk. P. C. c. 49*.

This forfeiture relates backwards to the time of the treason committed so as to avoid all intermediate sales and incumbrances, but not those before the fact. *3 Inst. 211*. A wife's jointure is not forfeitable for the treason of her husband: because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of *Stat. 5 & 6 E. 6. c. 11*, repealing in that particular *Stat. 1 E. 6. c. 12*. The husband notwithstanding shall be tenant by the curtesy of the wife's lands if the wife be attainted of treason, for that is not prohibited by the statute. *1 Hal. P. C. 359*. But though, after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no *Forfeiture* of his lands, for he never was attainted of treason; and by the express provision of *Stat. 34 E. 3. c. 12*, there shall be no *Forfeiture* of lands for treason, of dead persons, not attainted in their lives — Yet if the Chief Justice of the King's Bench (the supreme coroner of all *England*) in person upon the view of the body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited. *4 Rep. 57*.

Forfeiture of lands and tenements to the Crown for treason is by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island. See this Dict. title *Tenures* III. 10 — But in certain treasons relating to the coin it is provided by some of the more modern statutes which constitute the offence, that it shall work no *Forfeiture* of lands, save only for the life of the offender: and, by all, that it shall not deprive the wife of her dower. See *Stat. 5 Eliz. c. 11*; *15 Eliz. c. 1* — *8 & 9 W. 3. c. 26*; *15 & 16 Geo. 2. c. 28*. — And in order to abolish this hereditary punishment entirely, it was provided by *Stat. 7 Ann. c. 21*, that after the decease of the late Pretender no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. By which the law of *Forfeitures* for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration, namely the *Stat. 17 Geo. 2. c. 39*, by which the operation of the indemnifying clauses in *Stat. 7 Ann. c. 21*, is still farther suspended till the death of the sons of the late Pretender. See *1 Comm. 384*; and this Dict. title *Attainder*.

In petty treason, misprision of treason and felony, the offender also forfeits all his chattel interests absolutely; and the profits of all estates of freehold during life; and after his death all his lands and tenements in fee simple, (but not those in tail) to the Crown for a short period of time: so, the King shall have them for a year and a day, and may commit therein what waste he pleases; which

FORFEITURE II. 2.

is called the King's Year, Day, and Waste. 2 *Inst.* 37: 3 *Inst.* 392. Formerly the King had a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. But this tending greatly to the prejudice of the Publick, it was agreed in the reign of Hen. 1, that the King should have the profits of the land for a year and a day, in lieu of the destruction he was otherwise at liberty to commit; and therefore *Magna Carta*, c. 22, provides that the King shall only hold such lands for a year and day, and then restore them to the lord of the fee; without any mention of waste. See *Mirr.* c. 4. § 16: *Flet.* l. 1. c. 28. But the statute 17 E. 2, *de prerogativa regis* seems to suppose that the King shall have his year, day, and waste, and not the year and day in stead of waste, which Lord Coke and the *Mirror* very justly consider as an encroachment, tho' a very ancient one, of the royal prerogative. *Mirr.* c. 5. § 2: 2 *Inst.* 37.

This year, day and waste are now usually compounded for; but otherwise they regularly belong to the crown, and after their expiration the land would have descended to the heir, (as in *gavel kind* tenure it still does,) did not its feudal quality intercept such descent and give it by way of escheat to the Lord. See titles *Tenure*; *Escheat*.

These Forfeitures of lands for felony also arise only upon attainder; and therefore a *felon de se* forfeits no lands of inheritance or freehold, for he never is attained as a felon. 3 *Inst.* 55. They likewise relate back to the time of the offence committed, as well as Forfeitures for treason; so as to avoid all intermediate charges and conveyances. 4 *Comm.* 286.

These are all the Forfeitures of real estates created by the Common law as consequential upon attainders by judgment of death or outlawry. The particular Forfeitures created by the statutes of *Piſcunerie* and others are here omitted, being rather a part of the judgment and penalty inflicted by the respective statutes, than consequences of such judgment, as in treason and felony they are. See *Post.* II.

As a part of the Forfeiture of real estates, may be mentioned, the Forfeiture of the profits of lands during life: which extends to two other instances besides those already spoken of; the striking in *Westminster Hall*, or drawing a weapon upon a judge there sitting in the King's courts of justice. 3 *Inst.* 141. And it seems that the same Forfeiture is incurred by releasing a prisoner in or before any of the courts there, committed by the judges. *Cra Jac.* 307.

The Forfeiture of Goods and Chattels accrues in every one of the higher kinds of offence in high treason or misprison thereof; petit treason; felonies of all sorts, whether dangerous or not. self murder, or *felon de se*; petit larceny; handling stolen goods; challenging above 35 Jurors; and the above mentioned offences of striking, &c. in *Westminster Hall*. For High treason, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if he jury find the flight, the party shall forfeit his goods and chattels: for the very flight is an offence, carrying with it a strong presumption of guilt; and is at least an endeavour to elude and hide the course of justice prescribed by the law. But the jury very seldom find the flight; a forfeiture, being not only, on, since the vast increase of personal property, as too large a penalty for an offence to which a man is prompted by the natural love of liberty. 4 *Comm.* 307.

There are some remarkable differences between the Forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon attainder, and not before: goods and chattels are forfeited by conviction. Because in many of the cases where goods are forfeited there never is any attainder; which happens only where judgment of death or outlawry is given; therefore in those cases the Forfeiture must be upon conviction, or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases: for the law loves uniformity. 2. In outlawries for treason or felony lands are forfeited only by the judgment, but the goods and chattels are forfeited by a man's being first put in the exigent, without staying till he is *quinto exactus*, or finally outlawed, for the secreting himself so long from justice is construed a flight in law. 3 *Inst.* 232. (See this Dict. tit. *Outlawry*.) 3. The forfeiture of lands has relation to the time of the fact committed so as to avoid all subsequent sales and incumbrances; but the Forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels real or personal for the sustenance of himself or family between the fact and conviction; 2 *Hawk. P. C.* c. 49. For personal property is of so fluctuating a nature that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly *Stat.* 13 Eliz. c. 5 will reach them; for they are all the while truly and substantially the goods of the offender; and as he, if acquitted, might recover them himself, as not parted with for a good consideration, so in case he happens to be convicted, the law will recover them for the King. 4 *Comm.* 388.

2. Where land comes to the crown, as forfeited by attainder of treason, all mesne tenures of common persons are extinct; but if the King grant it out, the former tenure shall be revived, for which a petition of right lies. 2 *Hale's Hist. P. C.* 254. In treason, all lands of inheritance, whereof the offender was seised in his own right, were forfeited by the Common-law; and rights of entry, &c. And the inheritance of things not lying in tenure, as of rent-charges, commons, &c. shall be forfeited in *high treason* but no right of action whatsoever to lands of inheritance is forfeited, either by the common or statute law. 2 *Hawk. P. C.* c. 49.

By *Stat.* 26 H. 8. c. 13, All lands, tenements, &c. are forfeited in treason. And the King shall be adjudged in possession of lands and goods forfeited for treason on the attainder of the offender, without any office found, saving the right of others. See *Stat.* 33 H. 8. c. 20. Lands and hereditaments in *fee simple* and *fee tail*, are forfeited in *high treason*; but land in *tail* could not be forfeited only for the life of tenant in *tail*, till the statute 26 H. 8. c. 13, by which statute, they may be forfeited.

Upon outlawry in treason or felony, the offender shall forfeit so much as if he had appeared, and judgment had been given against him; so long as the outlawry is in force. 3 *Inst.* 52. 21...

Cra asked land in *Kent* is not forfeited by committing an offence, and by a *person only*, *inter alia* are not forfeited. *S. P. C.* 3. 20.

FORFEITURE II. 3.

Land that one hath in trust; or goods and chattels in right of another, or to another's use, &c. will not be liable to Forfeiture. Though he dies for years, in a man's own, or his wife's right, estates in jointenancy, &c. and all statutes, bonds, and debts due thereby, and upon contracts, &c. shall be forfeited. *Co. Lit.* 42, 151: *Staud.* 188.

A married man guilty of felony, forfeits his wife's to him; and if a wife kill her husband, the husband's goods are forfeited. *Jenk. Cent.* 65. In manslaughter, the offender forfeits goods and chattels, and in chance-medley and sedition, &c. goods and chattels; but the offenders may have their pardon of court. *Co. Lit.* 319.

Those that are hanged by Martial Law in the time of war, forfeit no lands. *Co. Lit.* 13. And for robbery or piracy, &c. on the sea, if tried in the Court of Admiralty, by the Civil Law, and not by jury, there is no forfeiture: but if a person be attainted before commissioners by virtue of the Stat. 28 Hen. 8 c. 15, there it works a Forfeiture. *111 a.*

In cases of felony the profits of lands whereof a person, attainted of felony, is seized of an estate of inheritance in right of his wife; or of an estate for life only in his own right; are forfeited to the King, and nothing is forfeited to the Lord. *3 Inst.* 19. *Fitz. Aff.* 166.

Goods of persons that fly for a felony, are forfeited to the Lord of the franchise, when the flight is found of record. *2 Inst.* 281.

In a person's lands in fee-simple are forfeited, with goods and chattels. *Co. Lit.* 129.

Before the statute of 1 E. 6. cap. 12, the wife not only lost her dower at Common law, but also her dower *ad osium ecclesie*, or *ex assensu patris*, or by special custom (except that of gavelkind,) by the husband's attainder of treason, or capital felony, whether committed before or after marriage. *Co. Lit.* 31 b: 37 a: 41 a: *F. N. B.* 150: *Perk.* § 308: *Bro. tit. Dower* 82: *Plo. ad.* 261.

But the wife forfeited lands given jointly to her husband and her, whether by way of frank marriage or otherwise, only for the year, day, and waile. *Co. Lit.* 37: *3 Inst.* 216.

By Stat. 1 E. 6. cap. 12. par. 17, It was enacted that albeit any person shall be attainted of any treason or felony whatsoever; yet notwithstanding every woman, that shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as tho' her husband had not been attainted, &c. This however was repealed as to treason by 5 & 6 E. 6. cap. 11. par. 9. See ante I.

Though Lord Coke expressly makes dower *ex assensu patris*, as well as the dowers at Common law and *ad osium ecclesie*, liable to be defeated at Common-law, by the husband's treason or felony; *1 Inst.* 37 a; yet some have inclined to think that this Stat. 5 & 6 E. 6. c. 11, doth not extend to dower *ex assensu patris*, so that that shall not be forfeitable on the treason of the husband — And in *1 Inst.* 35 b, Lord Coke mentions that according to some opinions the wife loses dower *ex assensu patris*, if after the assent the father was attainted of treason. — See *1 Inst.* 41 a. in note.

If the husband seized of lands in fee, makes a feoffment and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee. *Bondl.* 56: *Dyer* 140; *Co. Lit.* 111 a. So if the husband is attainted of treason, and afterwards pardoned, yet the wife shall

not recover dower; but of lands purchased by the husband after the pardon, the wife shall be endowed. *3 Leon* 3: *Perk. fecit.* 391.

If a husband having levied a fine with proclamation, is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and non-claim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainer stood in force, neither could she any way reverse it. *3 Inst.* 216: *Moor* 639. pl. 879.

After the making of the above mentioned statute 1 E. 6. cap. 12, it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; therefore where several offences have been made felony since, care has been taken to provide for the wife's dower. *2 New Abr.* 584. See *12 Fin. abt. tit. Forfeiture* 2 *Hawk. P. C.* c. 49.

If a woman after a rape, consent to the ravisher, she shall lose her dower after the death of her husband, &c. Stat. 6 R. 2. c. 6. And if any maiden or woman child above twelve, and under sixteen years of age, shall agree to be taken away and deflowered, or contract with any man for marriage against the will and without the consent of her father; or, if he be dead, her mother or guardian appointed by her father's will, she shall forfeit her land of inheritance for her life. *4 & 5 P. & M.* c. 8.

Artificers going out of the kingdom and teaching their trades to foreigners, are liable to forfeit their lands, &c. by Stat. 5 G. 1. c. 27. Similar Forfeitures likewise are inflicted by several other penal statutes. See title *Manu-factuaries*.

In all cases where a penalty or Forfeiture is given by statute, without saying to whom it shall be, or a limitation for a recompence for the wrong to the party, it belongs to the King, *Str.* 50, 828: *2 Vent.* 267. And such Forfeitures shall be construed favourably. *Corop* 585, 8.

3 Goods or lands of one arrested for felony, shall not be seized before he is convicted or attaint of the felony; on pain of *prostituting* double value. Stat. 1 R. 3. c. 3. Goods of a felon, &c. cannot be seized before *Forfeited*; though they may be inventoried, and a charge made thereof before indictment. *Wood's Inst.* 659. Where goods of a felon are pawned before he is attainted, the King shall not have the *Forfeiture* of the goods till the money is paid to him to whom they were pawned. *3 Inst.* 17: *2 Nelf. Abr.* 874, 875.

After conviction by judgment, or outlawry, for high-treason, &c. a commission goes to persons named by the King or by the Attorney General, to inquire, what lands and tenements the offender had at the time of the treason committed, and the value; and that they seize them into the King's hands. And the inquisition taken thereon shall be returned to the Court of *Exchequer*, and filed in the office of the King's Remembrancer. *Lut.* 997. So after conviction for felony, a *fine facias* shall go against the vill, or any other, who has the goods in his custody. *S. P. C.* 194. But if any one has title to the goods or lands found by inquisition to be the goods or lands of the offender, he may make his claim by pleading his title. *Lut.* 998. To which the Attorney General shall demur, or reply. *Vid. Com. Dig.* title *Prærogative*, (D. 83, 84.)

A copyholder surrenders to the use of his will; the devisee is convicted of felony and hanged before admittance,

tance, the lands are not forfeited to the lord but descend to the heir of the surrenderor. 2 *Wils.* 13.

Forfeiture differs from *confiscation*, in that *Forfeiture* is more general; whereas *confiscation* is particularly applied to such as are *forfeit* to the King's *Exchequer*, and *confiscate* goods are said to be such as nobody doth claim. *Staundf. P. C.* 186.

There is a full *Forfeiture*, *plena forisfactura*, otherwise, called *plena wita*, which is a *Forfeiture* of life and member, and all that a man hath. *Leg. H. 1. c.* 88. And there is mention in some statutes, of *Forfeiture*, at the King's will, of body, lands, and goods, &c. 4 *Inst.* 66. See further on this subject this Dict. titles *Attainder*; *Corruption of Blood*; *Felony*; *Treason*, &c. and *Com. Dig.* tit. *Forfeiture*.

FORFEITURE OF MARRIAGE, *Forisfactura maritagii*.] A writ which anciently lay against him, who, holding by knights-service, and being under age, and unmarried, refused her whom the lord offered him without his disparagement, and married another. *F. N. B. fol.* 141.: *Reg. Orig. fol.* 163. See title *Tenure*.

FORFEITED ESTATE. Several statutes have been from time to time passed, appointing *Commissioners of Forfeited Estates*, on rebellions in this kingdom and Ireland. Thus by *Stat. 11 & 12 W. 3. c.* 3, all lands and tenements, &c. of persons attainted or convicted of treason or rebellion in Ireland, were vested in several commissioners and trustees for sale thereof. And by several *Stats. temp. Geo. 1.*, commissioners were appointed to inquire of *Forfeited Estates* in England and Scotland, on the rebellion at *Presburg*, &c. And the estates of persons attainted of treason were vested in His Majesty for public uses; but afterwards in trustees to be sold for the use of the Public; and it was provided that the purchasers should be *Protestants*.

FORGAVEL, *Forgabulum*.] A small reserved rent in money, or quit-rent. *Cartular. Abbat. de Hadley MS. f.* 58.

FORGE, *Forgia*.] A smith's *Forge*, to melt and work iron. *Chart. Hen. 2.*

FORGERY, From Fr. *Forger*, i. e. *accudere, fabricare*, to beat on an anvil, to *forge* or form.] The fraudulent making or alteration of any Deed, Writing, Instrument, Register, Stamp, &c. to the prejudice of another man's right. An offence punishable, according to its circumstances, by fine, imprisonment, pillory, transportation and death.

By *Stat. 5 Eliz. c.* 14, to forge or make, or knowingly to publish or give in evidence, any forged deed, court-roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a *Forfeiture* to the party grieved, of double costs and damages; by the offender's standing in the pillory and having both his ears cut off and his nostrils slit and seared; by *Forfeiture* to the crown of the profits of his lands, and by perpetual imprisonment. For any Forgery relating to a term of years, or annuity, bond, obligation, acquittance, release or discharge of any debt or demand of any personal chattels, the same *Forfeiture* is given to the party grieved, and on the offender is inflicted the pillory, loss of one ear, and a year's imprisonment.—The second offence, in both cases, being felony without benefit of clergy.

Besides his general act, a multitude of others, since the Revolution, when paper credit was first established, have inflicted capital punishment on the following species

of Forgery, viz.—The forging, altering or uttering as true when forged, of any *Bank notes*, bills or other securities; See *Stats. 8 & 9 W. 3. c.* 20. § 36: 11 *Geo. 1. c.* 9: 12 *Geo. 1. c.* 32: 15 *Geo. 2. c.* 13: 13 *Geo. 3. c.* 79; and this Dict. title *Bank of England—Exchequer-bills*; by the several acts for issuing them.—*South sea Bonds*; See *Stats. 9 An. c.* 21: 6 *Geo. 1. cc.* 4, 11: 12 *Geo. 1. c.* 31.—*Lottery Tickets* or orders: by the several *Lottery-acts*.—*Army or Navy Debentures*; *Stats. 5 Geo. 1. c.* 14: 9 *Geo. 1. c.* 5.—*East India Bonds*; *Stat. 12 Geo. 1. c.* 32.—*Writings* under the Seal of the London or Royal Exchange Assurance: *Stat. 6 Geo. 1. c.* 18; and of other Corporations by the *Stats.* establishing them.—Of the *hand-writing* of the Receiver of the præ-fines; *Stat. 32 Geo. 2. c.* 14; or of the Accountant-General and other officers of the court of Chancery.—Of a *Letter of Attorney* or other Power to receive or transfer *Stock* or annuities; of *transfers* and *dividend-warrants*; and on the personating a proprietor thereof to receive or transfer such funds or dividends. *Stats. 8 Geo. 1. c.* 22: 9 *Geo. 1. c.* 12: 31 *Geo. 2. c.* 22. § 77: 33 *Geo. 3. c.* 30.—Also on the personating or procuring to be personated any seaman or person entitled to wages, prize-money, &c. for perjury in obtaining probate or administration to receive such wages, &c. and the forging, procuring to be forged, or publishing a forged seaman's will and power. *Stats. 31 Geo. 2. c.* 10: 9 *Geo. 3. c.* 30. and See *Stat. 32 Geo. 3. c.* 34—to which may be added counterfeiting *Mediterranean passes* from the Admiralty, *Stat. 4 Geo. 2. c.* 18.—the forging or imitating stamps, to defraud the publick revenue; by the several stamp-acts; [the refusing them is made single Felony by *Stat. 12 Geo. 3. c.* 48, punishable with 7 years transportation]—Forging of any marriage register or licence, *Stat. 26 Geo. 2. c.* 33.—Counterfeiting or removing stamp or mark on plate, 24 *Geo. 3. ft.* 2. c. 53. [a similar offence is punishable with 14 years transportation by *Stat. 13 Geo. 3. cc.* 52, 59]—Forging the frank on a general post letter. *Stat. 24 Geo. 3. ft.* 2. c. 37.

Besides these there are certain general laws with regard to Forgery. By *Stat. 2 Geo. 2. c.* 25, the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, bill of exchange, promissory note, and indorsement or assignment of such bill or note, or any acquittance or receipt for money or goods, with an intention to defraud any person; (or corporation, *Stat. 31 Geo. 2. c.* 22. § 78;) is made *Felony* without benefit of clergy.—And by *Stats. 7 Geo. 2. c.* 22: 18 *Geo. 3. c.* 18, it is equally penal to forge or cause to be forged, or uttered as true, a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt, for any note, bill, or other security for money, or any warrant or order for payment of money, or delivery of goods.

By the above, and a number of other general and special provisions, there is now hardly a case possible to be conceived wherein Forgery that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime. See *Foss.* 116, and this Dict. title *Bills of Exchange*, V. 3.

A deed forged in the name of a person who never had existence is within the *Stat. 2 Geo. 2. c.* 25: for the statute doth not use the words *the deed of any person*, or the deed of *another*, or any words of like import, but *any* deed. And Coke's description of Forgery (3 *Inst.* 169,) "When the act is done in the name of another person;"

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is apparently too narrow, and only takes in that species of Forgery which is most commonly practised; but there are many other species of Forgery which will not come within the letter of that description. *For. 116.*

There can be no Forgery where none can be prejudiced by it but the person doing it. *1 Salk. 375.*

Forgery by the common law extends to false and fraudulent making or altering of a deed or writing, whether it be a matter of record, in which seems to be included a parish register; which is punishable by fine, imprisonment, and corporal punishment at the discretion of the court, or any other writing, deed, or will, *3 Inst. 163*; *1 Rol. Ab. 65*; *1 Hawk. P. C. c. 70*. Not only where one makes a false deed; but where a fraudulent alteration is made of a true deed, in a material part of it, as by making a lease of the manor of Dale, and it appears to be a lease of the manor of Sale, by changing the letter D into an S. or by altering a bond, for 500*l.* expressed in figures, to 5000*l.* by adding a new cypher, these are Forgery: so it is, if one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, &c. *1 Hawk. P. C. c. 70*.

Also a writing may be said to be forged, where one being directed to draw up a will for a sick person, doth insert some legacies therein falsely of his own head; though there be no Forgery of the hand or seal; for the crime of Forgery consists as well in endeavouring to give an appearance of truth to a meer falsity, as in counterfeiting a man's hand, &c. *1 Hawk. P. C. c. 70*; *3 Inst. 170*. But a person cannot regularly be guilty of Forgery by an act of omission; as by omitting a legacy out of a will, which he is directed to draw for another: though it has been held, that, if the wilful omission of a bequest to one cause a material alteration in the limitation of an estate to another, as if the deviser directs a gift for life to one man, and the remainder to another in fee, and the writer omit the estate for life, so that he in remainder hath a present estate upon the death of the deviser, not intended to pass, this is Forgery. *Nov. 118*; *Mon. 760*.

If a feoffment be made of land, and livery and seisin is not indorsed when the deed is delivered, and afterwards on selling the land for a valuable consideration to another, livery is indorsed upon the first deed; this hath been adjudged Forgery both in the feoffor and feoffee; because it was done to deceive an honest purchaser. *Mon. 665*. And when a person knowingly falsifies the date of a second conveyance, which he had no power to make, in order to deceive a purchaser, &c. he is said to be guilty of Forgery. *3 Inst. 169*; *1 Hawk. P. C. c. 70*.

It seems to be no way material, whether a forged instrument be made in such manner, that if it were in truth such as it is counterfeited for, it would be of validity or not. *1 Sd. 142*. The counterfeiting writings of an inferior nature, as letters and such like, it hath been said, is not properly Forgery; but the deceit is punishable. But in the case of *John Ward, of Huchney*, it was determined that to forge a release or acquittance for the delivery of goods, although not under seal was Forgery at common law. See *Barr. K. B. 10*; *Ld. Raym. 737, 1461*; *5 Mod. 137*; *Raym. 81*; *Sid. 747*.

Where there is a penalty in an obligation, &c. the party grieved by a forged release thereof, shall recover

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double the penalty as damages, and not double the debt appearing in the condition. *3 Inst. 172*. If a person is informed by another that a deed is forged, if he afterwards publishes it as true, he is within the danger of the statute. *3 Inst. 171*. The King may pardon the corporal punishment of Forgery which tends to common example; but the plaintiff cannot release it: if the plaintiff release or discharge the judgment or execution, &c. it shall only discharge the costs and damages; and the judges shall proceed to judgment upon the residue of the pains, and award execution upon the same. *5 Rep. 50*.

A person convicted of Forgery, and adjudged to the pillory, &c. whereby he becomes infamous, is not allowed to be a witness; but such conviction is a good exception to his evidence. And one convicted of this crime, may be challenged on a jury, so as to be incapable to serve as a juror; and it hath been holden, that exceptions to persons found guilty of perjury or Forgery, as well as felony, &c. are not saved by a pardon. *2 Hawk. P. C. c. 43. § 25*. The court of B. R. will not ordinarily, at the prayer of the defendant, grant a *certiorari* for a removal of an indictment of Forgery, &c. *1 Sid. 54*. See titles *Certiorari*; *Indictment*. See further on this subject of Forgery. *1 Hawk. P. C. c. 70*, at length.

FORINSECUS, Outward, or on the outside. *Kerret's Gloss.*

FORINSECUM MANERIUM, The Manor as to that part of it which lies without the town, and not included within the liberties of it. *Paroch. Antiq. 351*.

FORINSECUM SERVITIUM, The payment of extraordinary aid, opposed to *intinsecum servitium*, which was the common and ordinary duties, within the Lord's court. *Kerret's Gloss*. See title *Foreign Service*.

FORISBANNITUS. Banished: *Mat. Paris. Ann. 1245*.

FORISFAMILIARI. When a son accepts of his father's part of lands, in the life-time of the father, and is contented with it; he is said *forisfamiliari* to be discharged from the family, and cannot claim any more. *Blount*.

FORLAND, or *Foreland*, *Forlandum*.] Lands extending farther or lying before the rest: A *Promontory*. *Mon. Angl. Tom. 2 fol. 332*.

FORLER-LAND. Land in the bishoprick of *Hereford* granted or leased *dum episcopus in episcopatu fuerit*, so as the successor might have the same for his present revenue: this custom has been long since disused, and the land thus formerly granted is now let by lease as other lands, though it still retains the name by which it was anciently known. *Butterfield's Surv. 56*.

FORM, Is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or intrap. *Hob. 232*. Matters of Form in pleas that go to the action, may be held on a general demurrer; as when a plea is only in abatement. *2 Ld. Raym. 1015*. The formal part of the law or method of proceeding, cannot be altered but by parliament: for, if once those were demolished, there would be an inlet to all manner of innovation in the body of the law itself. *1 Comm. 142*.

FORMA PAUPERIS, See title *Costs*, II.

FORMEDON, *Breve de formâ donacionis*] A writ that lieth for him who hath right to lands or tenements by virtue of any *intail*.

Upon alienation by a tenant in tail, whereby the estate-tail is discontinued, and the remainder or reversion is

is, by failure of the particular estate, displaced and turned to a mere right, the remedy is by this action of *formedon* (*secundum formam doni*) which is in the nature of a writ of right, and is the highest action that Tenant in tail can have. *Finch. L. 267; Co. Lit. 316.* For Tenant in tail cannot have an absolute writ of right, which is confined to such only as claim in fee simple: and for that reason this writ of *formedon* was granted him by the statute *de donis*; (*W. 1 R. 2. c. 13*) which is therefore emphatically called his writ of right. *F. N. B. 255.*

This writ is distinguished into three species; a *Formedon* in the *defender*, in the *remainder*, and in the *reverter*.

A writ of *Formedon* in the *defender* lieth where a gift in tail is made, and the tenant in tail alienates the lands intailed, or is disseised of them and dies; in this case the heir in tail shall have this writ of *formedon* in the *defender*, to recover these lands so given in tail, against him who is then the actual tenant of the freehold. In which case the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni*. *F. N. B. 211, 212.*

A *Formedon* in the *remainder* lieth where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession. In this case the remainder-man shall have this writ of *formedon* in the *remainder*, wherein the whole term of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the *statute de donis* but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to land, he ought also to have an action to recover it. See *F. N. B. 217.*

A *Formedon* in the *reverter* lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor his heirs or assigns; in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place. *F. N. B. 219: 8 R. p. 88.* This lay at common law, before the *statute de donis*, if the donee aliened before he had performed the condition of the gift by having issue, and afterwards died without any. *Finch. L. 268.*

The time of limitation in a *Formedon*, by *Stat. 21 Jac. 1. c. 16*, is twenty years, within which space of time after his title accrues, the demandant must bring his action, or else is for ever barred. See *3 Comm. 191—3.*

There is a writ of *Formedon* in *defender*, where partition of lands, held in tail, is made among parceners, &c. and one alieneth her part; in this case her heir shall have this writ; and by the death of one sister without issue, the partition is made void, and the other shall have the whole land as heir in tail. Also there is a writ of *formedon in fine* *tenuit*, that lies for a coparcener against a stranger upon the possession of the ancestor; which may be brought without naming the other coparcener who hath her part in possession. This writ may be likewise had by one heir in *Gavelkind*, &c. of lands intailed; and where the lands are held without partition. *New Nat. Brev. 476, 7, 481.*

Where a fee-simple is demanded in a *Formedon* in *reverter*, the taking of the profits ought to be alledged in the donor, and donee: if an estate tail is demanded, it must be alledged in the donee only. *1 Lutr. 96.*

There are several pleas both in bar and in abatement, which the tenant may plead to this action; such as non-tenure, which is a plea in abatement, and by which the tenant shews, that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called the pleading non-tenure generally. *Fe 162.*

Special non-tenure is where the tenant shews what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, *eligit*, or the like; and therefore the plea of special non-tenure must always shew who is tenant. *Booth 29.* See *1 Brownl. 153.*

At common law, non-tenure of parcel of an intire thing, as a manor, &c. abated the whole writ; but now by the *Stat. 25 E. 3. cap. 16*, it is enacted, "That by the exception of non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure was alledged." *Booth 29: 1 Mod. 181.*

If the tenant pleads non-tenure of the whole, he need not shew who is tenant: but in a plea of non-tenure of parcel, he must shew who is tenant, and this even before the statute; for the common law would not suffer a writ, good in part, to be wholly destroyed, except the tenant shewed the demandant how he might have a better. *1 Mod. 181.* The tenant cannot, after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole. *3 Lev. 55.*

The writ of *Formedon* is now rarely brought; the trying titles by *Ex. Sent.* supplying its place, in an easier manner. See *Booth of Real Actions.*

FORMELLA, A certain weight of about 70lbs. mentioned in the *Statute of weights and measures*, *Stat. 51 H. 3.*

FORNAGIUM, or *Fornagium*, fr. *Fornage*, *Furnage*.] The fee taken by a lord of his tenant, bound to bake in the lord's common oven, (*in furno domini*) or for a permission to use their own; this was usual in the Northern parts of England. *Plac. Parl. 18 Ed. 1.* And see *Affisa panis et cervisie*, 51 H. 3.

FORNICATION, *Fornication*; from the *Fornices* in Rome, where lewd women prostituted themselves for money.] Whoredom, or the act of incontinency in single persons; for if either party is married, it is *Adultery*. The *Stat. 1 H. 7. c. 4*, mentions this crime; which by an act made anno 1650, during the times of the *Usurpation*, was punished with three months' imprisonment for the first offence; and the second offence, it is said, was made felony. *Schep's Collect. The Spiritual Court* hath cognisance of this offence; but by *Stat. 27 Geo. 3. c. 44*, the suit must be instituted within eight months, and not at all after the intermarriage of the parties offending: and formerly *courts-leet* had power to inquire of and punish *Fornication* and *adultery*; in which courts the king had a fine assised on the offenders, as appears by the book of *Domesday*. *2 Inst. 488.*

FORPRISE, *Forprisum*.] An exception or reservation: This word is frequently inserted in leases and conveyances, wherein *excepted* and *forprised* is an usual expression. In another signification it is taken for any exaction; according to *Ibom. anno 1285.*

FORSSES, *Catadulæ*.] Water-falls, so called in *Westmorland*. *Camd. Britan.*

FORSPEAKER, An attorney or advocate in a cause. *Blount.*

FORTIA, Power, dominion, or jurisdiction: whence *infortune Placitum*, to enforce a plea by judges assembled. *L. g. H. 1. c. 20.*

FORTIORI, à *fortiori* or *multo fortiori*, is an argument often used by *Littleton*, to this purpose: If it be so in a feoffment passing a new right, *much more* is it for the restitution of an ancient right, &c. *Co. Lit. 253, 260.*

FORTILIE AND FORTILITY, *Fortellium*] A fortified place, bulwark or castle; as it is said within the towns and *fortilles* of *Berwick* and *Carlisle*. *Stat. 11 H. 7. c. 18.*

FORTLEF, *Fr.*] A place or fort of some strength; or rather a little fort. *Old Nat. Brew 45.*

FORTS AND CASTLES, The *Stat. 13 Car. 2. c. 6*, extends to forts and other places of strength within the realm; the sole prerogative as well of erecting, as manning, and governing of which belongs to the king, in his capacity of General of the kingdom. *2 Inst. 30.*

No Subject can build a castle or house of strength imbarred, or other fortrefs defensible without the license of the king; for the danger which might ensue, if every man at his pleasure might do it. *1 Inst. 5: 1 Comm. 263.*

FORTUNA, Treasure trove.

FORTUNE TELLERS, See title *Conjuration*.

FORTUNIUM, A tournament or fighting with spears; or an appeal to *fortune* therein. *Mat. Paris Anno 1241.*

FORTY DAYS-COURT. The court of attachment of the fortieth or *quadragesima*. See title *Tryst*.

FOSSA, A ditch full of water; wherein women committing felony were drowned: It has been likewise used for a grave in ancient writings. See *Furca*.

FOSSATUM, FOSSATURA, *Lat*] A ditch, or place fenced round with a ditch or trench; also it is taken for the obligations of citizens to repair the city ditches. The work or service done by tenants, &c. for repairing and maintenance of ditches is called *fossatum operatio*; and the contribution for it *fossagium*. *Kennet's Gloss.*

FOSEWAY, or the *Fosse*, from *Fossus*, dugged.] One of the four ancient Roman ways through England. See title *Watling Street*.

POSTERIAN, *Sax.*] A nuptial gift; the jointure or stipend for the maintenance of the wife.

FOTHER OR FODDER, From Teuton. *Fuder*.] A weight of lead containing eight *pigs*, and every pig one and twenty stone and a half, so that it is about a ton or common cart load: Among the *plumbers* in *London* it is nineteen hundred and a half; and at the mines it is two and twenty hundred weight and a half. *Skene.*

FOVEA, A place for burial of the dead. *Stat. Eccl. Paulin. Lond. n. MS. 29.*

FOUNDATION, The founding and building of a college or hospital is called *fundatio*, *quasi fundatio*, or *fundamenti locatio*. *Co. lib. 10.* The king only can found a college; but there may be a college in reputation, founded by others. *Lyn 267.* If it cannot appear by inquiry, who it was that founded a church or college, it shall be intended it was the king; who has power to found a new church, &c. *Moor 282.* The king may found and erect an hospital, and give a name to the house, upon the inheritance of another, or licence another person to

do it upon his own lands; and the words *fundo*, *creo*, &c. are not necessary in every foundation, either of a college or hospital made by the king; but it is sufficient if there be words equivalent: The incorporation of a college or hospital is the very foundation; but he who endows it with land is the founder; and to the erection of an hospital nothing more is requisite but the incorporation and foundation. *10 Rep. Case of Sutton's Hosp.*

Persons seized of estates in fee simple, may erect and found hospitals for the poor, by deed inrolled in Chancery, &c. which shall be incorporated, and subject to such visitors as the founder shall appoint, &c. *Stat. 19 Ed. 1. c. 5.* Where a corporation is named, it is said the name of the founder is parcel of the corporation. *2 Nelf. 886.* Though the foundation of a thing may alter the law, as to that particular thing; yet it shall not work a general prejudice. *1 Lil. Abr. 634.* By *Stat. 7 & 8 H. 3. c. 37*, The Crown may grant licence to alien in mortmain. By *Stat. 9 Geo. 2. c. 36*, Gifts in mortmain by will, &c. are restrained; but there are exceptions with respect to Universities and Royal Colleges. See this Dict. titles *Corporation*; *University*; *Mortmain*.

FOUNDER OF METAL, From *Fr. Fondeur*, to melt or pour.] He that melts metal, and makes any thing of it by pouring or casting it into a mould. See *Stat. 17 R. 2. c. 1*, this Dict. title *Money*: Hence, *Bell-founder*, a found of letter, &c.

FOURCHER, *Fr. Fourche*; *Lat. Furca*, because it is two-fold.] A putting off, or delaying of an action; and has been compared to stammering, by which the speech is drawn out to a more than ordinary length of time; so a suit is prolonged by *fourching*, which might be brought to a determination in a shorter space: The device is commonly used when an action of suit is brought against two persons, who being jointly concerned, are not to answer till both parties appear; and is where the appearance or *essoin* of one will excuse the other's default, and they agree between themselves that one shall appear or be *essoined* one day, and for want of the other's appearing, have day over to make his appearance with the other party; and at that day allowed the other party doth appear, but he that appeared before doth not, in hopes to have another day by adjournment of the party who then made his appearance. *Terms de Ley.*

This is called *fourcher*; and in the statute of *H. 7. c. 42*, it is termed *fourcher by essoin*; where are words to this effect, *viz.* coparceners, jointenants, &c. may not *fourch* by *essoin*, to *essoin* severally; but shall have only one *essoin*, as one sole tenant. And in *Stat. Glouc. 6 Ed. 1. c. 10*, it is used in like manner: The defendants shall be put to answer without *fourching*, &c. *2 Inst. 250.*

FRACTION. The law makes no fraction of a day; if any offence be committed, in case of murder, &c. the year and day shall be computed from the beginning of the day on which the wound was given, &c. and not from the precise minute or hour. See *Co. Litt. 255.* and this Dict. titles *Murder*; *Appeal*.

An act of record will not admit any division of a day, but is said to be done the first instant of the day. *M. 137.*

In presumption of law, when a thing is to be done upon one day, all that day is allowed to do it in, for the avoiding of fractions in time, which the law admits not of, but in case of necessity. *Sti. 119.*

Insurance for *H.*'s life; *H.* died on the last day; *per Holt* Ch. J. the law makes no fraction in a day; yet, in this case, he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over; yet, if *A.* be born on the 3d day of September, and on the second day of September, twenty-one years afterwards, he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age. 2 Salk. 625. See titles *Bond*; *Condition*; *Infant*, &c.

FRACITTIUM, Arable land. *Mon. Angl. Tm.* 2. 873.

FRACURA NAVIUM, Wick of shipping at sea.

FRAMPOLE FENCES, Such *fines* as the tenants in the manor of *Writtle* in *Essex*, set up against the lord's demesnes; and they are intitled to the wood growing on those *fences*, and as many poles as they can reach from the top of the ditch with the helve of an axe, towards the reparation of their *sewers*. It is thought the word *frampole* comes from the Sax. *fram*, *ul* profitable; or that it is a corruption of *franch pole*, because the poles are free for the tenants to take: but Chief Justice *Brampton*, whilst he was steward of the court of the manor of *Writtle*, acknowledged that he could not find out the reason why those *fences* were called *frampole*; so that we are at a loss to know the truth of this name etymologically. *Bleant*.

FRAME-WORK KNITTERS, regulated by *Stat. 6 Geo. 3. c. 29*. See this Dict. title *Manufactory*.

FRANCHILANUS, A freeman. *Chart. H. 4.* *Francus* *homo* is used for a freeman, in *Domesday* book.

FRANCHISE, *Fr.*] A privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either *personal* or *real*, that is belonging to a person immediately; or by means of this or that place whereof he is a chief or member. *Comp. Jurisd.* 141.

There is also a *Franchise royal*; which seems to be that where the King's writ runs not. 21 H. 6. c. 4. But *Franchise royal* is said by some authors to be where the King grants to one and his heirs, that they shall be quit of toll, &c. *Bract. lib. 2. c. 5*.

Franchises, are a species of incorporeal hereditaments. *Franchise* and *Liberty* are used as synonymous terms; and their definition is "A royal privilege or branch of the King's prerogative, subsisting in the hands of a Subject." *Finch* L. 164.—Being therefore derived from the crown, they must arise from the King's grant; or in some cases may be held by prescription, which pre-supposes a grant. *Finch* L. 164. The kinds of them are various and almost infinite: They may be vested either in natural persons or in bodies politic; in one man or many: But the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant. 2 *Roll. Ab.* 191; *Kirkw.* 196.

The *Principality of Wales* is a Franchise—To be a *County-Palatine* is also a Franchise, vested in a number of persons. It is likewise a Franchise for a number of persons to be incorporated, and subsist as a *Body politic*; with a power to maintain perpetual succession, and do corporate acts: and each individual member of such corporation is also said to have a Franchise or freedom. Other Franchises are, to hold a *Court-Leet*: to have a

Manor or *Lordship*; or at least to have a *lordship paramount*: to have *Waifs*, *Wrecks*, *Estovers*, *Treasure trove*, *Royal fish*, *Forfeitures* and *Deadlands*: to have a *Count* of one's own, or liberty of holding pleas, and trying causes: to have the *Consuance of Pleas*, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: (See this Dict. title *Cognizance*;) to have a *Bartwick*, or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process: to have a *Fair* or *Market*, with the right of taking *Toll*, either there or at any other public places, as at bridges, wharfs or the like; which tolls must have a reasonable cause of commencement (as in consideration of repair, or the like,) else the franchise is illegal and void: 2 *Inft.* 220: See this Dict. titles *Toll*; *Toll*;) or lastly to have a *Forest*, *Chace*, *Park*, *Warren* or *Liberty*, endowed with privileges of royalty. *F. N. B.* 230. See this Dict. title *Forest*, &c.

Usage may uphold *Franchises*, which may be claimed by *prescription*, without record either of creation, allowance or confirmation; and wreck of the sea, waifs, strays, fairs and markets, and the like, are gained by *usage*, and may become due without any matter of record. But goods of felons and outlaws, and so on like, grow due by *charter*, and cannot be claimed by *usage*, &c. 2 *Inft.* 281: 9 *Rep.* 27.

It hath been adjudged, that grants of *Franchises*, made before the time of memory, ought to have allowance, within the time of memory, in the King's Bench, or before the barons of the *Exchequer*, or by some confirmation on record; and it is said they are not records pleadable, if they have not the aid of some matter of record within time of memory; and such ancient grants, after such allowance, shall be construed as the law was when they were made, and not as it hath been since altered: But *Franchises* granted within time of memory are pleadable without any allowance or confirmation; and if they have been allowed or confirmed as aforesaid, the *Franchises* may be claimed by force thereof, without shewing the charter. 9 *Rep.* 27, 28: 2 *Inft.* 281. 494.

There have been formerly several ancient prerogatives derived from the crown; besides the *Franchises* aforesmentioned; as power to pardon felony, make justices of assize, and of the peace, &c. But by the *Stat. 27 H. 8. c. 24*, they were resumed and re-united to the crown. The King cannot grant power to another to make strangers born, denizens here, because such power is by law inseparably annexed to his person. 7 *Rep.* 25.

By *Magna Charta* c. 1, and several ancient statutes, the *Church* shall have all her liberties and *Franchises* inviolable: And the *Lords Spiritual* and *temporal* shall enjoy their liberties, &c. and the King may not deprive them of any of them. 14 *Ed.* 3. *ff.* 2. c. 1: 2 *H.* 4. c. 1.

By *Magna Charta*, c. 37, The *Franchises* and liberties of the city of *London*, and all other cities, towns, &c. are confirmed. By *Stat. 27 H. 8. c. 24*, all writs, processes, &c. in *Franchises*, are to be made in the King's name; and stewards, bailiffs, and other ministers of liberties, shall attend the justices of assize, and make due execution of process, &c.

Some *Franchises*, as *York*, *Bristol*, &c. have return of writs, to whom mandates are directed from the courts above, to execute writs and process: And a mayor or

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bailiff of a town, may have liberty to keep courts, and hold pleas in a certain place, according to the course of the Common law; and power to draw causes out of the King's courts, by an *e. dukor juyant en*: But the causes here may be removed to the superior courts. *Co. Lit.* 114: 4 *Id.* 87, 224.

Sheriffs of counties, within which is any *Franchife*, the lord whereof is intitled to a return of writs, shall, on his request, appoint one or more deputies, to reside at some place near, there to receive all writs in the sheriff's name, and under his seal to issue warrants for their due execution, and the Lord Chancellor is to settle the charges to be paid on such deputy. *Stat. 13 Geo. 2. c. 18.*

A *Franchife* hath no relation to the county wherein it lies, as has been generally held; for it is not necessary to set forth the county when any thing is shewn to be done within a liberty or *Franchife*. *11 n. 23 Car. B. R.*

If a *Franchife* fails to admit a justice within the same, the *Franchife* shall not be allowed, but on any such failure, the court of *B. R.* may compel the owners of the *Franchife* to do justice; for that court ought to see justice equally distributed to all persons. *1 Litt. Abi. 635.*

Whether the King is party to a suit, as in all informations and indictments, the process ought to be executed by the sheriff, and not by the bailiff of any *Franchife*, whether it have the clause *non omittas*, *&c.* or not; for the King's prerogative shall be preferred to any *Franchife*. *2 Litt. P. C.* A sheriff upon a *non omittas*, or on a *capia* *in arrest*, or *quo minus*, may enter and make arrests in a *Franchife*. *1 Litt. 635.* An arrest by the sheriff within a *Franchife* on a common writ, is said to be good, though the officer be subject to an action at the suit of the lord of the *Franchife*. *&c.* See title *Arrest*.

Franchises may be forfeited and seized where they are abused, for misuser, or non-user; and when there are many points, a misuser of any one will make a forfeiture of the whole on a *quo warranto* brought. *Kitch. 65.* For contempt of the King's writ, in a county palatine, *&c.* the liberties may be seized, and the offenders fined; and the temporalties of a bishop have been adjudged to be seized until he satisfied the King for such contempt, on information exhibited. *1 Cro. Car. 253.* The bishop of *D. Dun* pretending he had such a *Franchife*, that the King's writ was not to come there, and because one brought it thither he imprisoned him; this being proved upon an information brought against him, it was adjudged he should pay a fine to the King, and lose his liberties. *2 Rep. 210.*

If a person claim a *Franchife* which he ought not to have, and an injury done upon the King, and not shewing his title, the King shall take from him his *Franchife*. *1 Rep. 180: 1 Engl. 34.* The King's Bench will not give an information on private usurpation of *Franchises*, till the proper remedy be pursued by *quo warranto*. *Hud. 211.*

If *Franchises* and liberties are granted to the King, which were before *in re*, as fiefs of his crown, and afterwards by escheat, surrender, or otherwise, come back to the crown, they are re-united to the crown, and the King has them *in re* as before. *9 Co. 256.* So if liberties, franchises, *&c.* which were appendant to a manor, come with the manor to the King, the appendancy is extinct, and the King is re-leased of them *in re*. *9 Co. 256: Cro. Eliz. 591. 1 And. 67.*—See *John.*

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286. But if *Franchises*, liberties, *&c.* created *de novo*, by the King come back to the crown, they are not merged or extinguished in the crown. *9 Co. 256: 1 And. 87.*—See *Cro. El. 592: Dy. 327 a: Com. Dig. title Franchife (G).*

Disturbance of *Franchises* happens, when a man has the *Franchife* of holding a court-leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or, in short, any other species of *Franchife* whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions, prevail upon the suitors not to appear at my court; or obstruct the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes, or is carried out of my liberty: In all cases of this kind, and which are of a variety too extensive to be here enumerated, an injury is done to the legal owner of the *Franchife*; his property is diminished: and the profits arising from such his *Franchife* are diminished. To remedy which, as the law has given no other writ, he is therefore entitled to sue for damages by a special action on the case: or in case of toll, may take a distress, if he pleases. *3 Comm. 236.*

See further as to *Franchises* under the several titles and names of the different subjects, above concisely mentioned, and more at large under title *Quo Warranto: Com. Dig. titles Franchises: Liberties.*

FRANCIGENÆ, Was anciently the general appellation of all foreigners. Vide *Engle. ey.*

FRANCIANÆ, Used in ancient authors to denote a freeman or a gentleman. *Fortescue.*

FRANK, A *French* gold coin, worth twenty *den.*, which is a *livre*, about ten pence $\frac{1}{2}$ *d.* English money.

FRANKALMOIGN, *Libera Eleemosyna*] A tenure by spiritual service, where an ecclesiastical corporation, sole or aggregate, holdeth land to them and their successors, of some lord and his heirs in free and perpetual alms: And perpetual supposes it to be a fee simple; tho' it may pass without the word *jur. cellos.* *Lit. § 133. Co. Lit. 94.* A lay person cannot hold in free alms. And when a grant is in *Frankalmoin*, no mention is to be made of any manner of service. *Lit. 137.* None can hold in *Frankalmoin* but by prescription, or by force of some grant made before the statute of *Mortmain*, *7 Ed. 1. st. 2: 18 Et 1. st. 1. c. 3.* So that the tenure cannot at this day be created, to hold of a founder and his heirs in free alms: But the King is not restrained by the statutes; nor a Subject licensed or dispensed with by the King, to make such a grant. *&c. Co. Lit. 98, 99.* And if an ecclesiastical person holds lands by fealty and certain rent, the lord may at this time confirm his estate, to himself and his successors in *Frankalmoin*, for the former services are extinct, and nothing is reserved but that he should hold of him, which he did before; whereby this change and alteration is not within the *Stat. 18 Ed. 1. of quia emptoris terrarum. Lit. § 140, 540: Co. Lit. 99 306.*

Tenure in *Frankalmoin* is incident to the inheritable blood of the donor or founder; except in case of the King, who may grant this tenure to hold of him and his successors. *Lit. 135.* And the reason why a grant in *Frankalmoin*, since the *Stat. 18 Ed. 1. (quia emptoris)* is void, except

cept in the case of the King, &c. is because none can hold land by this tenure, but of the donor; whereas the statute enjoins, that it be held of the Chief Lord, by the same service by which the feoffor, held it; though the King may grant away any estate, and reserve the tenure to himself. *Co. Lit.* 99, 223.

The service which ecclesiastical corporations were bound to render for lands held in *Frankalmoin* was not certainly defined, but only in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this) because this divine service was of a higher and more exalted nature. *Lit.* § 134, 5.

This is the tenure by which almost all the ancient Monasteries and Religious houses held their lands; and by which the parochial clergy and very many ecclesiastical and eleemosynary foundations hold them to this day. The nature of the service being, upon the Reformation, altered and made conformable to the doctrines of the Church of England. It was an old Saxon tenure, and continued under the Norman Revolution; from the respect then shewn to religion and religious men: which is also the reason that tenants in *Frankalmoin* were discharged of all other services, except the *trioda necessitas* of repairing the highways, building castles and repelling invasions. See *Bract.* l. 4. tr. 1. c. 28. § 1: *Seld.* Jan. 1. 42.

Even at present, this is a tenure of a nature very distinct from all others, being not in the least feudal, but merely spiritual. For this reason, if any person that holds lands or tenements in *Frankalmoin*, make any failure in doing such divine service as they ought, the lord may make complaint of it to the Ordinary or visitor; who if he be the King, if he be founder; or a Subject where he was appointed visitor upon the foundation; and the Ordinary, &c. may punish the negligence, according to the ecclesiastical laws. *Lit.* 136: *Co.* l. 1. 96.

In this particular, tenure in *Frankalmoin* materially differs from what was called tenure by *Divine Service*: in which tenants were obliged to do some special divine services to certain: as to sing to many masses, to distribute such a sum in alms, and the like; which being expressly defined and prescribed, could with no kind of propriety be called free *tenement*; especially as for this, if unperturbed, the lord might distrain without any complaint to the visitor. *Lit.* § 137: *Britt.* c. 66.

Antient donations in *Frankalmoin* are now out of use, as none but the King can make them; but they are expressly excepted, by name, in the Stat. 12 Car. 2. c. 24, (§ 7) abolishing tenures, and therefore subsist in many instances at the present day. 2 *Comm.* 101. c. 6.

See farther on this subject this Dict. title *Mortmain*.

FRANK CHASE, A liberty of *free chase*; by which all persons that have lands within the compass thereof, are prohibited to cut down any wood, &c. without the view of the forester, though it be in their own demesnes. *Comp. Juris.* 187.

FRANKED LETTERS, See title *Post: Parliament*.

FRANK-FEE Freehold lands which are held exempted from all services, but not from homage. In the register of writs we find that is *frank fee*, which a man holds at the Common law, to him and his heirs; and not by such service, as is required in ancient demesne, according to the custom of the manor: And that the lands in the hand

of King Edward the Confessor, at the making of the book of *Domesday*, were ancient demesne, and all the rest *frank-fee*; wherewith Fitz-Herbert agrees. *Reg. Orig.* 12: *F. N. B.* 161. These lands were exempted from all services, but not from homage.—*Bro. tit. Demesne* 32, says, that land which is in the hands of the King or lord of any manor, or being ancient demesne of the crown (*viz.* the demesnes) is called *frank fee*; and that which is in the hands of the tenant, is ancient demesne only. The author of the *Terms of the Law* defines a *Free-fee* to be a tenure pleadable at the Common-law; and not in ancient demesne. *Cowel: Blount.* See title *Ancient Demesne*.

FRANK-FERM. Lands or tenements, changed in the nature of the fee by *teofment*, &c. out of knight service, for certain yearly services. *Britton*, c. 66. See title *Fee-farm*.

FRANK-FOLD, See *Follage*.

FRANK-LAW, *Libera Lex*.] The benefit of the free and Common-law of the land. You may find what it is by the contrary, from *Crompton* in his *Justice of Peace*; where he says, he that for any offence loseth his *frank-law*, falls into these mischiefs, *viz.* He may never be impanelled upon any jury or assize; or be permitted to give any testimony: If he hath any thing to do in the King's courts, he must not attend them in person, but appoint his attorney therein for him: And his lands shall be estreated, and his body committed to prison, &c. *Crompt. Juris.* 156: *Lib. Assis.* 59.

FRANK-MARRIAGE, *Libera Matrimonium*.] A tenure in tail special where a man feoffed of land in fee-simple, gives it to another with his daughter, sister, &c. in marriage; to hold to them and their heirs: This tenure groweth from these words in the gift, *v. c.* *Sciant, &c. me A. B. dedisse & concessisse, &c. T. B. suo reo & Annæ uxori eius, filie, &c. in liberum matrimonium, unum messuagium, &c.* *Lit.* § 17: *West. Symb.* p. 1. l. 2. § 303. The effect of which words is, That they shall have the land to them and the heirs of their bodies; and shall do no services to the donor, except fealty, until the fourth degree. *Glanvil*, lib. 7. c. 18. And *Fleta* gives this reason why the heirs do no service until the fourth degree: *Ne donatores vel eorum heredes pro bona receptione à reversione repellantur.* And why in the fourth descent and downward, they shall do services to the donor; *quia in quarto gradu vehementer presumitur, quod terra est per feodum hæreditatibus donatorum reversione. Fleta*, lib. 3. c. 11; and see *Bracton*, lib. 2. c. 7.

Bracton also divides marriage into *liberum matrimonium* and *maritagium* *per totam vitam*; which last was where lands were given in marriage, with a reservation of the services to the donor, which the donee and his heirs were bound to perform for ever; but none of his, or the next two heirs, were obliged to do homage, which was to be done when it came to the fourth degree; and then, and not before, they were required to be performed by services and homage. *Bract.* l. 2. A gift of lands by one man to another with a wife in *frank marriage*, amounts to an application of law to a gift in tail; which in this case may be created without the words *heirs* or *lo. s.* *Lit.* 17: *West.* l. 120. A gift in *frank-marriage* may be made as well after as before marriage: and though a gift was a fee-simple before the Statute of *Wigorn.* 2; but since, it is actually

usually a fee-tail: Though this tenure is now grown out of use, it is still capable of feoffment in law: It is liable to no service but fealty. *8 Co. 2. 6. 115. c. 7.*

FRANK-PLEDGE, [*Frankpledge*, from *Fr. Franc*, Liber, and *pledge*, Edj. *pledge*.] A pledge or surety for the behaviour of *Fr. Frank*; it being the ancient custom of this kingdom, borrowed from the *Lombards*, that for the preservation of the public peace, every free-born man at the age of fourteen, (religious persons, clerks, &c. excepted) should give surety for his truth towards the King and his subjects, or be committed to prison; whereupon a certain number of neighbours, usually become bound one for another, to see each man of their *pledge* forth-coming at all times, or to answer the transgression done by any gone away: And whenever any one offended, it was forthwith inquired in what *pledge* he was, and then those of that *pledge* either produced the offender within one and thirty days, or satisfied for his offence. This was called *Frankpledge*; and this custom was so kept, that the sheriffs at every *county court*, did from time to time take the oaths of young persons as they grew to fourteen years of age, and see that they were settled in one *hundred* or other; whereby this branch of the sheriff's authority was called *regis franci plegii*, or *regis of Frankpledge*. At this day no man ordinarily giveth other security for the keeping of the peace, than his own oath; so that none answereth for the transgression of another, but every person for himself. *4 Inst. 72.* Living under *Frankpledge* has been termed living under *law*, &c. See this Dist. titles *County Court*; *Deceit*; *Deceit*.

FRANK TENEMENT, A possession of *freehold* lands and tenements. See *Freehold*.

FRASSETUM, A corruption of *fraxinetum*.] A wood or woody ground, where *ash-trees* grow. *Co. Lit. 4.*

FRATER CONSANGUINEUS. A brother by the father's side.

FRATER NUTRICIUS. Used in ancient deeds for a bastard brother. *Malm. 3.*

FRATER UTERINUS. A brother by the mother's side.

FRATERIA, A fraternity, brotherhood or society of religious persons, who were bound to pray for the good health and life, &c. of their living brethren, and the souls of those that were dead: in the statutes of the cathedral church of *St. Paul* in *London*, collected by *Ralph Baldock*, Dean, A. D. 1295, there is one chapter *de Frateria beneficiorum ecclesie St. Pauli*, &c.

FRATERNITATES, See title *Corporation*.

FRATRES CONJURATI, Sworn brothers or companions; sometimes those were so called who were sworn to defend the King against his enemies. *Hoveden*, p. 445: *Let. W. 1: Leg. Ed. 1. c. 35.*

FRATRES PYES, [*Fred. friars*.] Certain friars, wearing black and white garments; of whom mention is made by *Walsingham*, p. 124.

FRATRIAGIUM, A younger brother's inheritance; Whatever the sons or brothers possess of the estate of the father, they enjoy it *ratione fratriagii*, and are to do homage to the elder brother for it, who is bound to do homage for the whole to the superior lord. *Bract. lib. 2. c. 35.*

FRAUD, [*Fraus*, Lat.] Deceit in grants and conveyances of lands, and bargains and sales of goods, &c. to the damage of another person; which may be either by suppression of the truth, or suggestion of a falsehood.

On this subject of **FRAUD**, we may enquire,

I. *What Acts are fraudulent at Common law, and in Equity.*

II. *What Acts are fraudulent by Statute.*

I. It may be laid down as a general rule, that, without the express provision of any act of parliament, all deceitful practices in defrauding, or endeavouring to defraud, another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the Common law, and punishable according to the heinousness of the offence. *Co. Lit. 3 b: Dyer 295.* Such as causing an illiterate person to execute a deed to his prejudice, by reading of it over to him in words different from those in which it was written, &c. *1 Sid. 312. 431.*

Also it is a rule, that a wrongful manner of executing a thing shall avoid a matter that might have been executed lawfully. *Co. Lit. 35: 41 Aff. 25: 47 Aff. 29: 1 Rel. Abr. 420, 54: Co. Lit. 357: Popb. 61. 100.*

A deed not fraudulent at first may become so afterwards. And if one add a seal to a note which is good without it, he shall lose his security. *2 Vern. 123, 162.*

As to frauds in contracts and dealings, the Common-law subjects the wrong-doer, in several instances, to an action on the case; as if a person, having the possession of goods, sell them to another, affirming them to be his own, when in truth they are not, an action on the case lies. *1 Rel. Abr. 90: Cro. Jac. 474.* But if *A.* possessed of term for years, offers to sell it to *B.* and says, that a stranger would have given him twenty pounds for this term, by which means *B.* buys it, tho' in truth *A.* was never offered twenty pounds, no action on the case lies, tho' *B.* is hereby deceived in the value. *1 Rel. Abr. 91, 101: 1 Sid. 146: Titb. 20. S. P.*

If on a treaty for the purchase of a house, the defendant affirms the rent to be more than it is, whereby the plaintiff is induced to give more than the house is worth, this is a fraud. *1 Salk. 211: 1 Lev. 102: 1 Sid. 146: 1 Keb. 510, 518, 522. S. P.* And see *Kil. 24, 81: 1 Show. 50, 51.*

Where a person is party to a Fraud, all that follows by reason of that Fraud shall be said to be done by him. *Cro. Jac. 469.* But when Fraud is not expressly averred, it shall not be presumed; nor shall the court adjudge it to be so, till the matter is found by a jury. *10 Rep. 50.*

All Frauds and deceits, for which there is no remedy by the ordinary course of law, are properly cognisable in equity; and it is admitted, that matters of Fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined. *4 Inst. 84.* It would be endless to enumerate the several cases, wherein relief has been given against Frauds: but the following instances are too material to be omitted.

Wherever Fraud or surprise can be imputed to, or collected from the circumstances of the transaction, Equity will interpose and relieve against it. *Torb. 101, 2: 2 Co. Ca. 103: Fin. b. 161: 2 P. Wms. 203, 270: 3 P. Wms. 130: 2 Vern. 189: 2 Atk. 324: 2 Vex. 407.* It is said however that it must not be understood, from cases of this kind being generally brought into equity, that the courts of law are incompetent to relieve; so, where the Fraud can be clearly established, courts of law exercise a concurrent jurisdiction with courts of equity; and will relieve by making

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making void the instrument obtained by such corrupt agreement or Fraud. 1 *Burr.* 396: *Wood's Inst.* 296. Therefore where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumstance in an action on the bond. 9 *H.* 5. 15. cited 11 *Co.* 27 b. So if the bond be in part read to an unlettered man, and some of its material contents be omitted or mis-represented. 2 *Roll. Ab.* 28. p. 8. It is observable that Lord Coke in the same passage where he confines the jurisdiction of courts of equity to such "frauds covin and deceit, for which there is no remedy by the ordinary course of law," seems to admit that all frauds were not relievable at law. See 3 *Inst.* 84.

The Chancery may decree a conveyance to be *fraudulent*, merely for being voluntary, and without any trial at law; yet it has been insisted, that *Fraud* or not, was triable only by a jury. *Pie. Ch.* 14, 15.

A poor man was drawn in to sell an estate, at a great under-value: but no *Fraud* appearing, though the purchase was not a fair bargain, the seller could not be relieved in equity, to set it aside. *Preced. Canc.* 206.

There does not appear to be a single case in the books in which it has been held that mere inadequacy of price alone is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. See *Gilb. Rep.* 155: *Bro. P. C. Keen v. Stutley*.—2 *Atk.* 251: *Anbl.* 18. To set aside a conveyance there must be an inequality of price so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it. 1 *Bro. C. R.* 9: and see 2 *Bro. C. R.* 179 *in n.* A strong argument in support of this rule may be drawn from those cases in which losing bargains have been actually established and decreed. See 2 *Vern.* 423: 1 *Eq. Ab.* 170: 2 *Vern.* 422: 1 *Bro. C. R.* 158.—But tho' courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to a *Fraud*. 2 *Bro. C. R.* 175. See also 1 *Bro. C. R.* 558: *Hene v. Meers*: 2 *Vern.* 155: 2 *P. Wms.* 203.

A. being tenant in tail, remainder to his brother *B.* in tail, *A.* not knowing of the entail, makes a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which *B.* who knew of the entail ingrosses, but does not mention any thing of the entail, because, as he confessed in his answer, if he had spoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; and altho' after *A.*'s death, *B.* recovered in ejectment against the widow by force of the entail; yet she was relieved in Chancery, and a perpetual injunction granted for this *Fraud* in *B.* in concealing the entail; which if it had been disclosed, the settlement might have been made good by a recovery. *Preced. Chanc.* 35: 2 *Vern.* 239.

So where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a

witness to the deed, whereby the reversion of the term is settled on the issue of the marriage after the mother's death; she was compelled in equity to make good the settlement. 2 *Vern.* 150.

Where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterward desiring to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by at the corner of a street to see them go by to be married; The plaintiff was relieved on the point of *Fraud*. 1 *Eq. Ab.* 20: 2 *Vern.* 373.

It seems agreed that if a woman on the point of marriage, charge, or convey her property to a mere stranger, for whom she was not under even a moral obligation to provide, that such conveyance will be decreed a *Fraud* on the marital rights. 2 *C. R.* 41: 2 *Vern.* 264.

If *A.* has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a *Fraud* in him for which his incumbrance shall be postponed. 2 *Vern.* 151. And see 2 *Vern.* 554. So if *A.* having a mortgage on a leasehold estate lends the mortgage deed to the mortgagor, with an intent to borrow more money; that is such a *Fraud* in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance. 2 *Vern.* 726: 1 *Eq. Ab.* 321.—See this Dict. title *Mortgage*.

If a copyholder, by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it will be decreed against the wife on the point of *Fraud*, though there was no memorandum thereof in writing pursuant to the statute of *Frauds* and *Perjuries*. *Preced. Canc.* 3.

Since the cases of *Kerick v. Bransby*, (*Bro. P. C.*) and *Webb v. Cleveland*, (2 *Atk.* 424.) it appears to have been settled that a will cannot be set aside in equity for *Fraud* and imposition; because a will of personal estate may be set aside for *Fraud* in the ecclesiastical court, and a will of real estate may be set aside at law: for in such cases, as the *animus testandi* is wanting, it cannot be considered as a will. 2 *Atk.* 324: 3 *Atk.* 17.—Though equity will not set aside a will for *Fraud*, nor restrain the probate of it in the proper court, yet if the *Fraud* be proved, it will not assist the party practising it, but will leave him to make what advantage he can of it. 2 *Vern.* 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the prerogative court, to controvert its validity. 1 *Atk.* 623. That the party prejudiced by the *Fraud* may file a bill in equity for a discovery of all its circumstances is unquestionable: the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving relief. *Fonblanque's Treat. Eq. c. 2. § 3, An.*

If a security be obtained from a person by *Fraud* and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity. 2 *Vern.* 173, 632.

There are likewise several instances, where a parol agreement intended to be reduced into writing, but prevented by *Fraud*, has been decreed in equity, notwithstanding the statute of *Frauds* and *Perjuries*; as where
upon

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upon a marriage treaty, instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him; It was decreed, that he should make good the settlement. *1 Ff. Ab. 19.* So where a parol agreement was concerning the lending of money on a mortgage, and the covenants proposed were an absolute deed from the mortgager and a deed of satisfaction from the mortgagee, and after the mortgage had not the deed of conveyance, he refused to execute the satisfaction; It was decreed against him on the point of fraud. *1 Ff. Ab. 90.* See title *Agreement*.

II By *Stat. 1 R. 2. c. 9.*, no gift or feoffment of lands or goods shall be made by fraud for maintenance. And the disseisees shall have their recovery against the first disseisors as well of their lands as of double damages, without regard to such alienations. See also *Stats. 4 H. 4. c. 7: 11 H. 6. c. 3*; and this Dictionary titles *Dissipation: Forfeiture*.

By *Stat. 3 H. 7. c. 4.*, (and see *Stat. 50 E. 3. c. 6.*) All deeds of gift of goods made in trust for the use of persons making the said gifts, with intent to defraud creditors, shall be null and void.

By *Stat. 13 Eliz. c. 5.* (made perpetual by *Stat. 29 Eliz. c. 5.*) Every feoffment, gift, alienation and conveyance of lands or goods, leases, rents, &c. and every bond, judgment and execution with intent to defraud creditors or others, shall (only against creditors and others whose actions shall be thereby defrauded or delayed) be of none effect; all parties and privies to such conveyances, bonds, &c. shall forfeit one year's value of the lands and the whole of the goods, or money contained in the bond, &c. half to the crown and half to the party grieved; and suffer half a year's imprisonment.—This statute not to extend to any estate made on good considerations *bonâ fide* to persons not having notice of such fraud.

By *Stat. 27 Eliz. c. 4.* (made perpetual by *Stat. 39 Eliz. c. 18.*) Every conveyance, charge, lease or incumbrance of any lands made with intent to defraud purchasers shall be deemed utterly void as against such purchasers and all claiming under them.—The parties and privies to such conveyances shall forfeit one year's value of the land and suffer half a year's imprisonment.—The statute expressly excepts any conveyance made for good consideration and *bonâ fide*.—If any person shall make any conveyance or limitation of lands with a clause of revocation, and after such conveyance shall convey or charge the same lands for money or other good consideration, the said first conveyance against the said vendees shall be void.—Lawful mortgages made *bonâ fide* on good consideration are excepted.—By the same act *statutes-merchant* and *statutes-staple* are to be entered in the office of the clerk of the recognizances. See this Dict. those titles.

By *Stat. 29 Car. 2. c. 3.*, (known more commonly by the name of *The Statute of Frauds*, and by which various provisions are made as to *Contracts, Wills, &c.* which see in this Dict. under titles *Agreement; Assumpsit; Wills, &c.*) All leases, estates of freehold, or terms for years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing and signed by the parties or their agents shall have the force of leases at will only.—Except leases not exceeding the term of

three years at two thirds of the improved value.—And no leases, estates or interests of lands, either of freehold or terms of years, or any uncertain interest, not being copyhold, shall be assigned, granted or surrendered, unless by deed or note in writing signed by the parties or their agents: or by the operation of law.

By *Stat. 3 (or 3 & 4) W. & M. c. 14.*, made perpetual by *Stat. 6 W. 3. c. 14.*, all wills or appointments of lands, or of any rent, &c. out of the same shall be deemed, only as against Creditors by bond or specialty binding the heir, to be fraudulent and void.—And every such creditor shall have his action of debt upon his bonds and specialties against the heir at law of such obligors, and such devisees jointly.—This statute however excepts dispositions for the payment of debts and raising portions for children in pursuance of marriage contracts made before marriage: It further provides that where any heir at law shall be liable to pay his ancestor's debt, in respect of lands descended to such heir, and shall alien the same before action brought, such heir shall be answerable to the creditor in an action of debt to the value of the land aliened; but the lands *bonâ fide* aliened before action brought shall not be liable.—Every devise however, made liable by the statute, shall be chargeable, in the same manner as the heir, tho' the lands devised shall be aliened before action brought.

The *Stat. 50 E. 3. c. 6: 3 H. 7. c. 4.* expressly declare all gifts, &c. of goods and chattels intended to defraud creditors, to be null and void; creditors might however still in some cases be defrauded, by their debtors' executing powers of appointment (vested in them by settlement, &c.) in favour of mere volunteers, unless courts of equity interposed, and made such voluntary appointment in the first place subject to payment of debts. *2 Vern. 319, 465: 2 Vez. 1.* But tho' courts of equity will subject a voluntary appointment to payment of debts, yet they will not interfere where the debtor has not executed his power of appointment. *2 Vern. 465: 2 Vez. 1.* See also *Hob. 9.* as to the rule of law.

As the *Stat. 13 Eliz. c. 5.* not only declares all deeds made in fraud of creditors to be null and void, but subjects the parties to such fraud, to the penalties and forfeitures above mentioned, it should seem that the provisions of this act ought to be construed strictly; but Lord Mansfield has said, that the *Stats. 13 El. c. 5: 27 El. c. 4.* cannot receive too liberal a construction, or be too much extended in suppression of fraud. *Cowp. 434.*

The object of the Legislature was evidently to protect creditors from those frauds which are frequently practised by debtors under the pretence of discharging a moral obligation: for as to those gifts or conveyances which want even a good or meritorious consideration for their support, their being voluntary seems to have been always a sufficient ground to conclude that they were fraudulent: but tho' the statute protects the legal right of creditors against the fraud of their debtors, it anxiously excepts from such imputation the *bonâ fide* discharge of a moral duty. It therefore does not declare all voluntary conveyances, but all fraudulent conveyances to be void: and whether the conveyance be fraudulent or not is declared to depend on the consideration being good, and also *bonâ fide*. *1 Ch. Ca. 99, 291: 1 Vent. 194: 1 Mod. 119: 1 Atk. 15: Cowp. 703.*

A good

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A good consideration is that of blood, or of natural love and affection. See this Dict. title *Consideration*. A gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; in that case it is equally clear it ought to be set aside. If therefore a man being indebted convey to the use of his wife or children, such conveyance would be within the statute; for tho' the consideration be good, yet it is not *bonâ fide*; that is, the circumstances of the grantor render it inconsistent with that good faith which is due to his creditors. *Fonblanque's Treat. Eq. t. 4. § 12. in notes.*

If there be a voluntary conveyance of real estate, or chattel interest by one not indebted at the time, tho' he afterwards becomes indebted, if that voluntary conveyance was for a child, and there is no particular evidence or badge of Fraud to deceive subsequent creditors, that will be good; but if any mark of fraud, collusion or intent to deceive subsequent creditors appear, that will make it void. 2 *Ven.* 11: See also 2 *Atk.* 481: 1 *Atk.* 13: *Cowp.* 711.

But the grantor's being indebted is not the only badge of Fraud; several other circumstances are enumerated in *Twyne's Case*, (3 *Rep.*) as furnishing a strong presumption that the transaction is *malâ fide*. Gifts made in secret are liable to suspicion of Fraud: a general gift of all a man's goods may be reasonably suspected to be fraudulent, even tho' there be a true debt owing to the party to whom made. The several marks or badges of Fraud, in a gift or grant of goods are, if it be general, without exception of some things of necessity; if the donor still possesses and uses the goods; if the deed be secretly made; if there be a trust between the parties; or if it be made pending the action. 3 *Rep.* 80—82.—If also the conveyance contain a power of revocation, or a power to mortgage, it will be considered as fraudulent against creditors. 2 *Vern.* 510.—So if the grantor be allowed to continue in possession of lands, the conveyance being absolute. 2 *Bullst.* 218.—So if the conveyance or gift be in general of the whole or the greater part of the grantor's property, such conveyance or gift would be presumed to be fraudulent; for no man can voluntarily divest himself of all, or the most of what he has, without being aware that future creditors will probably suffer for it. In short if the transaction be chargeable with any circumstance sufficiently strong to raise a presumption of its being a Fraud, it cannot be supported, unless some other consideration be interposed to obviate the objection arising from the general nature of the transaction: as where the husband after marriage being indebted conveyed an estate to trustees, to the separate use of his wife: it was held that the trustees having undertaken to indemnify him against his wife's debts, was sufficient to support the settlement as a valuable consideration. 2 *Bry. C. R.* 90. But if this transaction had been with a view to defraud creditors, it would probably have been set aside; for if the transaction be not *bonâ fide*, the circumstance of its being even for a valuable consideration will not alone take it out of the statute. *Cowp.* 434: 2 *Atk.* 477.

But tho' creditors may under the above and other circumstances avoid a voluntary conveyance, yet it is binding on the party making it and all claiming under him. *Cro. Jac.* 270: 1 *Eq. Ab.* 168: 22 *Vin. Ab.* 16—18: 1 *Vern.* 100, 132, 464: 2 *Vern.* 475: 22 *Vin. Ab.* 24. pl. 3. And

if there be two or more voluntary conveyances, the first shall prevail, unless the latter be for payment of debts. 1 *Ch. Rep.* 92: 2 *Ch. Rep.* 199.

A conveyance, if made of lands by Fraud, is not void by the *Stat.* 13 *El. c.* 5, against all persons; but only against those who afterwards come to the land upon valuable consideration. *Cro. Eliz.* 445: *Cro. Jac.* 271.

A distinction has been taken between the claims of real creditors, and a debt founded in *maleficio*: for *A.* having brought an action against *B.* for criminal conversation with *A.*'s wife *B.* assigned his estates to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name. *A.* recovered 5000*l.* damages and brought his bill to set aside this deed as fraudulent, but the Court held that it was not fraudulent either in law or equity: for the plaintiff was no creditor at the time of making the deed: and though it were made with an intent to prefer his real creditors before this debt when it should come to be such, yet it was conscientious so to do. But the plaintiff was held to have an interest in the surplus after payment of the other debts. *Pr. Ch.* 105.

On the construction of the *Stat.* 27 *Eliz. c.* 4, it has been held that every voluntary conveyance shall be presumed to be fraudulent against a subsequent purchaser. 1 *Pent.* 194: 1 *Ch. Ca.* 100, 217: *Cro. Jac.* 158. But if the conveyance, tho' voluntary, appear to have been made for a meritorious consideration; and without Fraud or covin, it shall not be void against a subsequent purchaser; for there is no part of the act which affects voluntary settlements *eo nomine* unless they are fraudulent. *Doe v. Routledge*, *Cowp.* 708. See also, 2 *Wils.* 356: *Forrest* 64: 2 *Vern.* 44. As to what shall be deemed a meritorious consideration, see the above cases, and also, 1 *Vern.* 408, 467: 1 *Atk.* 265. And though a conveyance be covinous in its creation it may acquire validity by subsequent matter; as where the land conveyed is afterwards aliened or settled for valuable consideration. 1 *Sid.* 133, 4: *Stin.* 423: 3 *Lev.* 387. It has also been held that a purchaser, to avail himself of this act, must be a purchaser for money or other valuable consideration. 3 *Co.* 83*a*: *Cro. Eliz.* 444. See also *Com. Dig. Fraud.* 4 *I.* 2: 1 *Eq. Ab.* 353.

Good's Case, (5 *Co.* 60*b*,) determines that a purchaser shall avoid a fraudulent conveyance, notwithstanding his notice of the Fraud, but this can by no means bear out the inference that all voluntary conveyances are fraudulent, and therefore absolutely void, though the purchaser have notice of them. The terms of *Stat.* 27 *Eliz. c.* 4. § 2, seem to be sufficiently distinct to confine its operation to such conveyances as are made with an intent to defraud and deceive subsequent purchasers; but it were difficult to maintain that a conveyance was made with intent to defraud a person who before he became a purchaser had full notice of such conveyance. See 2 *Lev.* 105.—The policy of the act was to prevent Fraud; the construction most favourable to such purpose is that which excludes all temptation to the practice of it. A voluntary deed, as has already been noticed, is binding on the party and all claiming under him as subsequent volunteers; and to allow him to defeat his bounty in favour of a purchaser for valuable consideration without notice is merely to prefer a higher consideration: but to allow a purchaser with notice to supercede the claims of a volunteer seems to encourage a breach of the respect morally due to the

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fair claims and interests of others: and may render the provisions of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it.—This point seems deserving of consideration; for if the construction of this act which has certainly prevailed in favour of purchasers with notice were traced, it would probably appear to have originated in the opinion, that the statute avoids all *voluntary* conveyances whatever; though, as very strongly observed by Lord Mansfield in *Doe v. Routledge*, (Cov. 708,) it merely affects *fraudulent* conveyances. *Fonblanque, Treat. Eq. c. 4. § 13. in n.*

Before the above Stat. 3 W. & M. c. 14, against *fraudulent devises* bond and other specialty creditors whose debts did not immediately affect the lands of their debtors, were liable to be defrauded, either by their debtor devising his lands, or by the alienation of the heir before any action could be brought against him. To obviate these the statute was made, by the provisions of which the bond creditor is in some degree protected against the fraud of the debtor or his heir. But the statute having expressly excepted devises for payment of debts or children's portions, bond and other specialty creditors whose demands do in their nature affect the land are still liable to be prejudiced by the right of their debtor to devise his real estate; for if he devise subject to the payment of debts, his simple contract creditors will be entitled to be paid *pari passu* with such bond or other specialty creditors; for in conscience their debts are to be equally favoured, being equally due. 1 Ch. Ca. 32, 248; 2 Ch. Ca. 54; 3 Ch. Rep. 7; 1 Vern. 63, 101; 2 Vern. 61, 763.—And even creditors who are barred, by the statute of Limitations shall be let in. 2 Vern. 141. And tho' it has been held in some cases, that if the estate be devised to the executor for payment of debts, such circumstance will render the estate *legal assets*, yet it seems now to be settled that this shall not occasion the produce of it, when sold, to be applied as it would in the ecclesiastical court, but the estate must nevertheless be considered as *equitable assets*. *Newton v. Bennet*, 1 Bro. C. R. 135. and *Silk v. Prince*, in the note there. But if the estate descends to the heir charged with the payment of debts, it will still be legal assets. 1 P. Wms 430; 2 Atk. 290.—See this Dict. titles *Executor V. 6: Assets*.

The following cases may serve further to elucidate the foregoing principles.

If a man seised of land in fee, make a feoffment of it to divers uses, with remainders over, &c. with power of revocation by writing under hand and seal; here if he for good consideration doth enter into a recognisance, the land shall be charged with the same: so if A. reserves to himself power to revoke by the assent of B. and then bargains to another. *Brigg. 22: Lane 22*. And where one hath made an estate with the power of revocation; and after with intent to deceive a purchaser he makes a feoffment, &c. to a stranger, to *extinguish the power*, and then sells the land for a valuable consideration; in this case both the conveyances shall be *fraudulent* as to the purchaser. 2 Rep. 83.

A man made a lease for twenty-one years, in trust for his daughter till marriage; and if she married with his consent, then to her during the term; this, till marriage, has been held *fraudulent* as to a purchaser; but after marriage it is good, because marriage is an ad-

vancement to the daughter, and taking effect made it upon valuable consideration, which a marriage is always taken to be, and the husband was drawn in by this conveyance to marry her. 1 Sid. 133.

If a father makes a feoffment to another, for the advancement of daughters, or his younger sons, or for payment of his debts; and afterwards infeoffs his eldest son or heir, that is not *Fraud* or collusion within the statute, for he is bound in law to make provision for his children: but where there is a grandfather, father, and two sons, and the grandfather (living the father) conveys his land to either of the sons, this is out of the Stat. 32 H. 8. c. 1; because it is not a common thing for to do, and the father ought to have the immediate care of his children; though if he is dead, then it belongeth to the grandfather. 6 Rep. 76. If a man levy a fine to the use of himself for life, remainder to his son in tail, and after sells the fee-simple to another, he as a purchaser shall avoid this conveyance upon the Stat. 27 Eliz. c. 4; because it was *voluntary*, and therefore *fraudulent*; so it had been if he had settled the remainder on his wife, unless there had been a consideration on a precedent marriage. *Sid. 133: 3 Salk. 174*.

A deed, as has been already said, may be voluntary, and not *fraudulent*; thus where a father having an extravagant son, settles his land so that he may not spend all; this is good, though there is no consideration of money. 1 Mod 119.

An infant promised, on his marriage, to settle his estate when he came of age, upon himself and his issue; and this was held a sufficient consideration, though an infant by law is not compellable to fulfil such promise. 2 Lev. 147. A person, in consideration that his son is to marry the daughter of A. B. covenants to stand seised of lands to the use of his son for life; and after to other sons in reversion or remainder: the uses thus limited in remainder, shall be *fraudulent* as to any purchaser of the land, tho' the first be upon good consideration. And although the consideration of marriage is good; if there be a power to revoke annexed to the deed, it will be void as to purchasers. *Lane 22*.

If a man after marriage, make a voluntary conveyance of land for a jointure, or maintenance for his wife, and afterwards sell the land for money, to one that hath no notice of it; in this case the conveyance, made to the use of the wife, shall be said to be *fraudulent*: and yet if a person upon a marriage, before the marriage, and in consideration thereof, or after marriage, in consideration of a portion given or money paid, convey his land to the use of his wife, &c. it will not be a *fraudulent* deed. *Cro. Jac. 158*. A feme covert joins with her husband in the alienation of her jointure, and hath a new deed of settlement of other lands dated the same day in lieu thereof, without articles or agreement precedent to this second settlement; this is not *fraudulent* against a purchaser, though the lands in the new settlement are more in value than those in the first; for the old settlement being destroyed, and a new one made on the same day, it shall be presumed that there was an agreement for it. 2 Lev. 70, 71.

The husband who married a wife an inheritrix, promised, that if she would join with him in a sale of her land, and let him have the money to pay his debts, that he would leave her 400 l. at his death; about six months after

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after the lands were sold, he gave bond to a stranger to leave his wife the 40*l*. And it was adjudged, that this was not *fraudulent* as to creditors, but good against them. 2 *Lev.* 148. A person makes a voluntary conveyance, and then mortgages the same land, and the first deed is upon a trial found *fraudulent*; then he to whom the deed was made, exhibited his bill in *equity* to redeem the mortgage; and it was held, that though the first deed was *fraudulent*, *quoad* the mortgage money, yet it was good to pass the equity of redemption. *Chan. Rep.* 59.

Where a lease is made with a *provis*, that if the lessor pays 10*l*. the lease shall be void; because 10*l* is not the value of the lease and land, but only limited as a power of revocation, it is *fraudulent* as to a purchaser. *Cro. Jac.* 455. And if a man makes an assignment of his lease, and yet keeps possession of the lands, the deed of assignment will be adjudged *fraudulent*. In *Chancery* it has been decreed, that if a man conveys his land to friends in trust, to the use of his children, &c. to defraud a purchaser, the trust shall go in *equity* to the purchaser; also it shall be liable for debts, to satisfy the same. *Lutw.* 43, 44. A husband assigned a term of his wife's, in trust for his wife; and it was held *fraudulent* against purchasers. *Chan. Rep.* 225.

By the *Common-law*, an estate made by *fraud*, shall be avoided only by him who hath a former right, title, interest, debt or demand. 3 *Rep.* 83. If one indebted do really sell lands, though to avoid payment of debts, if the vendee be not privy to the intent, the sale to him is good for as to the vendee, there is no *fraud* in the case. *Mich.* 24 *Car. B. R.* A man gives his goods to his son, they are nevertheless liable as to his creditors; but if he gives them to one of his creditors, without any trust or covin, it shall not be *fraudulent* to make him liable to other creditors. 3 *Salk.* 174.

If tenant for life commit a forfeiture, and he in the reversion enters, this shall be as a *fraudulent* conveyance with respect to creditors. *Vent.* 257. *Fraudulent* gifts, or grants of goods to defraud the lord of his heriot, shall be void; and the value of the goods forfeited, under *Stat.* 13 *Edw. c.* 5.

Fraudulent conveyances to multiply votes at election of *Knights of the shire*, shall be taken against the persons making them as free and absolute; and all securities for redeeming and restoring, &c. to be void. *Stat.* 10 *Ann. c.* 23. See title *Parliament*. A presentation to a benefice; or administration of goods, obtained by *Fraud*, are void; and so is sale of goods by *Fraud*, although in open market, &c. Where a *fraudulent* deed or conveyance is assigned upon a valuable consideration, the *Fraud* is purged thereby. 1 *Ld. Raym.* 88.

Gross criminal Frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, &c. for these and such like offences the party may be punished not only with fine and imprisonment, but also with such farther infamous punishment, as the Judges in their discretion shall think proper. *Cro. Jac.* 497: 2 *Vol. Abr.* 78: 2 *Vol. Rep.* 107: 1 *Keb.* 849: 6 *Mod.* 42: 1 *Sid.* 312, 431: *Noy* 99, 103: *Moor* 630: *Cro. Eliz.* 531: 1 *Mod.* 40: 2 *Jon.* 64: 6 *Mod.* 105: 1 *Salk.* 379. See title *Cheats*.

For further matter relative to Frauds, and fraudulent conveyances, and obtaining relief against them; and as

FREE

to the operation of the statute of Frauds, and other statutes before mentioned, See this Dict. titles *Agreement III, IV; Assumpsit; Bankrupt; Bill of Sale; Chancery; Contract; Conveyance; Deeds; Equity; Execution; Judgment; Will; &c.*

FRAUDS AND PERJURIES, Statute of, See tit *Frauds II.*
FRAUNK FERME, See *Frank-Farm: Fee-Farm.*

FRAUS LEGIS. If a person having no manner of title to a house, procure an affidavit of the service of a declaration in ejectment, and thereupon gets judgment; and, by virtue of a writ of *hab. fac. possessionem*, turns the owner out of possession of the house, and seizes and converts the goods therein to his own use, he may be punished as a felon; because he used the process of the law with a felonious purpose, *in fraudem legis*. *Raym.* 276: *Sid.* 254.

FRAXINETUM, A wood of ash trees. *Domesday.*

FREDUM, A composition anciently made by a criminal, to be freed from prosecution, of which the third part was paid into the *Exchequer*. Formerly compositions were paid for crimes in general, particularly for murder. The magistrate was to determine the composition, and protect the offender against the violence of resentment. See *Montesquieu's Spirit of Laws*, l. 30. c. 20: *Robertson's Charles V.* l. 300.*

FREDWIT, A liberty to hold courts, and make amerciaments, &c. *Cowel.*

FREE-BENCH, *Francus bancus; fide. libera*] That estate in copyhold lands which the wife hath on the death of her husband for her dower, according to the custom of the manor. but it is said the wife ought to be espoused a virgin; and is to hold the land only so long as she lives sole and continent. *Kitch.* 102. Of this *Free-Bench* several manors have several customs; and *Fitzherbert* calls it a custom, whereby in certain cities the wife shall have the whole lands of the husband for her dower, &c. *F. N. B.* 150. In the manors of *East and West Embourne* in the county of *Berks*, and the manor of *Lotte* in *Devonshire*, and other parts of the *West of England*, there is a custom, that when a copyhold tenant dies, his widow shall have her *Free bench* in all his customary lands, *dum sola & casta fuerit*; but if she commits incontinency, she forfeits her estate: yet nevertheless, on her coming into the court of the manor, riding backwards on a black ram, with his tail in her hand, and saying the words following, the steward is bound by the custom to re-admit her to her *Free-bench*; the words are these,

Here I am,
Riding on a black ram,
Like a whore as I am:
And for my crincum crancum,
I have lost my bincum bancum;
And for my tail's game,
Have done this awfully shame;
Therefore pray Mr. Steward, let me have my land again.
Cowel.

FREEBORD, *Francbordus*.] Ground claimed in some places more or less, beyond, or without the fence: it is said to contain two foot and a half. *Mon. Angl. Tom.* 2. p. 141.

FREE BOROUGH-MEN, Such great men as did not engage like the *frank-pledge* men for their decennier. See *Frisburgh*.

FREE

FREE-CHAPEL, *Libera capella*] A chapel so called, because it is exempt from the jurisdiction of the diocesan. Those chapels are properly *Free-chapels* which are of the King's foundation, and by him exempted from the Ordinary's visitation; also chapels founded within a parish for the service of God, by the devotion and liberality of pious men, over and above the mother-church, and endowed with maintenance by the founders, which were *free* for the inhabitants of the parish to come to, were therefore called *Free chapels*. *Reg. Orig.* 40, 41. The *Free-chapel* of *St. Martin le Grand* is mentioned in the *Stat.* 3 *Ed.* 4. c. 4, as are others likewise by ancient statutes: but these chapels were given to the King, with the *chantries*, &c. By *Stat.* 1 *Ed.* 6. c. 14. See title *Monasteries*.

FREEHOLD, *Liberum tenementum*.] That land or tenement which a man holds in fee-simple, fee tail, or for term of life. *Bract. lib.* 2 c. 9. It is described to be of two sorts: *freehold in deed*, and *freehold in law*; the first being the real possession of lands, &c. in fee, or for life; the other, the right a person hath to such lands or tenements, before his entry or seizure. *Freehold* is also extended to *offices*, which a man holds either in fee, or during life: and, in the register of writs it is said, that he who holds land upon an execution of a *statute-merchant* until he is satisfied the debt holds as *freehold* to him and his assigns, and the same of a tenant by *elegit*; but such tenants are not in fact *Freeholders*, only as *Freeholders* for their time, till they have received the profits of the land to the value of their debt, *Reg. Judic.* 68, 73. A lease for ninety-nine years, &c. determinable upon a life or lives, is not a lease for life to make a *Freehold*, but a lease for years, or chattel determinable upon life or lives; and an estate for one thousand years is not a *Freehold*, or of so high a nature as an estate for life. *Co. Lit.* 6. He that hath an estate for the term of his own life, or the life of another, hath a *Freehold*, and no other of a less estate; though they of a greater estate have a *Freehold*, as tenant in fee, &c. *Lit.* 57.

When a man pleads *liberum tenementum* generally, it shall be intended that he hath an estate in fee; and not a bare estate for life, *Cro. Eliz.* 87. An estate of *Freehold* cannot by the *Common-law* commence *in futuro*; but it must take place presently in possession, reversion, or remainder. 5 *Rep.* 94.

A man made a deed of gift to his son and his heirs, of lands after his death, and no livery was made; now if there had been livery, it had been void, because a *Freehold* cannot commence *in futuro*: and it has been held, that it shall not enure as a covenant to stand seized, by reason of the word *give*; by which was intended a transmutation of the estate, and not to pass it by way of use. *March. Rep.* 50, 51. Whatsoever is part of, or fixed to the *Freehold* goes to the heir; and glass windows, wainscot, &c. affixed to the house are parcel of the house, and cannot be removed by tenants. 4 *Rep.* 63, 64. But it hath been adjudged, that if things necessary for trade, &c. are affixed to the *Freehold* by the lessee, he may take them down and remove them, so as he do it before the end of the term, and he do not thereby injure the *Freehold*. 1 *Salk.* 368. See title *Heir*.

Any thing fixed to the *Freehold* may not be taken in distress for rent or in execution, &c. It is not felony at *Common-law*, only trespass, to steal or take any thing annexed to the *Freehold*; such as lead on a church, or house,

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corn or grass growing on the ground, apples on a tree, &c. Though if they are severed from the *Freehold*, whether by the owner or a thief, if he severed them at one time, and took them away at another, it was larceny to take them. 12 *Aff.* 32: 1 *Hawk. P. C.* And now by *Stat.* 4 *Geo.* 2. c. 32, To steal lead on houses, &c. is made felony.

The statute of *Magna Charta*, c. 29, ordains, "that no person shall be disseised of his *Freehold*, &c. but by judgment of his peers, or according to the law of the land;" which does not only relate to common disseisins, but the King may not otherwise seize into his hands the *Freehold* of the subject. *Wood's Inst.* 614. None shall distrain any freeholders to answer for their *Freeholds*, or any thing touching the same, without the King's writ. *Stat.* 52 *H.* 3. c. 22. Nor shall any person be compelled to answer for his *Freehold*, before any lord of a manor, &c. *Stat.* 15 *R.* 2. c. 12; See this Dict. title *Liberty*.—As to the *Freehold* qualifications necessary in certain cases, See this Dictionary titles *Parliament*; *Jury*, &c. and further for the definition and description of *Freehold* estates, title *Estate*.

FREEHOLDERS, Such as hold any freehold estate. By the ancient laws of Scotland, Freeholders were called *milites*; and freehold, in this kingdom, hath been sometimes taken in opposition to *villanage*, it being lands in the hands of the gentry and better sort of tenants, by certain tenure, who were always Freeholders, contrary to what was in the possession of the inferior people, held at the will of the lord. *Lambard*.

FREEMAN, *Liber homo*.] One distinguished from a slave; that is born or made free; and these have divers privileges beyond others. In the distinction of a Freeman from a vassal under the feudal policy, *liber homo* was commonly opposed to *vassus* or *vassallus*; the former, denoting an *allodial* proprietor; the latter, one who held of a superior. See title *Tenures*.

The title of a *Freeman* is also given to any one, admitted to the freedom of a corporate town, or of any other corporate body, consisting, among other members, of those called *Freemen*. See titles *Corporation*; *London*.

FREIGHT, *Fr. fret*.] The money paid for carriage of goods by sea; or in a larger sense, it is taken for the cargo, or burthen of the ship. Ships are freighted either by the ton, or by the great; and in respect of time, the freight is agreed for, at so much *per month*, or at a certain sum for the whole voyage. If a ship freighted by the great, happens to be cast away, the freight is lost; but if a merchant agrees by the ton, or at so much for every piece of commodities, and by any accident the ship is cast away, if part of the goods is saved, it is said she ought to be answered her freight *pro rata*: and when a ship is insured and such a misfortune happens, the insured commonly transfers those goods over to the assurers, towards a satisfaction of what they make good. *Lex Mercat.*

If freight is agreed for the lading and unlading of cattle at such a port, and some die before the ship arrives there, the whole freight shall be paid for the living and the dead; but if the agreement be for transporting them, Freight shall be only paid for the living: it is the same of slaves. *Ibid.* 85. The lading of a ship in construction of law, is bound for the Freight; the Freight being in point of payment preferred before any other debts to which the goods so laden are liable, though such debts as to time were precedent to the Freight. *Hil.* 17 *Car.* 2. B. R.

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B. R. If part of the lading be. on ship-board, and through some misfortune happening to the merchant, he has not his full lading aboard at the time agreed, the master shall have Freight by way of damage, for the time those goods were on board; and is at his liberty to contract with another, lest he lose his season and voyage: and where a ship is not ready to take in, or the merchant not ready to lade his goods aboard, the parties are not only so at liberty, but the person damnified may bring an action against the other and recover his damages sustained. *Leg. Rhod.*

If the freighter of a ship shall lade on board prohibited goods, or unlawful merchandize, whereby the ship is detained, or the voyage impeded; he shall answer the Freight agreed for. *Styl. 220.* And when goods are laden aboard, and the ship hath broke ground, the merchant may not afterwards unlade them; for if he then changes his mind, and resolves not to venture, but will unlade again, by the marine law the Freight becomes due. If a master Freights out his ship, and afterward secretly takes in goods unknown to the first laders, by the law marine he forfeits his Freight: and if a master of a ship shall put into any other port than what the ship was freighted to, he shall answer damages to the merchant; unless he is forced in by storm, enemies, or pirates; and in that case he is obliged to sail to the port agreed, at his own expence. *Leg. Ocean.* A ship is freighted so much out and so much in, there shall be no Freight due till the voyage is performed; so that if the ship be cast away, coming home, the Freight outwards, as well as inwards, are both gone. 1 *Brownl. 21. Mal. 98,* and see *Ch. Ca. 75: 2 Vau. 212:* and also *Dougl. 541, 2,* that where a ship perishes, the whole Freight from the last place or time of payment will be lost. And if no freight be payable till the return, if the ship is lost returning, the freight outwards shall be lost as well as that inwards. *Mal. 98.*

The goods carried, generally, are a security for the Freight, and the master is not bound to deliver them without payment. *Dougl. 104.*

If a freighted ship becomes disabled without the master's fault, he has his option to re fit, (if possible, in convenient time) or to hire another ship to carry the goods. If the merchant will not agree to this, the master is entitled to the full freight for the whole voyage. 2 *Burr. 882: 1 Bl. Rep. 190.*

The master shall have his Freight tho' the goods are spoiled, if the merchant takes them.—The merchant may abandon all, tho' all are not lost: but he cannot abandon some and take some: if he abandon all, he is excused Freight.—If the ship is disabled or taken when part of the voyage is performed, without fault of the Master, he shall be paid a rateable proportion of the Freight. 2 *Burr. 882.*—See further this Dict. titles *Charter-party: Insurance: Merchants.*

FRENCH Language, anciently used in law records. See title *Pleading.*

FRENCHMAN, Heretofore a term for every stranger or outlandish man. *Bract. lib. 3. tract. 2. c. 15.* See *Francigena.*

FRIENDWITE, From Sax. *freund*, amicus, & *wite* mulier. A mulier or fine exacted of him who harboured his outlawed friend. *Blount.* But see *Fleta, lib. 1. c. 7.*

FRESCA, Fresh water, or rain, and land floods. *Charv. Antiq. in Somner of Gavelkind, p. 132.*

FRESH

FRESH DISSEISIN, *Frisca disseisina*, from Fr. *fraîs* recens; & *disseisin*, *possessionem ejicere*.] That *disseisin*, which a man might formerly seek to defeat of himself, and by his own power, without resorting to the King, or the law; as where it was not above fifteen days old, or of some other short continuance. *Britton, c. 5.* Of this, *Bracton* writes at large, concluding it to be arbitrary. *Lib. 4. c. 5.* See title *Disseisin.*

FRESH FINE, A fine levied within a year past: it is mentioned in the statute of *Westm. 2. 13 Ed. 1. st. 2. c. 45.*

FRESH FORCE, *frisca fortia*.] Is a force newly done in any city, borough, &c. And if a person be disseised of any lands or tenements within such a city, or borough, he who hath a right to the land, by the usage and custom of the said city, &c. may bring his *assise*, or *bill of fresh force*, within forty days after the force committed; and recover the lands. *F. N. B. 7: Old Nat. Br. 4.* This remedy may be also had where any man is dispossessed of any lands, after the death of his ancestor, to whom he is heir; or after the death of tenant for life, or in tail, in dower, &c. within forty days after the title accrued; and in a bill of *fresh force*, the plaintiff or demandant shall make protestation to sue in the nature of what writ he will, as *assise of mortdancester*, of *novel disseisin*, *intrevisin*, &c. *New Nat. Br. 15.* The assise or bill of *fresh force* is sued out without any writ from the Chancery; but after the forty days, there is to be a writ out of Chancery, directed to the mavor, &c. But this writ is obsolete since Ejectments have come in use for recovering the possession of lands, &c.

FRESH SUIT, or *Pursuit*, *Recens insecutio*.] Such a present and earnest following of an offender, where a robbery is committed, as never ceases from the time of the offence done or discovered, until he be apprehended. *Vide post.* And the benefit of such pursuit of a felon is, that the party pursuing shall have his goods restored to him; which otherwise are forfeited to the King. *Statut. Pl. Cor. lib. 3. cap. 10. & 12.* When an offender is thus apprehended, and indicted, upon which he is convicted, the party robbed shall have restitution of his goods; and though the party robbed do not apprehend the thief presently, but that it be some time after the robbery, if the party did what in him lay to take the offender; and notwithstanding in such case he happen to be apprehended by some other person, it shall be adjudged *fresh pursuit*. *Terrus de Ley.* It has been anciently holden, that to make a *fresh suit*, the party ought to make *hue and cry* with all convenient speed, and to have taken the offender himself, &c. But at this day, if the party hath been guilty of no gross negligence, but hath used all reasonable care in inquiring after, pursuing, and apprehending the felon, he shall be allowed to have made sufficient *fresh suit*. 2 *Hawk. P. C. c. 23.* Also, it is said, that the judging of *fresh suit* is in the discretion of the court, though it ought to be found by the jury; and the justices may, if they think fit, award restitution without making any inquisition concerning the same. 2 *Hawk. P. C. c. 23.* See title *Hue and Cry.*

Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is *fresh suit*, to excuse the gaoler: and if a lord follow his *disseisin* into another's ground, on its being driven off the premises, this is called *fresh suit*; so where a tenant pursues his cattle, that escape or stray into another man's lands, &c. *Fresh suit* may

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PRETUM BRITANNICUM, Is used in our ancient writings for the *Streights between Dover and Calais.*

Ch n/ 17. Job. m. 16.

FRIÐSIOLL; FRITISTOW: Sax. *frid*, pax, & *sol*, ledes] A seat, chair, or place of peace. In the charter of immunities granted to the church of St Peter in York by Hen I, and confirmed anno 5th 7, *Friedstoll* is expounded *in whicha þas 3 questums, &c.* And there were many such in England; but the most famous was at *Beverly*, which had this inscription: *hic sedes lapidea friedstoll dicitur, i. e. pacis caribilia, ad quam res fugiendo perueniens, omnino iam habet securitatem.* Camd. See titles *abatement* *Sai* *Quary*.

FRIENDLY SOCIETIES. Associations, chiefly among the most indolent of the lower and middling class of tradesmen for the purpose of affording each other relief in sickness, and their widows and children some assistance at their death. These have been thought worthy the protection of the Legislature, to prevent frauds which had arisen from the irregular principles on which many of them were conducted.

of persons may form themselves into a society, and raise among themselves a fund for their mutual benefit, and make rules and impose fines.—The rules, declaring the purpose for which such societies are established, are to be exhibited to the Quarter Sessions, who may annul or confirm them; in which latter case they are to be signed by the clerk of the peace. No rule thus confirmed to be altered but at a general meeting of the Society, and subject to the controul of the Sessions.—Societies may appoint officers, who are to give securities for their trust, the treasurer or trustees by bond, to the Clerk of the peace and other persons to the treasurer or trustees; which bonds are exempted from the stamp duty. Committee of not less than 11 members may be appointed their powers to be declared by the Society and subject to their controul.—Treasurers and trustees are enabled to lay out subscriptions in fur-

Thus have the Legislature, with that humanity which peculiarly distinguishes the British constitution, taken under their care all those men who, tho' generally useful and industrious, are but too apt not to be sufficiently conscious of the benefits conferred upon them, by a form of Government in which Charity is enforced and regarded as a ruling principle.

PRIER OUSEVANT, *fratres observants*.] A branch
 of the *Franciscan friars*, who were *monks* as well as the
Conventuals and *Capuchins*. They were called *Observants*
 because they are not combined together in any cloister,
 convent, or corporation, as the *Conventuals* are; but
 tied themselves to *observe* the rules of their order more
 strictly than the *Conventuals*, and upon a singularity of
 zeal separated themselves from them, living in certain
 places of their own choosing. *Zach de Rep. Eccles. de Re-*
gular. c. 12. They are mentioned in the *Stat. 25 H. 8.*
c. 12.

FRIPPERER, *Fr. Friper, i. e. Interpolator.*] One that scours and furbishes up old cloths to sell again; a kind of broker. See *Stat. 1 Jac. 1. c. 21*; and title *Brokers*.

FRITH, Sax.] A wood, from *Fil, Pax*; for the English Saxons held woods to be sacred, and therefore made them sanctuaries. Sir Edward Coke expounds it a plain between woods, or a lawn. *Co. Lit* 5. *Camden* in his *Britannia*, useth it for an arm of the sea, or a streight, between two lands, from the word *Fretum*.

FRIIIGEAR, From Six *Frithor Frid, Pax, & Gear*,
Annus.] The year of jubilee, or of meeting for peace
and friendship. *Sonn.*

FRITHGILD, A *Guildball*; also a company or fraternity.

FRITHMAN,

FRITHMAN, One belonging to such fraternity or company. *Blount*.

FRITHMOTE, Is mentioned in the records of the county palatine of *Chester*: *Per Frithmote J. Stanley, Ar. clamat capere annuatim de villa de Olton, quæ est infra feodum manerium de, &c. 10 sol. quos comites Gestræ ante consecrationem hantæ præd. solebant capere. Pl. in Itin. apud Cæstriam. 14 Hen. 7.*

FRITHSOKE, FRITHSOKEN, From Sax. *Friðh, pax & socue, libertas*.] Surety of defence, a jurisdiction for the purpose of preserving the peace; according to *Fleta, libertas habendi franci plegii; seu immunitatis lotus. — Convel: Blount.*

FRODMORTEL, rather **FREOMORTEL**, From Sax. *Freo, free, and Morthdel, Homicide*.] An immunity for committing manslaughter — *Mon. Angl. Tom. 1. p. 173.*

FRUIT, *Stealing of*.] By *Stat. 4 Geo. 2. c. 32*, To rob orchards or gardens of fruit growing therein, may be punished by fine, whipping, &c. and by *Stat. 1 Geo. 1. c. 48*, fine and imprisonment may be inflicted on persons destroying fruit trees — See title *Larceny*.

FRUMGYLD, Sax] The first payment made to the kindred of a person slain, towards the recompence of his murder — *LL Edmund.*

FRUMSTOL, The chief seat or mansion-house; which is called by some the *Homesal. Leg. Inæ. c. 38.*

FRUSCA TERRÆ, Waste and desert lands, *Mon. Angl. tom. 2. p. 327.*

FRUSTURA, From Fr. *Froussure*.] A breaking down; also a ploughing or breaking up: *Frustrura domorum* is house-breaking: and *Frustrura terræ*, new broke land. *Mon. Angl. Tom. 2. p. 394.*

FRUSTRUM TERRÆ, A small piece or parcel of land, *Domesday.*

FRULECTUM, A place where shrubs, or tall herbs do grow. *Mon. Angl. Tom 3 p. 22.*

FUAGE, In the reign of King Edward III, The *Black Prince*, having *Aquitain* granted him, laid an imposition of *suage* upon the subjects of that dukedom, *i. e. 12 d. for every fire. Rot. Parl 25 Ed. 3.* And it is probable, that the *hearth money* imposed Anno 16 Car. 2, took its original from hence. See title *Fumage*.

FUEL. If any person shall sell billet-wood or faggots for fuel under the assise, &c. on presentment thereof upon oath by six persons sworn by a justice of peace, the party may be set on the pillory in the next market town, with a faggot, &c. bound to some part of his body. None are to buy fuel but such as will burn it, or retail it to those who do; on pain to forfeit the treble value; also no person may alter any mark or assise of fuel, on the like forfeiture. *Stats. 7 E. 6. c. 7: 43 Eliz. c. 14*, and see title *Billet Wood*.

FUER, Fr. *Fuir*, Lat. *Fugere*.] *Flight* is used substantively though it be a verb; and is two-fold, *fuer in fact*, or *in facto*, when a man doth apparently and corporally fly; and *fuer in ley*, *in lege*, when being called in the county court he appeareth not, which is *flight* in the interpretation of the law. *Staundf. Pl. Cor. lib. 3. c. 22.*

FUGA CATALLORUM, A drove of cattle; *fugatores carrutatum*, waggoners who drive oxen, without beating or goading. *Fleta, lib. 2 c 78.*

FUGACIA. A chase; So *fugatio*, is hunting, or the privilege to hunt. *Blount.*

FUGAM FECIT, Is where it is found by inquisition, that a person fled for felony, &c. And if *flight* and felony be found on an indictment for felony, or before the coroner, where a murder is committed, the offender shall forfeit all his goods, and the issues of his lands, till he is acquitted or pardoned: and it is held, that when one indicted of any capital crime, before justices of Oyer, &c. is acquitted at his trial, but found to have fled, he shall, notwithstanding his acquittal, forfeit his goods: but not the issues of his lands, because by acquittal the land is discharged, and consequently the issues. *3 Inst. 218.* The party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit*; and the particulars of the goods found to be forfeited, may be always traversed; also whenever the indictment against a man is insufficient, the finding of a *fugam fecit* will not hurt him. *2 Hawk. P. C. c. 47.* Making default in appearance on indictment, &c. whereby outlawry is awarded, is a *flight in law*. See this Dict. titles *Exigent: Outlawry: Forfeiture*.

FUGITIVES GOODS, *Bona Fugitivorum*.] The goods of him that flies upon felony, which after the flight lawfully found on record, do belong to the King or Lord of the manor. *5 Rep 103.*

FUGITIVES OVER SEA. By two ancient and obsolete, if not expired, statutes 9 E. 3. c. 10: 5 R. 2. st. 2. c. 2, To depart this realm over the sea, without the King's licence, except it were great men and merchants, and the King's soldiers, incurred forfeiture of goods: and masters of ships, &c. carrying such persons beyond sea, forfeited their vessels; also if any searcher of any port, negligently suffered any persons to pass, he should be imprisoned, &c. See titles *Aliens: Allegiance; Foreign Service; Treason*.

FUGITIO, *Pro Fuga* — *Knighton, Anno 1537.*

FULL-AGE. See titles *Age; Infant*.

FULLUM AQUÆ, A steam or stream of water, such as comes from a mill.

FUMAGE, *Fumagium*.] Dung for soil, or manuring of land with dung — *Chart. R. 2. p. 11. 5 E. 4.* And this word has been sometimes used for *smoke money*, a customary payment for every house that had a chimney. *Domesday.* See 1 *Comm 324*; and this Dict. title *Taxes*.

FUMADOES *Pukhards* garbaged and salted, then hung in the smoke, and pressed; so called in *Spain* and *Italy*, whither they are exported in great abundance. See titles *Fish: Navigation Acts*.

FUNDITORES, Is used for pioneers, in *Pat. 10 Ed 2. m. 1.*

FUNDS, See titles *National Debt: Stocks: Stock brokers*.

FUNERAL CHARGES, As to the payment of these by an executor, See title *Executor V. 2.*

A person died in debt, and 600*l.* was laid out in his funeral; decreed the same should be a debt, payable out of a trust estate, charged with payment of debts, he being a man of great estate and reputation in his country, and buried there; but had he been buried elsewhere, it seemed his funeral might have been more private, and the court would not have allowed so much. *Precc. Ch. 27.*

Where a citizen of *London* devised 700*l.* for mourning, the question was, if it should come out of the whole estate, or out of the legatory part only; it was insisted that as there had been no direction by the will, or if the will had directed, that the expences of the funeral should not exceed such a sum, there the deduction must have been out

out of the whole estate. *Per cur.* Mourning devised by the will, must come out of the legatory part, and not to lessen the orphanage and customary part. 2 *Vinn.* 240.

Executor is not liable to pay for funeral expences, unless he contracts for it. 12 *Mod.* 256.

Settlements for separate maintenance of the wife shall never extend to funeral charges; and though she made a will, (according to a power given her) and an executor, and gave several legacies, but there was no residuum for the executor, the husband's estate in the hands of a devisee subject to the payment of debts was made liable to the funeral charges of the wife. 9 *Mod.* 31.

In strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearer's fees; but not for pall or ornaments; *per Holt.* 1 *Salk.* 296. Ten pounds is enough to be allowed for the funeral of one in debt; *per Holt.* Baron *Powell* in his circuit would allow but 11 s. 6 d. as all the necessary charge. *Comb.* 342. *Quere*, If 40 s. is not now the usual sum in case of an insolvent? See *Salk.* 196: *Godolph.* p. 2. c. 26. § 2.

FURCA ET FOSSA; the gallows and the pit.] In ancient privileges granted by our Kings, it signified a jurisdiction of punishing felons; that is, men by hanging and women with downing. And Sir *Edw. Coke*, says *fissa* is taken away, but that *furca* remains. 3 *Inst.* 58. and see *Skene*.

FURCARE AD TASSUM, To pitch corn with a fork in loading a waggon, or in making a rick or mow. *Cowel.*

FURCAM ET FLAGELLUM, The meanest of all servile tenures, when the bondman was at the disposal of his Lord for life and limb. *Placit. Term Mich.* 2 *Job. Rot.* 7.

FURIGELDUM, A mulct paid for theft: by the laws of King *Ethelred*, it is allowed, that they shall be witnesses *qui nunquam furigeldum reddiderunt*, i. e. who never were accused of theft.

FURLONG, A quantity of ground containing generally forty poles or perches in length, every pole being sixteen feet and a half; eight of which *Furlongs* make a mile: it is otherwise the eighth part of an acre of land in quantity. *Stat.* 34 *Ed.* 1. *st.* 5 c. 6. In the former acceptance, the *Romans* call it *Stadium*; and in the latter *Jugerum*. Also the word *Furlong* has been sometimes used for a piece of land of more or less acres.

FURNAGIUM, See *Fornagium*.

FURNARIUS, A baker, who keeps an *oven*; hence *furniare* signifies to bake or put any thing in the oven. *Mat. Paris.* anno 1258.

FURR, *Furru*, from the *Fr. Fourer*, i. e. *Pelliculare*] The coat or covering of a beast. The *Stat.* 24 *H.* 8. c. 13, mentions divers kinds of it, viz. *Sables*; which are a rich *Furr*, of colour between black and brown, the skin of a beast called a *Sable*, of bigness between a pole-cat and an ordinary cat, bred in *Russia* and *Tartary*. *Lucerns*, the skin of a beast of that name, near the size of a wolf, in colour neither red nor brown, but between both, and mingled with black spots; which are bred in *Muscovy*; and is a very rich *Furr*. *Genets*, a beast's skin so called, in bigness between a cat and a weezle, uailed like a cat, and of that nature; and of two kinds, black and grey, the black most precious which hath black spots upon it hardly to be seen; this beast is the product of *Spain*. *Foins*, are of fashion like the *sable*, the top of the *Furr* is black, and the ground whiteish; bred for the most part in *France*. *Marten* is a beast very like the *Sable*, the skin something coarser, produced in *England* and *Ireland*, and all countries not too cold; but the best are in *Ireland*. Besides these, there are the *Fitch* or *Pole cat*; the *Calabar*, a little beast, in bigness near a *Squirrel*: *Miniver* being the bellies of *Squirrels*; and *Shanks*, or what is called *Budge*, &c. all of them *Furrs* of foreign countries, some whereof make a large branch of their inland traffick.

FURST & FONDONG, *Sax.*] Time to advise, or to take counsel.—*Leg. H.* 1. c. 46.

FURIUM, Theft, or robbery of any kind,

FUSTIANS. No persons shall dress *fustians* with any other instrument than the broad sheers, under the penalty of 20 s. And the master and wardens of the company of *Clothworkers* in *London*, &c. have power to search the workmanship of sheermen, as well for *fustian*, as cloth. *Stats.* 11 *H.* 7. c. 27: 39 *Elix.* c. 13. See this Dict. title *Manufactory*.

FUSTICK, Wood brought from *Barbadoes*, *Jamaica*, &c. used by dyers, mentioned in *Stat.* 12 *Car.* 2. c. 18: See title *Navigation-acts*.

FYRDERINGA; FYRTHING; FYRDUNG, From *Sax. Firaerung*, i. e. *Expeditionis apparatus*.] A going out to war or a military expedition at the King's command; not going upon which, when summoned, was punished by fine at the King's pleasure. *Leg. H.* 1. c. 10. *Blount* calls it an expedition; or a fault or trespass for not going upon the same.

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GABEL, *Gabella, Gablum, Gablagium*, in French *Gabelle*, i. e. *Veſigal*.] This word hath the ſame ſignification among our ancient writers, as *gabelle* had formerly in France: it is a tax; but hath been variously uſed; as for a rent, cuſtom, ſervice, &c. And where it was a payment of rent, thoſe who paid it were termed *gabellans*. *Domeſday: Co. Lit.* 213. It is by ſome authors diſtinguiſhed from *tribute*; Gabel being a tax on moveables, *Tribute* on immoveables. When the word *Gabel* was formerly mentioned in France without any addition to it, it ſignified the *tax on ſalt*; though afterwards it was applied to all other taxes.

GABLE END, *Gabulum*.] The head or extreme part of a houſe or building. *Paroch. Antiq.* 286.

GABULUS DENARIORUM, Rent paid in money. *Selden on Tribes*, p. 321.

GAFOLD-GILD, *Sax.*] The payment of tribute or cuſtom; it ſometimes denotes uſury.

GAFOLD LAND, or **GAFUL-LAND**, *Terra cenſualis*] Land liable to taxes; and rented or let for rent. *Sax. Diſt.*

GAGE, *Fr. Lat. Vadium*.] A pawn or pledge. *Glanv. lib. 10 c. 6.* *Gage deliverance* is where he that hath taken a diſtreſs being ſued, hath not delivered the cattle, &c. that were diſtrained; then he ſhall not only avow the diſtreſs, but *gage deliverance*, i. e. put in ſurety, or pledges, that he will deliver them. *F. N. B.* 67, 94. This *gage deliverance* is had on ſuing out *replevins*, upon the plaintiff's praying the ſame: and it is ſaid the parties are to be at iſſue, or there is to be a demurrer in law, before *gage deliverance* is allowed; and if a man claim any property in the goods, or the beaſts are dead in the pound, the party ſhall not *gage*, &c. *Kitch.* 145. See this Diſt. titles *Diſtriſs*; *Replevin*.

GAGER DEL LEY, *Wager of Law*,—See that title.

GAINAGE, *Gainagium*, i. e. *Plauſtri apparatus*, *Fr. Gaignage*, viz. *Lucrum*.] The gain or profit of tilled or planted land, raiſed by cultivating it; and the draught, plough, and furniture for carrying on the work of tillage, by the baſer kind of *ſoke-men* or *villeins*. *Gainage* was only applied to arable land, when they that had it in occupation, had nothing thereof but the profit raiſed by it from their own labour, towards their ſuſtenance, nor any other title but at the Lord's will: and *gainer* is uſed for a *ſoke-man*, that hath ſuch land in occupation. *Bract. lib. 1. c. 9*; *Old Nat. Br.* 117. The word *gain* is mentioned by *Weſt. Symb. par. 2. ſect. 3*; where he ſays land in demefne, but not in *gain*, &c. And in the *ſtat. 51 H. 3. ſt. 4*, there are theſe words; "no man ſhall be diſ-

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trained by his beaſts, that gain the land."—In the ſtatute of *Magna Charta*, c. 14, by *Galmage* is meant no more than the plough-tackle, or implements of huſbandry, without any reſpect to *gain* or profit: where it is ſaid of the knight and freeholder, he ſhall be amerced *ſalvo emendamento ſuo*; the merchant or trader, *ſalvo mercandisia ſua*; and the villein or countryman, *ſalvo gaignagio ſuo*. &c. In which caſes it was, that the merchant and huſbandman ſhould not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his *wainage*, to the end that the plough might not ſtand ſtill; for which reaſon the huſbandmen at this day are allowed a like privilege by law, that their beaſts of the plough are not, in many caſes, liable to diſtreſs. See title *Diſtreſs*.

GAMERY, *Fr. Gaignerie*] Tillage, or the profit ariſing from it, or of the beaſts employed therein. *Stat. Weſt. 1. c. 16, 17*.

GALEA, A galley, or ſwift ſailing ſhip. *Hoved. p.* 682, 692.

GALLETI, According to *Somner* were *viri Galleti*; but *Knighion* ſays they were *Welchmen*.

GALLIGASKINS, Wide hoſe or breeches, having their name from their uſe by the *Gaſſogus*. *Diſt.*

GALLI-HALFPENCE, A kind of coin, which with *ſuſkins* and *doitkins*, were forbidden by the *ſtat. 3 H. 5. c. 1*. It is ſaid they were brought into this kingdom by the *Genoeſe* merchants, who trading hither in *galleys*, lived commonly in a lane near *Tower ſtreet*, and were called *Galley men*, landing their goods at *Galley key*, and traded with their own ſmall ſilver coin termed *Galley Halfpence*. *Stow's Survey*, 137. See title *Coin*.

GALLIMAWFRY, A meal of coarſe victuals, given to *Galley Slaves*.—*Diſt.*

GALLIVOLA IIUM, (From *Gallus*, a cock) A cock-ſhoot or cock glade. *Diſt.*

GALOCHEs, *Fr.*] A kind of ſhoe, worn by the *Gauls* in dirty weather; mentioned in the *ſtat. 14 Ed. 1. 5 H. 8. c. 9*.

GAMBA, **GAMBERIA**, **GAMBRIA**, *Fr. Gambire*] Military boots or defence for the legs. *Diſt.*

GAMBEYSON, *Gambesonum*.] A horſeman's coat uſed in war, which covered the legs: or rather a quilted coat, *cento, reſtitutum ex coactilis lana confeſtum*, to put under the armour, to make it fit eaſy. *Fleta, lib. 1. c. 24*.

GAME. *Aucupia*, from *Aucupis*, i. e. *Acium Captio*.] Birds, or prey, got by ſowling and hunting.

GAME-LAWS.

THE GAME-LAWS are A System of positive regulations introduced and confirmed by several statutes: the provisions of which ascertain and establish certain *Qualifications* of property enabling or allowing persons to kill Game: and imposing *Penalties*, as well on such qualified persons for irregularities in killing Game, as on *unqualified* persons for hunting or killing Game at all.

These Laws have been the subject of much discussion; they have been stiled even from the Bench, (See 1 *Term Rep.* 49,) an oppressive remnant of the ancient arbitrary Forest laws, under which, in darker ages, the killing one of the king's deer was equally penal with murdering one of his Subjects. See this Dict. title *Forest*, and 4 *Comm.* c. 33. II. 2. On the other hand the object of them has been well defined to be, the preservation of the several species of these animals which would soon be extirpated by a general liberty: and the prevention of idleness and dissipation in husbandmen, artificers and others of lower rank. 2 *Comm.* 411. b. 2. c. 27. Though when the learned Commentator states the other purposes of these laws to be the encouragement of agriculture by giving every man an *exclusive dominion* over his own soil; and the preventing insurrections by *disarming the bulk of the people*; he seems rather incorrect: as, in the first of these instances, a Freeholder of 99 *l. per annum*, or a leaseholder of 149 *l.* whatever may be otherwise his exclusive dominion, has no right to kill Game on his own estate: and the latter motive seems more invidiously stated than is usual with that great and liberal writer; since any person, though unqualified, may keep and use a gun, provided it is not for the purpose of destroying the Game. *Andr.* 255: *Str.* 496, 1098: 2 *Term Rep.* 18.

Our esteemed Commentator also advances a position, "That no man but he who has a Chase or Free-warren by grant from the Crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all," even on his own ground. 2 *Comm.* 416. b. 2. c. 27. In conformity to which notion he considers the qualifications to kill Game as more properly exemptions from the penalties inflicted by statute-law. 4 *Comm.* 175.

These conclusions he deduces from the two following principles; that the King as ultimate proprietor of all the lands in *England* has a right to take these beasts *ferre nature* on the lands of any of his Subjects, and that, being *bona vacantia*, they are the King's by right of his prerogative: It follows then that he has power to grant these franchises to another, to enable him to do the same; and that no person is therefore, by the Game-law, abridged of any right possessed previously to the making them. The above is the substance of the reasoning of this celebrated writer on this subject; but his premises as well as his conclusion are very strenuously, and apparently successfully, combated by his annotator Mr. *Christian*, in his notes on the passages above alluded to: in conformity to which we have already stiled the Game laws, "A System of positive regulations by the statute-law of the kingdom."

Having said thus much on this topic, any further considerations on the policy or propriety of these laws, would here be unbecoming; strict they certainly are, and by many deemed severe; a very general statement of them is here inserted, under the following head:

I. The Qualifications to kill Game.

II. Penalties on qualified and unqualified Persons.

III. Of Trespasses in Hunting, &c.

For further matter connected with this title, see this Dict. under the heads, *Forest*; *Chase*; *Park*; *Warren*; *Deer*; *Fish*; *Swans*; *Pigeons*; *Black Act*, and, other apposite titles: and the *stat.* 13 *Geo.* 3. c. 54, for preservation of the Game in *Scotland*.

I. 1. THE QUALIFICATIONS for killing Game, to state them as concisely as possible, are, 1; The having a Freehold Estate of 100 *l. per ann.* 2; A Life-estate or Leasehold for 99 years of 150 *l. per annum*: 3; Being the son and heir-apparent of an Esquire, or of any person of superior degree: 4; Being the owner or keeper of a forest, park, chase, or warren. 4 *Comm.* 175. All other persons are termed Unqualified.

The qualification by estate for killing Game in the reign of *Richard II.* was 40 *s.* a year; in the reign of *James I.* it was advanced to 10 *l.* a year; and after that, in some instances to 40 *l.* a year; and at last in the reign of *Charles II.* it was raised to 100 *l.* a year. Not that the laws became gradually more severe; but as the value of money decreased, the qualification was raised in proportion, the estate continuing nearly the same; for an estate of 40 *s.* a year in the reign of *Richard II.* was not much inferior to an estate of 100 *l.* a year in the reign of *Charles II.* And the penalty for destroying the Game was even more severe then, than it is now. Those ancient laws relating to the Game are still in force, and are generally enacted so to be by the subsequent statutes; it is therefore necessary, in order to have a thorough knowledge of this matter, to be acquainted with the provisions contained in them.

The first qualification relating to the Game was by *stat.* 13 *R. 2. st.* 1. c. 13; by which it is enacted that no layman which hath not lands or tenements of 40 *s.* a year, nor clergyman if he be not advanced to 10 *l.* a year, shall have or keep any greyhound, hound, nor other dog, to hunt; nor shall use ferrets, hays, nets, hare-pipes, nor cords, nor other engines, for to take, or destroy *bares* nor *conies*, nor other *Gentlemen's Game*, on pain of a year's imprisonment. And see *stat.* 16 *Geo.* 3. c. 30.

The next qualification by estate or degree to kill Game, was by *stat.* 1 *Jac.* 1. c. 27. § 3; whereby it is enacted, that every person who shall keep any greyhound for coursing of *deer* or *bare*, or setting dog, or net to take *pheasants* or *partridges*, (except he be seized, in his own right or the right of his wife, of 10 *l.* a year estate of inheritance, or 30 *l.* a year of a lives estate, or goods to the value of 200 *l.* or be the son of a knight or a lord, or the son and heir-apparent of an esquire,) and be thereof convicted, he shall be committed to gaol for three months; or pay 20 *s.* to the use of the poor, and become bound with two sureties not to offend again in like manner.

The next qualification relates to *deer* and *conies* only, in *stat.* 3 *Jac.* 1. c. 13; by which it is enacted, that if any person not having hereditaments of 40 *l.* a year, or not worth in goods 200 *l.* shall use any gun or bow to kill any deer or conies; or shall keep any buckstall, nets, or coney-dogs (except he have grounds inclosed, and used for the keeping of deer or conies, the increasing of which said conies shall amount to the value of 40 *s.* a year; or keepers, or warreners in their parks, warrens, or grounds);

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in such case any person having lands or hereditaments of 100 *l.* a year in fee, or for life, may take from such person to his own use for ever, such guns, bows, buckballs, nets, and coney dogs.

The next qualification relates to pheasants and partridges only, and is as follows: Every free warrener, lord of a manor, or freeholder seised in his own or his wife's right of 40 *l.* a year of inheritance, or lives estate of 80 *l.* or worth in goods 400 *l.* may take pheasants and partridges (in the day time only) in his own free warren, manor, or freehold, betwixt Michaelmas and Christmas yearly. *Stat. 7 Jac. 1. c. 11. § 7.*

The last general qualification by estate or degree to kill Game, and which is now most to be regarded, is in *stat. 22 and 23 Car. 2. c. 25*, by which, every person not having lands and tenements, or some other estate of interest, in his own or his wife's right, of the clear yearly value of 100 *l.* per annum;—Or for term of life, or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150 *l.* (other than the son and heir apparent of an esquire, or [of] other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens, being stocked with deer or conies for their necessary use, in respect of the said parks, chases, forests, or warrens,) is declared to be a person by the laws of this realm, not allowed to have or keep for himself or any other person, any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, hare-pipes, gins, snares, or other engines for the taking and killing of Game. § 3.

Every person using any dog, gun, or engine for taking Game (except Game-keepers; see that title;) shall deliver his name and place of abode to the clerk of the peace, and take out an annual certificate or licence on a stamp of three guineas. But these certificates not to authorise unqualified persons to kill Game. *Stat. 25 Geo. 3. c. 50: 31 Geo. 3. c. 21.*

One having an estate of 103 *l.* a year, mortgaged a part of it of the value of 14 *l.* a year, which being copyhold was surrendered to the mortgagee, who was thereupon admitted tenant, but never entered on the premises, the mortgagor continuing in possession and paying interest. It was held that the mortgagor under these circumstances was not a qualified person. *Cald. 230. Burn J. title Game IV.*

The *stat. 22 & 23 Car. 2. c. 25*, is loosely worded, and the stops are no part of the original statute. It has been determined that the clause relative to qualification by freehold estate, terminates with the words *per annum*; and that a life estate being of an inferior quality, ought to be coupled with leasehold, whereof 150 *l.* a year is necessary to constitute a qualification. A clergyman's benefice is a life estate. *Lowndes v. Lewis, Cl. Cald. 188.*

In the case of *Jones v. Smart*, after much argument it was decided, that a diploma conferring the degree of Doctor of Physic granted by either of the Universities in Scotland, does not give a qualification to kill Game under *stat. 22 & 23 Car. 2. c. 25*; and that an Esquire or other person of higher degree as such is not qualified under that act, though the son of an esquire, or the son of other person of higher degree is qualified. *1 Term Rep. 44.* A Doctor of Physic of the English Universities, is not qualified as such. *Id. 53.*

H. THE PENALTIES, and regulations for recovering them, are so numerous under the various statutes, and sometimes, if not inconsistent, at least not easily reconcilable, that it is scarcely possible to methodize them in the limits prescribed by this work; or to avoid confusion and uncertainty in the recapitulation of them. Several are here enumerated. The exact Student must consult the *Statute book* and *Burn's Justice*, title *Game*: but must be careful not to trust too implicitly to the latter, or to his own interpretation of the former.

It may be observed, as a preliminary provision, that, by *stat. 8 Geo. 1. c. 19*, where any person for any offence against any law in being, at the making of the said act for the better preservation of the Game, shall be liable to pay any pecuniary penalty or sum of money, on conviction before a Justice of the peace, the prosecutor may either proceed to recover the same in such manner, or he may sue for the same [before the end of the second term after the offence committed 26 Geo. 2. c. 2.] by action of debt, or on the case, bill, plaint, or information, in any court of record at Westminster, wherein if he recovers he shall have double costs: provided that the offender shall not be prosecuted both ways; and in case of a second prosecution, he may plead in his defence the former prosecution pending, or the conviction or judgment thereupon had. And by *stat. 2 Geo. 3. c. 19*, whereas a moiety of the penalty by several acts is directed to be applied to the use of the poor of the parish where the offence was committed, by reason whereof inhabitants of the said parish have been disallowed to give evidence; it is enacted, that in order to enable the inhabitants to give evidence, it shall be lawful for any person to sue for the whole of such penalty to his own use, and if he recovers he shall have double costs; such action to be brought within six months after the offence committed.

By *stat. 33 H. 8. c. 6*, which is now considered as obsolete, if not superseded by subsequent statutes, shooting with a cross-bow, hand-gun or demihake, by a person not having 100 *l.* a year, incurs a penalty of 10 *l.* Hand-guns are to be of a yard in length in the stock and gun; and in this old statute a power is given to qualified persons to seize and destroy unlawful guns.

No person shall take pheasants or partridges with engines in another man's ground, without licence, on pain of 10 *l.* *stat. 11 H. 7. c. 17.*—If any person shall take or kill any pheasants or partridges, with any net in the night-time, they shall forfeit 20 *s.* for every pheasant, and 10 *s.* for every partridge taken; and hunting with spaniels in standing corn, incurs a forfeiture of 40 *s.* *stat. 23 Eliz. c. 10.* Those who kill any pheasant, partridge, duck, heron, hare, or other game, are liable to a forfeiture of 20 *s.* for every fowl and hare; and selling, or buying to sell again, any hare, pheasant, &c. the forfeiture is 10 *s.* for each hare, or partridge—20 *s.* for a pheasant—40 *s.* for a deer. *Stat. 1 Jac. 1. c. 27.*

Killing in the night a hare, partridge, or pheasant, by a person qualified or unqualified. 5 *l.* *Stat. 9 Ann. c. 25.*

To kill, take, or destroy; or to use any gun, dog, snare, net, or engine, with intent to kill, &c. any hare, partridge, or other game, in the night; *viz.* between 7 at night, and 6 in the morning, from October 12 to February 12; and between 9 and 4 from February 12 to October 12; or in the day on Sunday or Christmas day;

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first offence, from 20*l.* to 10*l.*—*second* offence, from 30*l.* to 20*l.*—*third* and other offences, 50*l.*—In case of a third offence, the party shall be bound in a recognizance to be tried at the Sessions, and if the penalty is not paid, may be punished with from twelve to six months' imprisonment: *Stat. 13 Geo. 3. c. 80.* The information to be laid within *one month*. Penalty, half to the informer, and half to the poor.

Setling Game: qualified or unqualified, 5*l.* *Stat. 28 Geo. 2. c. 12.*—Unqualified person selling or exposing to sale hare, partridge, pheasant, or other Game; 5*l.* or three months' imprisonment. If Game is found in the shop, house or possession of any poulterer, saler, fishmonger, cook, or pastry-cook, not qualified to kill, this shall be deemed as exposing to sale. *Stat. 5 Ann. c. 14: 9 Ann. c. 25. § 2: 28 Geo. 2. c. 12.*

Higlers, chapmen, carriers, inn keepers, victuallers, &c. having in their custody hare, pheasant, partridge, heath-game, &c. (except sent by some person qualified to kill game) shall forfeit for every hare and fowl 5*l.* to be levied by distress and sale of their goods, being proved by one witness, before a Justice; and for want of distress shall be committed to the house of correction for three months: one moiety of the forfeiture to the informer, and the other to the poor. And if any persons shall drive wild fowls with nets, between the first day of July and the first of September, they shall forfeit 5*s.* for every fowl. *Stat. 5 Ann. c. 14: 9 Ann. c. 25.* Penalties for killing and destroying game, are recoverable not only before justices of peace by the several statutes; but also by action of debt, bill, plaint, or information, in any of his Majesty's courts at Westminster; and the plaintiff, if he recovers, shall likewise have double costs. *Stat. 8 G. 1. c. 19.*

No *certiorari* shall be allowed to remove any conviction or other proceeding on the *stat. 5 Ann. c. 14.* into any court at Westminster, unless the party convicted become bound to the party prosecuting with sufficient sureties, in the sum of 50*l.* to pay the prosecutor his costs and charges, &c. after the conviction confirmed, or a *procedendo* granted. *Stat. 5 Ann. c. 14.*

Persons convicted of entering warrens, in the night-time, and taking or killing conies there, or aiding or assisting therein, may be punished by transportation, or by whipping, fine or imprisonment. Persons convicted on this act, not liable to be convicted under any former act. This act does not extend to the destroying conies in the day time, on the sea and river banks in the county of Lincoln, &c. No satisfaction to be made for damages occasioned by such last mentioned entry, unless they exceed 1*s.* *Stat. 5 Geo. 3. c. 14.*

Killing, carrying, selling, buying, or having in possession, a partridge between February 12, and September 1, or pheasant between February 1, and October 1; by any person qualified or not qualified, 5*l.* *Stat. 2 Geo. 3. c. 19.* Hawking, to catch such game between July 1, and August 31; 40*s.* for hawking, and 20*s.* for each partridge, &c. *Stat. 7 Geo. 2. c. 11 § 2.*

Keeping or using grey-hounds, setting dogs, lurchers, hays, or engines to kill or destroy game, by one unqualified, 5*l.* *Stat. 5 Ann. c. 14.*—Keeping or using the above named, or any other dogs or engines for such purpose 20*s.* or not less than 5*s.* *Stat. 22 & 23 Car. 2. c. 25. § 2.*

Trailing a hare in the snow; by a person qualified or unqualified; 6*s.* *Stat. 14 & 15 H. 8. c. 10.*—

Three months' imprisonment or 20*s.* fine. *Stat. 1 Jac. 1. c. 37.*

Using Snares for hares; by one qualified, or unqualified; one month's imprisonment or 10*s.* fine. *Stat. 22 & 23 Car. 2. c. 25. § 6.* Destroying Game with engines; 20*s.* for each pheasant, &c. *Stat. 1 Jac. 1. c. 37.*

A Justice of peace, or Lord of a manor within his manor, may take away Game out of the possession of an unqualified person. *Stat. 5 Ann. c. 14. § 4.*—Unqualified persons having Game in their possession and not giving an account how they came by it, shall forfeit from 20*s.* to 5*s.* or suffer confinement to hard labour for from one month to ten days. *Stat. 4 & 5 W. & M. c. 23. § 3.*

Persons destroying, buying, or selling Game, informing against others buying, or selling Game, or offering so to do, to be indemnified. *Stat. 5 Ann. c. 14. § 3.*

Using dogs, guns, or engines for taking or killing Game, without a certificate 20*l.*—Refusing to produce certificate, or to tell his true name and place of abode to a certificated person, 50*l.* *Stat. 25 Geo. 3. c. 50.*

By the yearly mutiny-acts, if any Officer or Soldier shall, without leave of the lord of the manor under his hand and seal, destroy any hare, coney, pheasant, partridge, pigeon, or other fowl, poultry, or fish, or his Majesty's Game, and be convicted thereof, on oath of one witness, before one Justice; every officer so offending shall forfeit 5*l.* to the poor, and the commanding officer upon the place, for every offence committed by any soldier under his command, shall forfeit 20*s.* in like manner. And if upon conviction by the justices, and demand made thereof by the constable or overseers of the poor, he shall not in two days pay the said penalties, he shall forfeit his commission. *Burn. 7.*

By *Stat. 4 & 5 W. 3. c. 23. § 10.* It is provided, that whereas great mischiefs do ensue by inferior tradesmen, apprentices and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other Game, to the ruin of themselves and damage of their neighbours, therefore if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice duly qualified) he shall not only be subject to other penalties (according to the various statutes,) but if he be prosecuted for trespass in coming on any person's lands, and be found guilty, the plaintiff shall not only recover damages against him, but also full costs.

An unqualified person may go out to beat the hedges, bushes, &c. with a qualified person; and to see the Game pursued or destroyed; provided the unqualified person has no gun or other engine with him for the destruction of the Game; without being subject to any penalty. *R. v. Newnham. Offt. 178: Burn. 7. tit. Game, IV.*

Two persons, using a greyhound together to destroy Game cannot be convicted in separate penalties under *stat. 5 Ann. c. 14. § 4;* for it is only one offence, and the Magistrate should only convict them in one penalty. *4 Term Rep. 809.* So if a man not qualified goes a hunting and kills never so many hares on the same day, it is but one offence, and the statute imposes the penalty for the keeping and using the dogs and engines, and not for the killing the hares. *10 Mod. 26: Com. Rep. 274. and Rose's notes p. 278: Cowp. 646.*

In an *Action, qui tam*, on the Game laws, it is sufficient to say that a person is not qualified generally, without

out shewing that he had not 100*l.* a year, or any other estate which makes a qualification. 2 *Comm. Rep.* 522. But on *Convictions* it is necessary that all the qualifications should be negatively set out in the information; and it must be averred that the defendant had not the particular qualifications mentioned in the statute 22 & 23 C. 2 c. 25; because it must be made out before the Justice that he had no such qualification as the law requires; and therefore the Justice ought to return that he had no manner of qualification, before he can convict the defendant. See 1 *Burr.* 148; 2 *Lord Raym.* 1415; 1 *Strat.* 665 *Dough.* 345: But the evidence need not (and indeed how can it?) negative every specific qualification 1 *Term Rep.* 125.

A person was convicted before a Justice of peace upon the statute, for keeping a gun, not having 100*l.* *per annu.* and the conviction being removed into B. R. was quashed, for not saying when the defendant had not 100*l.* a year; for it might be he had such estate at the time when he kept the gun, though not at the conviction, and the offence and time ought to be certainly alleged. 3 *Mod.* 280

To convict an offender there must be an information on oath, and a summons to appear. 2 *Barr. B. R.* 34, 77, 101. The informer must be sworn, and examined in the presence of the defendant; and it is not sufficient if his deposition previously made is read over in the defendant's presence. 1 *Term Rep.* 125 Or he may be convicted on his own confession before a Justice *Strat.* 546. The informer cannot be a witness. *Lord Raym.* 1545: *Andr.* 240. These offences, where the justices have summary jurisdiction, are not indictable. *Strat.* 679.

In an action of debt on *stat. 5 Ann. c. 11*, for keeping and using a dog to kill the Game, it is necessary to shew what sort of dog it was. 2 *Comm. Rep.* 373. The word Hound is not sufficiently descriptive, not being mentioned in the statute. 2 *Strat.* 1126. See *Rye's Com. Rep.* 577, *in n*—Keeping a forbidden dog is penal, though he is not used; keeping and using are distinct offences. *Strat.* 496: *Cald.* 175.

It seems that an Apothecary is not an inferior tradesman within the *stat. 4 & 5 W. 3 c. 23. § 10*: though the word Inferior seems applicable rather to the man than to the trade; so that two persons of the same trade may be, one superior, and the other inferior. 2 *Wils.* 70: *Burr. F. tit. Game, IV.* A huntsman going out with hounds without his master, is not a dissolute person within the meaning of that act. He may however be a trespasser; but if the damages recovered against him are under 40*s.* he shall not be liable to full costs. 2 *Black. Rep.* 900.

III ONE GENERAL REMARK on this subject is the most forcible statement of the greatest hardship imposed by the Game laws, and which might probably be remedied without great inconvenience. Though a freeholder of less than 100*l.* a year, &c. is forbidden to kill a partridge, even upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free warren) can do it without committing a trespass and subjecting himself to an action. 4 *Comm. c.* 33. II. 2.

If a man starts any Game within his own grounds, and follows it into another's, and kills it there, the property remains in himself. 11 *Mod.* 75. And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the imme-

diately pursued. And so if a stranger starts Game in one man's chase, or free warren, and hunts it into another's property, the property continues in the owner of the chase, or warren, this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man starts Game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there, the property arising *ratione soli*: *Lord Raym.* 251. Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local, not yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it; though guilty of a trespass against both the owners. *Lord Raym.* *ibid.* 7 *Mod.* 18.—See 2 *Comm.* 419, and Mr. *Christiani's* note thereon, in which he observes that these distinctions never could have existed, if the doctrine were true, that all the Game was the property of the king, for in that case the maxim *in æquall jure potior est conditio possidentis*, must have prevailed. 2 *Comm. c.* 27. II. *ad fin.*

The Common Law allows the hunting of foxes, and other ravenous beasts of prey, in the ground of another person; though a man may not dig and break the ground to un-earth them, without licence; if he doth, the owner of the ground may maintain an action of trespass for it. 2 *Roll.* 538: *Cro. Jac.* 321. An action was brought against a person for entering another man's warren: the defendant pleaded that there was a pheasant on his land; and his hawk pursued it into the plaintiff's ground; it was resolved that this doth not amount to a sufficient justification, for in this case he can only follow his hawk, and not take the game. *Poph.* 162. Though it is said to be otherwise where the soil of the plaintiff is not a warren. 2 *Roll. Abr.* 567. If a man in hunting starts a hare upon his own ground, and follows and kills it on the ground of another, yet still the hare is his own, because of the fresh suit; but if a man starts a hare upon another person's ground, and hunts and kills it there, he is subject to an action. *Cro. Car.* 553.

If a person hunt upon the ground of another, such other person cannot justify killing of his dogs; as appears by 2 *Roll. Abr.* 567. But see *Cro. Jac.* 44. *contra* 3 *Lev.* 28.

A person may justify a trespass in following a fox with hounds over the grounds of another, if he do no more than is necessary to kill the fox; because foxes are noxious animals. 1 *Term Rep.* 334. See *Nicholas v. Badger*, 2 *Ro. Ab.* 558. B. p. 2. S. P.

GAME KEEPER] One who has the care of keeping and preserving the Game, being appointed thereto by a Lord of a Manor.

Game keepers were first introduced by the present qualification act, 22 & 23 Car. 2. c. 25; and various regulations have been made respecting them by subsequent statutes. As all these statutes seem to be in force in some degree at present, and as it is a subject interesting to Sportsmen, a short abstract of them according to their chronology, will be acceptable.

The *stat. 22 & 23 Car. 2. c. 25*, authorises Lords of manors of the degree of an esquire to appoint under their hands and seals Game keepers, who shall have power within the manor to seize guns, dogs, nets, and engines, kept by unqualified persons, to destroy Game; and by a warrant from a Justice of peace, to search in the day

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time the houses of unqualified persons upon good ground of suspicion, and to ~~leave~~ for the use of the Lord, or to destroy guns, dogs, nets, &c. kept for the destruction of the Game. This statute does not limit the number of those to whom such power and authority may be given. The *stat. 4 & 5 W. & M. c. 23. § 4.* gives to these Game-keepers the same protection in resisting offenders in the night-time, as the law affords to the keepers of antient parks. The *stat. 5 Ann. c. 14. § 4.* permits any lord or lady of a manor to empower Game-keepers to kill Game within the manor.

The *stat. 9 Ann. c. 25. § 1.* enacts, that no lord or lady of a manor shall appoint more than one Game-keeper within one manor, with the power of killing Game; and his name shall be entered with the clerk of the peace. And by *stat. 3 Geo. 1. c. 11.* the Game-keeper who shall have the power to kill Game within the manor, shall either be a qualified person, a domestic servant, or a person employed to kill for the sole use of the Lord or Lady of the manor. The only use of appointing a qualified person a Game-keeper is, to give him the power, as before described, of seizing the dogs, guns, and other engines of unqualified persons within the manor.

By *stat. 3 Geo. 1. c. 11.* no Lord of a manor is to make or appoint any person to be a Game-keeper, with power to take and kill hare, pheasant, partridge, or other game, unless such person be qualified by law so to do; or be truly and properly a servant to the said lord, or immediately employed to take and kill game for the sole use or benefit of the said lord: and any person not qualified, or not employed as aforesaid, who, under pretence of any qualification from any lord of a manor, shall take or kill any hare, &c. or keep or use any dogs to kill and destroy the game, shall for every such offence incur such forfeitures, pains, and penalties, as are inflicted by the *stat. 5 Ann. c. 14: 9 Ann. c. 25.* By this last statute, no game-keeper can qualify any person to kill game, or to keep guns, dogs, &c.

Where game-keepers ought to have a Justice of peace's warrant, to take away guns from unqualified persons, see *Comb. 305.*

By *stat. 25 Geo. 3. c. 50; 31 Geo. 3. c. 21.* every depuration of a Game-keeper shall be entered with the Clerk of the peace of the county in which the manor lies; and for a certificate thereof shall be charged one guinea.

By *stat. 5 Ann. c. 14. § 4.* any Justice of peace may within his county take either game, or dogs, and instruments kept for the destruction of Game, from unqualified persons, and retain them for his own use. But it has been decided, that though Game-keepers are liable to the same penalties as unqualified persons for killing Game out of their respective manors, yet no one is justified in taking from them their dogs and guns when they are out of the limits of their lord's manor, even in pursuit of Game. *2 Wils. 387.*

No Lord of a manor can grant to another person the power of appointing a Game-keeper, without a conveyance also of the manor. A right to a manor cannot be tried in a penal action under the Game laws. *5 Term Rep. 19.* This power of appointing a Game-keeper has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the Game, superior to that of any other land owner within the manor, although the estate of such land owner be a sufficient qualification to entitle him to follow the amusements of a sportsman.

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Game-keepers we have seen, were first created by *stat. 22 & 23 Car. 2. c. 25;* by the preceding qualification-act, *7 Jac. 1. c. 11.* their power was given to the constable and headborough; and it seems that it was transferred to the persons appointed by Lords of manors for no other reason than because it was probable they were the most interested in the preservation of the Game, by having in general the most extensive range to pursue it in, viz. upon their own estates and wastes. And the *stat. 22 & 23 Car. 2. c. 25.* appears to be the first instance, either in our statutes, reports, or law treatises in which Lords of manors are distinguished from their land-owners with regard to the Game. *2 Comm. 418. n.*

APPOINTMENT OF a GAME-KEEPER, by a LORD of a MANOR.

TO all People to whom these presents shall come, I. T. lord A. lord of the manor of B. in the county of, &c. have (by virtue of several acts of parliament lately made for the preservation of the Game) nominated, authorized and appointed, and by these presents do nominate, authorize and appoint E. D. of, &c. to be my Gamekeeper of and within my manor, &c. in the county of, &c. aforesaid, with full power and authority, according to the direction of the statutes in that case made, to kill Game for my use; and to take and seize all such guns, greyhounds, setting dogs, and other dogs, ferrets, trammels, bays, or other nets, snares or engines, for the taking, killing or destroying of hares, pheasants, partridges, or other Game, as within the said manor, of, &c. and the precincts thereof, shall be kept or used by any person or persons not legally qualified to do the same; and farther to act and do all and every thing and things which belong to the office of a Game-keeper, pursuant to the direction of the said acts of parliament, during my will and pleasure; for which this shall be his sufficient warrant. Given under my hand and seal, &c.

GAMING, or GAMES UNLAWFUL, *Ludi rarii.* The playing at tables, dice, cards, &c. King Ed. III. in the 39th year of his reign, enjoined the exercise of shooting and of artillery, and forbade the casting of the bar, the hand and foot-balls, cock-fighting, & *alios ludos vana;* but no effect followed from it, till they were some of them forbidden by act of parliament. *11 Rep. 87.* In the 28th of Hen. VIII. proclamation was made against all unlawful games, and commissions awarded into all the counties of England, for the execution thereof; so that in all places, tables, dice, cards and bowls, were taken and burnt. *Stow's Annals, 527.* At length by *stat. 33 H. 8. c. 9.* the Legislature intertered; and Justices of peace, and head officers in corporations, are by that act empowered to enter houses suspected of unlawful Games; and to arrest and imprison the gamblers, till they give security not to play for the future: also the persons keeping unlawful gaming-houses, may be committed by a justice, until they find sureties not to keep such houses; who shall forfeit 40*s.* and the Gamblers 6*s.* 8*d.* a time: and if the King license the keeping of Gaming-houses, it is against law, and void.—The same statute also provides that, no artificer, apprentice, labourer, or servant, shall play at any tables, tennis, dice, cards, bowls, &c. out of Christmas time, on pain of 20*s.* for every offence; and at Christmas, they are to play in their master's house, or presence: but any nobleman, or gentleman, having 100*l.* per an-

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man estate, may license his servants or family to play within the precincts of his house, or garden, at cards, dice, tables, or other games, as well among themselves, as others repairing thither. This act is to be proclaimed once a quarter, in every market-town by the respective mayors, &c. and at every assizes and sessions.

A person was convicted of keeping a cock pit; and the Court resolved it to be an unlawful Game, within the *stat. 33 Hen. 8. c. 9.* and fined him 40*s.* a day. *Keb. 510.* But if the guests in an inn or tavern, call for a pair of dice, or tables, and for their recreation play with them, or if any neighbours play at bowls, for their recreation, or the like, these are not within the statute; if the house be not kept for Gaming, nor the Gaming be for lucre or gain. *Dalt. c. 46.*

By the *stat. 16 Car. 2. c. 7.* if any person, of what degree soever, shall by fraud, deceit, or unlawful device, in playing at cards, dice, tables, bowls, cock-fighting, horse-races, foot-races, or other Games or pastimes, or bearing a share in the stakes, betting, &c. win any money, or valuable thing, he shall forfeit treble the value, one moiety to the crown, and the other to the party grieved, prosecution being in six months; in default whereof, the last mentioned moiety is to go to such other person as will prosecute within one year, &c. And by the said statute if any person shall play at cards, &c. other than for ready money; or bet, and shall lose above 100*l.* at one time or meeting, upon tick (*i. e.* tickets) he shall not be bound to make it good, but the contract or tick and security shall be void, and the winner shall forfeit treble the value.

By the *stat. 9 Ann. cap. 14.* all notes, bills, bonds, judgments, mortgages, or other securities, given for money won by playing at cards, dice, tables, tennis, bowls, or other Games; or by betting on the sides of such as play at any of those Games, or for repayment of any money knowingly lent for such gaming or betting, shall be void: And where lands are granted by such mortgages or securities, they shall go to the next person, who ought to have the same as if the grantor were actually dead, and the grants had been made to the person so intitled after the death of the person so incumbering the same. If any person playing at cards, dice, or other Game, or betting, shall lose the value of 10*l.* at one time, to one or more persons, and shall pay the money, he may recover the money lost by action of debt, within three months afterwards; and if the loser do not sue, any other person may do it, and recover the same, and treble the value with costs, one moiety to the prosecutor, and the other to the poor: And the person prosecuted shall answer upon oath, on preferring a bill to discover what sums he hath won.—Persons by fraud or ill practice, in playing at cards, dice, or by bearing a share in the stakes, &c. or by betting, winning any sum above 10*l.* shall forfeit five times the value of the thing won, and suffer such infamy and corporal punishment, as in cases of wilful perjury, being convicted thereof on indictment or information; and the penalty shall be recovered by action, by such person as will sue for the same. And if any one shall assault and beat, or challenge to fight any other person, on account of money won by gaming, upon conviction thereof, he shall forfeit all his goods and suffer imprisonment for two years. Also by this statute, any two or more Justices of peace, may cause such persons to be brought before them as they suspect to have no visible

estate, &c. to maintain them; and if they do not make, it appear that the principal part of their expenses is paid by other means than gaming, the Justices shall require securities for their good behaviour for a twelvemonth; and in default of such security, commit them to prison until they find it: And playing or betting during the time, to the value of 20*s.* shall be deemed a breach of good behaviour, and a forfeiture of their recognisances.

Where it shall be proved before any Justice of peace, that any person hath used unlawful games contrary to *Stat. 33 Hen. 8. c. 9.* the Justice may commit such offender to prison, till he enter into a recognisance that he shall not from thenceforth, at any time to come, play at any unlawful Game. *Stat. 2 Geo. 2. cap. 28.*—For better preventing excessive and deceitful gaming; the ace of hearts, faron, basset, and hazard, are declared to be lotteries by cards or dice; and persons setting up these games are liable to the penalty of 200*l.* And every person who shall be an adventurer, or play or stake therein, forfeits 50*l.* Likewise the sale of any house, plate, &c. in the way of lottery by cards, &c. is adjudged void, and the things to be forfeited to any person that will sue for the same. *12 Geo. 2. cap. 28.*—The game of passage, and all other games with one or more dice, or any thing in that nature, having figures or numbers thereon, (back-gammon and games now played with those tables only excepted) shall be deemed games or lotteries by dice, within the *stat. 12 Geo. 2. c. 28.* And such as keep any office or table for the said game, &c. or play thereat, are subject to the penalties in that act. *Stat. 13 Geo. 2. cap. 19.*

Playing at, or keeping any house or place for playing at the game of roulette, otherwise roly-poly, or any other game with cards or dice already prohibited, incurs the penalties in *Stat. 12 Geo. 2. cap. 28.* Persons losing 10*l.* and paying the same, may sue the winner, and recover the same with costs: And on a bill in equity the court may decree the same to be paid. The persons who have jurisdiction to determine informations on the statutes against gaming, may summon witnesses, who, on refusing to appear and give evidence, shall forfeit 50*l.* No privilege of parliament shall be allowed on prosecutions for keeping a Gaming-house. Persons losing or winning 10*l.* at one time, or 20*l.* in 24 hours, may be indicted and fined five times the value to be paid to the poor. *Stat. 18 Geo. 2. c. 34.*

By *stat. 30 Geo. 1. c. 74.* If any person licensed to sell liquors shall knowingly suffer any gaming in their house or grounds, with cards, dice, draughts, shuffle boards, Mississippi, or Billiard tables, scittles, or ninepins, by any Journeyman, labourers, servants, or apprentices, he shall forfeit 40*s.* for the first, and 10*l.* for every subsequent offence; three-fourths to the poor, and one-fourth to the informer.—Any journeyman, &c. so gaming, shall forfeit from 20*s.* to 5*s.*—No certiorari to be granted; but appeal given to the next Sessions; and persons punished by this act, not to be punished by any other law.

See the *stat. 25 Geo. 2. c. 36.* against unlicensed houses for musick, dancing, &c. the keeper of which, shall forfeit 100*l.* and further this Dict. title *Barony h. 12: Play-houses*; and *1 Salk. 341, 5: 5 Mod. 13: Mod. Ca. 125.*

From the above statutes and the several determinations in the books, it may be observed, that at common law, the

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playing at cards, dice, &c. when practised innocently, and as a recreation, was not unlawful. 2 *Vent.* 175. But common gaming-houses were always considered as nuisances in the eye of the law. 1 *Hawk. P. C.* c. 75. § 6: and as the practice was found to encourage idleness and debauchery, the *stat.* 33 *H. 8. c. 9.* was passed to restrain it among the inferior sort of people. And on this statute *Noy* had a writ to remove *brothel-houses* as common nuisances. 3 *Kebl.* 465. Gentlemen were however still left free to pursue their pleasure in this way, until the *stat.* 16 *Car.* 2. c. 7; the preamble of which states the inconveniences to be remedied as arising from the immoderate use of Gaming. The provisions of this statute however were soon found to be insufficient; and the *stat.* 9 *Ann. c. 14.* was made for the more effectually suppressing this pernicious vice. The subsequent statutes, already enumerated above, superadded further penalties to restrain this fashionable crime which may *Shew*, says *Blackstone*, that our laws against Gaming are not so deficient, as ourselves and our magistrates in putting those laws in execution. 4 *Comm.* 173.

Betting on horse-races is within the general words of the *stat.* 9 *Ann. c. 14.* (other Game *whatsoever*.) 2 *Stra.* 1159: 2 *Wils.* 303. See *Black. Rep.* 706 and this *Dict.* tit. *Horse-races*.—So is *Cricket*. 1 *Wils.* part 1, p. 220 So is a *foot-race*: and a foot-man running against time is a foot-race: but to bring it within the statute, it must appear that a person was engaged in such Game, and a wager was laid on his side. 2 *Wils.* 36.—But on a wager between two persons on the lives of their two fathers, the winner has been allowed to maintain an action. *Burr.* 2803.

Where two persons played at all fours for two guineas a game, from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner, the plaintiff lost fourteen guineas, for which he brought his action on *stat.* 9 *Ann. c. 14.* and this was held to be one sitting—One time in the act means one stake or bet; and is distinguished from one sitting, which means a course of play where the company never parts though the party may not be actually gaming the whole time. 2 *Black. Rep.* 1226.

On a conviction for Gaming under *stat.* 9 *Ann. c. 14.* the judgment is only that the defendant is convicted: and the Court cannot set a fine of five times the value, but a new action must be brought upon that judgment for the forfeiture. 2 *Stra.* 1048.

The statutes against Gaming have rendered it now less frequently necessary to resort to Courts of Equity, which appear to have often interposed, prior to the *stat.* 16 *Car.* 2. for the purpose of restraining the winner from proceeding at law against the loser upon the security which he had obtained for the money won. See 14 *Vin. Ab.* 8 pl. 1, 5. 2 *Eq. Ab.* 184: *Chan. Rep.* 47.

It is observable that the *stat.* 16 *Car.* 2. declares that the contract for money lost at play, and all securities given for it shall be utterly void; but the *stat.* 9 *Ann.* confines itself to the securities for money won or lent at play.—Upon which it has been determined that though both the security and the contract are void as to money won at play, only the security is void as to money lent at play: and that the contract remains, and the lender may maintain his action for it. 2 *Burr.* 1077: 2 *Stra.* 1249.

The statutes having declared the security void, a bill of exchange given for money won at play, cannot be re-

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covered upon, even by an indorsee for valuable consideration, and without notice, the original vice of the consideration affecting the security, even in the hands of an innocent and *bona fide* holder. 2 *Stra.* 1155: *Dougl.* 636, 736. And it seems that if money be paid on such security, it may be recovered back: for payment under a void security cannot be supported: nor does the limitation of three months, (within which time the loser of money actually paid at the time it is lost must bring his action to recover it back,) extend to payments on account of such void securities. *Ambl.* 269.

For further matter relative to Gaming, see also this *Dict.* titles *Lottery*: *Nuisance*: *Wager*.

GANG-DAYS. *Dies Lustrationis*.] And gang-weeks are mentioned in the laws of King *Ashteslan*. See *Rogation Week*.

GAOL AND GAOLER.

GAOLA, *Fr. Geole*, i. e. *Caveola*, a cage for birds; used metaphorically for a prison.] A strong place or house for keeping of debtors, &c. and wherein a man is restrained of his liberty to answer an offence done against the laws: Every County hath two gaols, one for Debtors, which may be any house where the Sheriff pleases; the other for the peace and matters of the crown, which is the County Gaol.

I. Of Erecting and Repairing Gaols.

II. *To what Place, and at whose Charge, Offenders are to be committed; and how they are to be healed and regulated.*

III. Of the Offence of breaking Gaol.

I. GAOLS are of such universal concern to the Public, that none can be erected by any less authority than an act of parliament. 2 *Inst.* 705 All prisons and gaols belong to the King, although the Subject may have the custody or keeping of them. 2 *Inst.* 100, 589. It is said, that none can claim a prison as a franchise, unless they have also a gaol-delivery; and that therefore the Dean and Chapter of *Westminster*, though they have the custody of the Gatehouse prison, yet as they have no gaol-delivery, must send a kalendar of the prisoners to *Newgate*. 1 *Salk.* 343: 7 *Mod.* 31.

By *stat.* 14 *Ed.* 3. cap. 10, it is enacted, that the Sheriffs shall have the custody of the Gaols as before, and shall put in under-keepers for whom they will answer. This statute is confirmed by *stat.* 19 *H.* 7. cap. 10.

Although divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the King's, *pro bono publico*; and therefore it is to be repaired at the common charge. 2 *Inst.* 589

The Justices, or the greater number of them within the limits of their commission, upon presentment of the Grand Jury at the assizes (or sessions; *stat.* 12 *Geo.* 2. c. 29. § 13;) of the insufficiency or inconvenience of the County gaol may contract with any person for the building, finishing or repairing the same. *Stat.* 11 & 12 *W.* 3. c. 19. § 1, 2. The expence thereof to be paid by the Treasurer out of the general county rates, *stat.* 12 *Geo.* 2. § 29. But this, (by said *Stat.* 11 & 12 *W.* 3.) not to extend to gaols held by inheritance, nor to charge any persons in any town

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town or liberty, which have common gaols for felons, and commissioners of assize or gaol-delivery, with any assent to the making the common gaol of the shire.

By *stat. 24 Geo. 3. s. 2. c. 54*, the Justices, at their general quarter sessions, or the major part of them, not being less than seven, on presentment made by the Grand jury, of the insufficiency, inconveniency, or want of repair of the gaol, may contract for the building, repairing, or enlarging the same: or for erecting any new gaol upon any site within two miles from that of the old gaol; and in that case for the selling the old gaol, and the site thereof, and the materials and land belonging thereto. In certain cases also Justices may build a new gaol in any part of the county; which is always to be divided into separate apartments with divers conveniences for the benefit of the health and morals of the prisoners, which are enforced by *stat. 31 Geo. 3. c. 46*.

II. Justices of peace may not commit felons, and other criminals to the *counters* in London, or other prisons, but the common gaols, for legally they cannot imprison any where but in the common gaol. *Co. Lit. 9, 119*. But the house of correction, and the *counters* of the *sheriffs of London*, are the common prisons for offenders for the breach of the peace, &c.

By *stat. 5 H. 4. cap. 10*, it is enacted, "That none shall be imprisoned by any justice of the peace, but only in the common gaol, saving to lords and others, who have *gaols*, their franchise in this case."—This statute is only declaratory of the common law. *2 Inst. 43*.

But the court of King's Bench may commit to any prison in the kingdom which they shall think most proper, and the offender so committed or condemned to imprisonment cannot be removed or bailed by any other court. *Mon 666 pl. 913; 1 Sid. 145*. See *stat. 31 C. 2. c. 2. § 12*.

And as prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases. To which purpose, by the said *stat. 31 Car. 2. c. 2. sect. 9*, it is enacted, "That if any Subject of this realm shall be committed to any prison, or in custody of any officer, for any criminal or supposed criminal matter, he shall not be removed into the custody of any other; unless it be by a *habeas corpus*, or other legal writ; or where the prisoner is delivered to the constable, &c. to be carried to some common gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common work-house, or house of correction; or where the prisoner is removed from one prison to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c." See *stat. 19 Car. 2. cap. 4*, for empowering justices of the peace to remove prisoners in case of infection.

By *stat. 11 & 12 Will. 3. c. 10*, All murderers and felons shall be imprisoned in the common gaol, and the sheriffs shall have the keeping of the gaol.

Offenders committed to prison, are to bear the charges of their conveying to gaol; or, on refusal, their goods shall be sold for that purpose, by virtue of a justice of peace's warrant; and if they have no goods, a tax is to be made by *constables*, &c. on the inhabitants of the parish where the offenders were apprehended. *Stat. 3 Jac.*

1. cap. 10. And by *stat. 27 Geo. 2. c. 3*, The expence of conveying poor offenders to gaol, or the house of correction, shall be paid by the treasurer of the county, except in *Middlesex*.

For the *Relief of Prisoners in gaols*, justices of peace in sessions have power to tax every parish in the county, not exceeding *6s. 8d. per week*, leviable by constables, and distributed by collectors, &c. *14 Eliz. cap. 5*. See also *stat. 12 C. 2. c. 29*. And by *stat. 31 Geo. 3. c. 46*, the Justices in sessions may order such sums as they shall think necessary to be paid out of the county-rate towards assisting such prisoners as are not able to work, or being able, cannot procure employment sufficient to maintain themselves in food and raiment, and not otherwise provided for by law.

Various provisions have been, from time to time, made for the relief of poor prisoners, and setting them to work. By *stat. 22 & 23 Car. 2. c. 20*, It is enacted, "That all sheriffs, gaolers, &c. shall permit their prisoners to send for necessary food where they please; nor demand any greater fee for their commitment or discharge, than what is allowable." Also it is thereby directed, that an inquiry be made into all charities given for the benefit of poor prisoners.

By *stat. 29 Geo. 3. c. 67*, Every gaoler is, on forfeiture (of *50l.* if a county gaoler, and *20l.* if another;) to deliver in at the *Misbehaviour* sessions yearly, a certificate stating how far the provisions made by various statutes for the benefit of prisoners, are observed in his gaol.—The following are the statutes to be particularized in such Certificate:

"The *stat. 22 & 23 Car. 2. c. 20*, enacts, that felons and debtors shall be kept separate.—*Stat. 24 Geo. 2. c. 40*, enacts, That no gaoler shall sell, lend, use, give away, or suffer any spirituous liquors within any gaol; and that a copy of the clauses prohibiting thereof shall be hung up in the gaol.—*Stat. 32 Geo. 2. c. 28*, enacts, The clerk of the peace shall cause a list of the fees payable by debtors, and the rules and orders for the government of gaols and prisons, to be hung up in the court where the assizes or sessions are held, and send another copy to the gaoler, who shall cause the same to be hung up in a conspicuous part of the gaol.—*Stat. 13 Geo. 3. c. 58*, enacts that clergymen may be provided to officiate in gaols.—*Stat. 14 Geo. 3. c. 20*, enacts that persons acquitted, or discharged on proclamation for want of prosecution shall be discharged immediately in open court and without fee.—*Stat. 14 Geo. 3. c. 59*, enacts that the walls and ceilings of cells in gaols shall be scraped and white-washed, at least once a year: that the cells shall be kept clean and supplied with fresh air by ventilators, &c.—that there shall be two rooms set apart, for the sick—that a warm and cold bath or bathing tubs shall be provided—that a Surgeon or Apothecary shall be appointed with a salary—that this act shall be hung up in the gaol." And by *stat. 32 Geo. 3. c. 45*, Prisoners discharged may, on application, be conveyed to their settlement by a vagrant pais, See title *Vagrant*.

Thus humane have the Legislature continually shewn themselves, in repeatedly interfering for the health and comfort of those who are considered generally as the mere out-casts of Society; to employ them also in useful industry, and thus turn their minds to good from evil, has been another attempt no less praise-worthy than the former.

GAOL. III.

The Justices in general sessions may provide a convenient stock of materials for setting poor prisoners to work, to be paid for by the treasurer out of the general county-rate; and may pay and provide fit persons to oversee and set such prisoners on work; and make the orders needful as to regulating the accounts, for punishing neglects and abuses, and for bestowing the profits of their labour for the relief of the prisoners. *Stats.* 19 C. 2. c. 4. § 1: 12 Geo. 2. c. 29: 31 Geo. 3. c. 46.

As to other matters relative to the ease, or to prevent the oppression, of Prisoners, see this Dict. title *Habeas Corpus: Transportation: Arrest: and Burn's f. tit. Gaol.*

III. The offence of *Prison-breaking* by the common law, was no less than felony; and this whether the party were committed in a criminal, or civil case, or whether he were actually within the walls of the prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the King's prison, or one belonging to a lord, or franchise. 2 *Inst.* 589: *Staundf. P. C.* 31: *Cro. Car.* 210.

But now, by the statute 1 Ed. 2. stat. 2. *de frangentibus prisonam*, "None from henceforth that breaketh prison shall have judgment of life, or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm; albeit in times past it hath been used otherwise." So that to break prison and escape, when one is lawfully committed for any treason or felony, remains still felony, as at the common law: and to break prison, (whether it be the county gaol, the stocks, or other usual place of security,) when lawfully confined upon any other inferior charge is still punishable as a high misdemeanor by fine and imprisonment. 4 *Comm. c.* 10: 2 *Hawk. P. C. c.* 18.

Any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common gaol, or the house of a constable, or private person, or the prison of the Ordinary, is a prison within the statute. 2 *Inst.* 589: *Dyer.* 99. pl. 60: *Crom.* 38: *Cro. Car.* 210: *Hale's P. C.* 107.

There must be an actual breaking, for the words *felonice fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the negligence or consent of the gaoler, or if he escape through a breach made by others without his privity, he is guilty of a misdemeanor only, and not of felony. 2 *Inst.* 589: *Hale's P. C.* 108: *Staundf. P. C.* 31.

Nor will the breaking of prison, which is necessitated by any accident, happening without any default of the prisoner, as where the prison is fired by lightning, or otherwise, without his privity, and he breaks out to save his life, come within the statute. *Plowd.* 136: 2 *Inst.* 590: *Hale's P. C.* 108. Nor is it felony to break a prison, unless the prisoner escape. *Keilw.* 87. a.

If the imprisonment be for any offence made capital by a subsequent statute, the breach of prison is as much within the act of 1 Ed. 2. stat. 2, as if the offence had always been felony; but if the offence, for which a man is committed, were but a trespass at the time when he breaks the prison, and afterwards become felony by a

subsequent matter; as where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the felon of law, (which to many purposes makes the offence a felony *ab initio*;) shall not be carried so far as to make the prison-breach also a felony, which, at the time when it was committed, was but a misdemeanor. *Hale's P. C.* 108: 2 *Inst.* 591: *Plowd.* 258.

It seems the better opinion, that if the offence, for which the party was committed, be in truth but a trespass, the breaking of the prison in the *mittimus*, will not make the breaking of the gaol amount to felony; and that on the other side, if the offence were in truth a capital one, the calling it a trespass in the *mittimus* will not bring it within the statute; for the cause of imprisonment is what the statute regards; and that is the offence, which can neither be lessened, nor increased by a mistake in the *mittimus*. But for this, see 2 *Hawk. P. C. c.* 18.

The offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others who were committed for treason, for that will make him a principal in the treason. 2 *Hawk. P. C. c.* 18.

The felony of breach of prison is within clergy, though the offence for which the party was committed be excluded clergy. 1 *Hal. H. P. C.* 612.

He that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independent offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man, without an indictment. 2 *Hawk. P. C. c.* 18.

It is not sufficient to indict a man generally, for having feloniously broken prison; but the case must be set forth specially, that it may appear he was lawfully in prison, and for a capital offence. *Hale's P. C.* 109: 2 *Inst.* 591.

If A. arrest B. for suspicion and carry him to the common gaol, and there deliver him; if he breaks prison and be indicted on it, there must be the following averments in the indictment: that there was a felony done, and that A. having probable cause to suspect B. had arrested and committed him, and that he broke the prison; all which must be proved on the trial. But where a felon is taken by *capias* and committed, and breaks prison, there needs no such averment, &c. because all appears by matter of record. 2 *Inst.* 590: *Hal. Hist. P. C.* 10.

For further matter relative to Gaols and Prisoners, see this Dict. titles *Arrest: Commitment: Debtor: Escape: Execution: False Imprisonment: Insolvent: Marshalsea: 2 Hawk. P. C.* and the title (Gaoler) immediately following.

GAOLER. The master of a prison; one that hath the custody of the place where prisoners are kept. Sheriffs must make such gaolers for which they will answer. But if there is a default in the gaoler, action lies against him for an escape, &c. 2 *Inst.* 592. In common cases, the sheriff, or gaoler, is chargeable at the discretion of the party; though the sheriff is most usually charged. He who hath the custody of the gaol wrongfully, or of right, shall be charged with the escape of prisoners; and if he that hath the actual possession be not sufficient, his superior shall answer. 2 *Hawk. P. C.*

It is said that for his own security a gaoler may hamper a felon with irons to prevent his escape. 1 *Hal. H. P. C.* 601: *Dalt. c.* 170: and that a gaoler is no way punishable for keeping even a debtor in irons. 2 *Hawk. P. C.*

But

But it has been observed that this proceeding, even in the case of a felon, (much more in that of a debtor,) can only be intended where the officer has just reason to fear an escape; as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise notwithstanding the too common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbidden to put their prisoners to any pain or torment: and Lord Coke, 2 *Inst.* 381, is express, that by the common law it might not be done. 1 *H. H.* 601. And if the gaoler keep the prisoner more strictly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler by the common law. And this is the cause that if a prisoner die in gaol the coroner ought to sit upon him: and if the death was owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, it will be deemed wilful murder in the person guilty of such excess. 3 *Inst.* 91: *Fest.* 321, 2. But if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Hawk. P. C.*: 1 *H. H.* 496. See *ante* Gaol III. and this Dict. title *Escape: Murder*.

A person in execution in the King's Bench prison was put in irons by the Marshal: and the Court ordered the Marshal to keep his prisoner according to law: and in this case they said the gaoler might justify putting him in irons if he feared an escape; or if the prisoner was unruly. 7 *Mod.* 52. In the second year of Geo. II, Sir William Rich being laid in irons in the Fleet prison, had his irons taken off by order of the House of Commons; who thereupon began an inquiry into the conduct of Gaolers, which produced some of the wholesome laws mentioned hereafter, and under title *Gaol*.

By *Stat.* 14 *Ed.* 3. *cap.* 10, "If any keeper of a prison, or under-keeper, by too great excess, of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellant against his will, he is guilty of felony." See title *Accessory*.

By *Stat.* 4 *Ed.* 3. *c.* 10, It is enacted, that the Sheriffs and gaolers shall receive, and safely keep in prison, from henceforth such thieves and felons, by the delivery of the constables and townships, without taking any thing for the receipt; and the justices to deliver the gaol, shall have power to hear their complaints, that will complain against the Sheriffs and Gaolers in such case, and moreover to punish the Sheriffs and Gaolers, if they be found guilty.

By *Stat.* 3 *H.* 7. *c.* 3, The Sheriff and every other person, having authority or power of keeping of gaol, or of prisoners for felony, shall certify the names of all prisoners in his custody to the justices of gaol-delivery.

If any person assault a gaoler, for keeping a prisoner in safe custody, he may be fined and imprisoned. 1 *Hawk. P. C.* Where a Gaol is broken by thieves, the Gaoler is answerable; not if it be broken by enemies. 3 *Inst.* 52.

It seems clearly agreed, that a Gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol, after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office it is implied; that the grantee execute it faithfully and diligently. *Co. Lit.* 233: 9 *Co.* 5: 3 *Mod.* 143.

By *Stat.* 8 & 9 *W.* 3. *c.* 27, The Marshal of the King's Bench, the Warden of the Fleet taking any reward for prisoners' escape, shall forfeit 500*l.* and shall and be rendered for ever after incapable of executing any such office.

It hath been resolved, that a forfeiture by a Gaoler who hath but a particular interest, as of him who hath custody of a gaol for life, or years, does not affect him in remainder, or reversion, who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the King. *Poph.* 119: 2 *Lev.* 71: *Raym.* 216: 3 *Lev.* 288.

By *Stat.* 8 & 9 *W.* 3. *c.* 27, It is enacted, That the office of Marshal of the King's Bench, and Warden of the Fleet, shall be executed by those who have the inheritance of the said prisons, or their deputies, &c. and the profits of their office may be sequestered on motion to the Court of B. R. to satisfy a judgment had against them for escape.

By *Stat.* 3 *Geo.* 1. *cap.* 15, None shall purchase the office of Gaoler, or any other office pertaining to the high sheriff, under pain of 500*l.*

By *Stat.* 24 *Geo.* 3. *A. 2. c.* 54, a Gaoler shall not directly or indirectly sell liquors to the prisoners, or keep, or be concerned in, or benefited by any tap-house, tap-room, tap, or license for that purpose, on pain of 10*l.* for each offence: The Justices in sessions may make allowance to Gaolers in lieu of profits formerly derived to them from the sale of liquors.

By *Stat.* 31 *Geo.* 3. *c.* 46. § 8, Gaolers are, on the first day of every assizes to make a return of the size and condition of Gaols, the number of prisoners, &c. therein. See further title *Gaol*.

GAOL DELIVERY. The administration of justice being originally in the crown, in former times our Kings in person rode through the realm once in seven years, to judge of and determine crimes and offences; afterwards Justices in eyre were appointed; and since Justices of Assize and gaol delivery, &c. A commission of a gaol delivery is a patent in nature of a letter from the King to certain persons, appointing them his justices, or two, or three, of them, and authorizing them to deliver his gaol, at such a place, of the prisoners in it; for which purpose, it commands them to meet at such a place, at the time they themselves shall appoint; and informs them that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the gaol, and their attachments before them, at the day appointed. *Crompt. Jurisd.* 125: 4 *Inst.* 168.

By *Stat.* 3 *H.* 7. *c.* 3, Those that have the custody of gaols must certify the names of all the prisoners to the justices of gaol-delivery in order to their trial or discharge, on pain of 5*l.*

Justices of gaol-delivery are empowered by the Common law, to proceed upon indictments of felony, trespass, &c. and to order execution or reprieve: And they have power to discharge such prisoners, as upon their trials shall be acquitted; also all such against whom, upon proclamation made, no evidence appears to indict them; which Justices of oyer and terminer, &c. may not do. 2 *Hawk. P. C.* But these justices have nothing to do with any person not in custody of the prison, except in some special cases; as if some of the accomplices to a felony be in such prison,

prison, and some of them out of it, the justices may receive an appeal against those who are out of the prison, as well as those who are in it; which appeal, after the trial of such prisoners, shall be removed into B. R. and process issue from thence against the rest. *Fitz. Coron.* 77: *S. P. C.* 64. Such justices have no more to do with one let to mainprise, than if he were at large; for such person cannot be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody: And where any person is bailed there he is in the custody of his sureties, and they may detain him where they please. *2 H. P. C.* 25. Though *per Holt*, Ch. J. If a person be let to bail, yet he is in law in prison, and his bail are his keepers; and therefore the justices of *gaol delivery* may take an indictment against him, as well as if he was actually in gaol. And they may take indictments not only of felony, but also of high treason, if the offenders are in prison, and try and give judgment upon them, like unto commissioners of *oyer and terminer*; though it has been formerly held otherwise. *2 Hale's Hist. P. C.* 35. Justices of *gaol delivery* may punish those who unduly bail prisoners; as being guilty of a negligent escape, *S. P. C.* 77: *25 Ed.* 3. 39. They are also to punish sheriffs and gaolers, refusing to take felons into their custody from constables, &c. *Stat.* 4 *Ed.* 3. c. 10; and have authority to punish many particular offences by statute.

The granting a new commission of *gaol delivery*, or of the peace, in a town corporate, shall not avoid the former commission. *2 & 3 Pb. & Mar. c.* 18. Justices of *gaol delivery* may act in their counties. *12 Geo.* 2. c. 27.—See titles *Affise: Circuits: Judges: Justices.*

GARB, Garba, from the Fr. Garbe, alias Gerbe, i. e. *fascis*.] A bundle or sheaf of corn. *Chart. Forest. cap.* 7. And in some places it is taken for an handful, viz. *Garba aceris fit ex triginta pecis. Fleta lib.* 2. *cap.* 12. *Garba sagittarum* is a sheaf of arrows containing twenty-four. *Skene.*

GARBLE, Is to sever the dross and dust from spice, drugs, &c. *Garbling* is the purifying and cleansing the good from the bad; and may come from the Italian *Garbo*, i. e. Finery or neatness; and thence probable we say, when we see a man in a neat habit, that he is in a handsome *Garb*. *Cowel.*

GARBLER OF SPICES, An officer of antiquity in the city of London, who may enter into any shop, warehouse, &c. to view and search drugs and spices, and *garble* and make clean the same, or see that it be done. And anciently all drugs, &c. were to be cleansed and garbled before sold, on pain of forfeiture, or the value. By *Stat.* 6 *Ann. cap.* 16, this officer is to be appointed by the Court of Lord Mayor, Aldermen and Common Council to Garble spices at the request of the owner, but not otherwise.

GARCIO, Fr. *Gargon*] A groom or servant. *Pla. Cor.* 21 *Ed.* 1. *Garcio stolar*, groom of the stole to the King. And in the Irish language, (according to *Toland*) *gargon* is an appellative for any menial servant. *Kennet's Gloss.*

GARCIONES. Servants who follow the camp.—*Inglulb.* 886: *Walsing.* 242.

GARD, GARDIAN, &c. See *Guard* and *Guardian*.

GARDEBRACHE, Fr. *Gardebrache*.] An armour or vambrace for the arm. *Chart. K: Hen.* 5.

GARDENS. Robbing of orchards or gardens of fruit growing therein, is punishable criminally by whipping, small-fines, imprisonment, and satisfaction to the party

wronged, according to the nature of the offence. See *Stat.* 43 *Eliz.* c. 7: and title *Trees: Trespass: Felony.*

GARDEROBE, *Garderoba*.] A wardrobe; a closet or small apartment, for hanging up clothes. See *2 Inst.* 255.

GARDIA, Is a word used by the feudists for *custodiam*. *Lib. Feud.* 1.

GARE, A coarse wool, full of staring hairs, such as grow about the shanks of sheep. See *Stat.* 31 *Ed.* 3. *cap.* 2.

GARLANDA, A chaplet, coronet, or garland. *Mat. Paris.*

GARNESTURA, Victuals, arms, and other implements of war, necessary for the defence of a town or castle. *Mat. Paris. Ann.* 1250.

To GARNISH, To warn; to *garnish* the heir, signifies in law to warn the heir. *Stat.* 27 *Eliz.* *cap.* 3.

GARNISHMENT, Fr. *Garnement*, from *Garnir*, i. e. *instruere*.] In a legal sense intends a warning given to one for his appearance, for the information of the Court and explaining a cause. For example; one is sued for the *detinue* of certain writings delivered; and the defendant alledging that they were delivered to him by the plaintiff, and another person, upon condition, prays that the other person may be warned to plead with the plaintiff, whether the condition be performed or not; in this petition he is said to pray *Garnishment*; which may be interpreted either a warning of that other, or a *furnishing* the court with all parties to the action, whereby it may thoroughly determine the cause; and until he appears and joins, the defendant is as it were out of the court. *Crompt. Juris.* 211: *F. N. B.* 106. A writ of *scire facias* is to go forth against the other person to appear and plead with the plaintiff; and when he comes and thus pleads, it is called *enterpleader*: If the *garnishes* be returned *scire feci*, and make default, judgment will be had to recover the writings, and for their delivery, against the defendant; and if the *Garnishee* appears and pleads, if the plaintiff recovers, he shall have damages. *Rast.* 213: *1 Brownl.* 147.

Garnishment is generally used for a warning; as *garnisher le court* is to warn the court; and *reasonable Garnishment*, is where a person hath reasonable warning. *Kitch.* 6. In the *Stat.* 27 *Eliz.* *cap.* 3, we read, upon a *Garnishment* or two *nibils* returned, &c. And further, some contracts are naked, *sans garnement*, and some furnished, &c.—See title *Interpleader*.

GARNISHEE; Such third person or party in whose hands money is attached within the liberties of the city of London, by process out of the sheriff's court; so called, because he hath had *Garnishment* or warning, not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit. Vide *Attachment Foreign*.

GARNISTURE, A furnishing or providing. *Pat.* 17 *Ed.* 3. Vide *Garnestura*.

GARSUMMUNE, *Gersuma*, or *Gersoma*, A Fine or amercement. *Domesday: Selm. Gloss.*

GARTER, *Garterium*, Fr. *Jartier*, i. e. *Periscelis, Fascia poplitaria*.] Signifies in divers statutes, and elsewhere a special garter, being the ensign of a noble order of knights, instituted by King *Ed.* III. anno Dom. 1344, called *Knights of the Garter*: It is also taken for the principal *King at arms*, among our *English heralds*, attending upon the *Knights* thereof; created by King *Hen.* V.

The first dignity after that of nobility, is that of a Knight of the Order of Saint George, or of the Garter. Indeed many Sovereign Princes have been proud of the order.

GART

order, and considered themselves as highly honoured by our Sovereign's conferring it on them. See titles *Knights: Precedency*.

GARTH, A little back-side or close in the North of England; being an ancient British word; *gardd* in that language signifying garden, and pronounced and writ *garth*; also a dam or wear, &c.

GARTHMAN. As there are *fishgarths* or weirs for catching of fish, so there are *Garthmen*; for by statute 17 R. 2. c. 9, it is ordained, that no fisher nor *Garthman* shall use any nets or engines to destroy the fry of fish, &c. This word is supposed to be derived from the Scottish *gart*, which signifieth enforced, or compelled; the fish being forced by the wear to pass in at a loop where they are taken.

GASTALDUS, A governor of the country, whose office was only temporary, and who had jurisdiction over the common people. *Blount*.

GATE, At the end of the names of places, signifies a way or path, from the Sax. *geat*, i. e. *porta*, the custody of the gates of the city of London, is granted to the Lord Mayor, &c. by *Chart. King Hen. 4.* See *London*.

GAVEL, Sax. *gafel*.] Tribute, toll, custom or yearly revenue; of which we had in old time several kinds. See title *Gabel*.

GAVELET, *gaveletum*.] An ancient and special kind of *cessavit* used in Kent, where the custom of *gavel kind* continues, whereby a tenant, if he with-holds his rents and services due to the lord, shall forfeit his land: it was intended where no distress could be found on the premises, so that the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time, if the tenant came and paid his rent, he was admitted to his tenement to hold it as before; but if not, the lord might enter and enjoy the same. The lord was to seek by the award of his court, from three weeks to three weeks, to find some distress upon the land or tenement, until the fourth court; and if in that time he could find none, at the fourth court it was awarded that the tenement should be seized as a distress, and kept in the lord's hands a year and a day without manuring; and if the tenant did not in that time redeem it, by paying the rent and making amends to the lord, the lord having pronounced his process by witnesses at the next county court, was awarded by his court to enter and manure the tenement as his own; and if the tenant would afterwards have it again, he was to make agreement with the lord. *Fitz. Cess. 60: Terms de Ley*.

Gaveletum is as much as to say to cease, or to let to pay the rent; and *consuetudo de gavelet* was not a rent or service, but a rent or service with-held, denied or detained, causing the forfeiture of the tenement. *Dist.*

The word *gavelet* in its original signification imported rent; but it means also a process for the recovery of rent peculiar to Kent, and London.—The *gavelet* thus prevailing by the custom of Kent may be used whether there is a sufficient distress on the land or not; but is restricted to gavelkind tenure. *Robins. on Gavelk. 243.* To London this writ was given for rent-service generally by Stat. 10 E. 2; which is therefore called the statute of Gavelet. But by the words of the statute this latter *gavelet* only lies where the lord cannot obtain payment by distress. See *Spelm voc. Gaveletum; Wright's Ten. 197.*

GAVELKIND.

This remedy of *gavelet* as well as that of *cessavit* is now fallen wholly into disuse; nor, whilst they continued in use, were they applicable, except where the tenure was in fee. *Booth on Real Act. 133.* See 1 Inst. 142. n. 2. and this Dict. titles *Cessavit: Distress: Tenure*.

GAVELET IN LONDON, *breve de gaveleto in London, pro redditu ibidem, quia tenementa fuerunt indistinguishibilia.*] The writ used in the *hustings* of London; where the parties, tenant and demandant, appear by *seire facia*; to shew cause why the one should not have his tenement again on payment of his rent, or the other recover the lands, on default thereof.

GAVELGELD, Payment of tribute or toll. *Mon. Ang. tom 3.*

GAVELKIND.

A Tenure or Custom, annexed and belonging to lands in Kent, whereby the lands of the father are equally divided at his death among all his sons; or the land of the brother among all the brethren, if he have no issue of his own. *Lit. 210.* See title *Tenures III. 12.*

All the lands in England, it is said were of the nature of *Gavelkind* before the year 1066, and descended to all the issue equally; but after the Conquest (as it is called), when *knight-service* was introduced, the descent was restrained to the eldest son for the preservation of the tenure. *Lamb. 167: 3 Salk. 129.* Except in Kent, for the supposed reason of which see *Blount in v. Gavelkind*, who relates the story of the *Kentish men* surrounding *Will. I.* with a moving wood of boughs, and thus obtaining a confirmation of their ancient rights.

In the reign of Hen. VI. there were not above thirty or forty persons in all Kent that held by any other tenure than this of *Gavelkind*; which was afterwards altered upon the petition of divers *Kentish* gentlemen, in much of the land of that county, so as to be descendible to the eldest son, according to the course of the Common-law, by the Stat. 31 H. 8. cap. 3. Though the custom to devise *Gavelkind* land, and the other qualities and customs remain. *Co. Lit. 140.* By the Stat. 34 & 35 Hen. 8. cap. 26. all *Gavelkind* lands in Wales were made descendible to the heir, according to the Common-law; whereby it appears, that the tenure of *Gavelkind* was likewise in that Principality.

Blackstone relies on the nature of tenure in *Gavelkind* as a pregnant proof that tenure in free socage was a remnant of Saxon Liberty. It is universally known what struggles the *Kentish men* made to preserve their ancient liberties, and the success with which those struggles were attended. And as it is principally here that we meet with the custom of *Gavelkind*, we may fairly conclude that this was a part of those liberties; agreeable to Mr. *Selden's* opinion that *Gavelkind*, before the Norman Conquest was the general custom of the realm.—The distinguishing properties of this tenure are various. Some of the principal are; that the tenant is of sufficient age to alien his estate, by feoffment, at the age of fifteen.—That the estate does not escheat in case of an attainer and execution for felony.—That in most places the tenant had power of devising lands by will before the statute for that purpose was made. *Fitz. N. B. 198: Cro. Car. 501.*—The descent of the lands, as above-stated; which was indeed anciently the most usual course of descent all over England. *Glanvil, l. 7. c. 3.* though in particular cases particular customs prevailed.

These.

These among other properties distinguished this tenure in a more remarkable manner; and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands, being holden by suit of court and fealty, which is a service in its nature certain. *Wright* 211. See this Dict. title *Tenures* III. 12. Wherefore by a charter of King *John*, *Hubert* Arch-bishop of *Canterbury* was authorized to exchange the Gavel-kind tenures holden of the See of *Canterbury* into tenures by Knight's service: and by the above mentioned statute of 31 *Hen. 8. c. 3.* for disgavelling lands in *Kent*, they are directed to be descendible, for the future, like other lands which were never holden by service of socage. Now the immunities which the tenants in Gavelkind enjoyed were such as cannot be conceived should be conferred on mere plowmen and peasants: from all which the learned Commentator conceives it to be sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by *Littleton*, or after him by the bulk of common lawyers. 2 *comm.* 84, 5. c. 6.

A father having Gavelkind lands, had three sons, one of whom died in the life-time of his father, leaving issue a daughter; and it was held that the daughter shall inherit the part of her father *jure representationis*, and yet she is not within the words of the custom of dividing the land between the heirs male, for she is the daughter of a male and heir by representation. 1 *Salk.* 243. The heir at the age of fifteen years, it is said, may give and sell his lands in Gavelkind, and shall inherit. *Co. Lit.* 111. The custom of Gavelkind, is not altered, though a fine be levied of the lands at Common-law; because it is a custom that runs with the land. 6 *E. 6.*

Land in Gavelkind was devised to the husband and wife for life, remainder to the next heir male of their bodies, &c. They had three sons, and it was adjudged that the eldest son should not have the whole. *Dyer* 133. A donee in tail, of Gavelkind lands had issue four sons; and it was held, that all should inherit: but if a lease for life is made of Gavelkind, remainder to the right heirs of *A. B.* who hath issue four sons, in this case the eldest son shall inherit the remainder, because, in case of purchase, there can be but one right heir. 1 *Rp.* 102. If Gavelkind lands come to the crown, and are regranted to hold in capite, &c. the land shall descend to all the heirs male as Gavelkind. *Nelf. Abr.* 895.

A wife shall be endowed of Gavelkind land, of a moiety of the land whereof her husband died seised, during her widowhood. *Co. Lit.* 111. And it has been adjudged, that the widow cannot have election to demand her thirds or dower at Common-law, so as to avoid the custom, by which she shall lose her dower, if she marry a second husband. *Moor* 260. But see 1 *Leon.* 62. See title *Dower*.

The husband shall be tenant by the curtesy of half the Gavelkind lands of the wife, during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. *Co. Lit.* 111. If the husband had issue by his wife, and she die, he shall be tenant by the curtesy of the whole land; and though he marry, he shall not forfeit his tenancy. *Mich. 21 Car. B. R.*: 1 *Lil. Abr.* 649.

It was formerly supposed that although a father was attainted of treason or felony, the heir of Gavelkind land should inherit, for the custom, as said, was, 'the father to the bough and the son to the plough.' *Doct. & Stud.* c. 10. But, it has been held, that, in matters of treason, which strike at the foundations of policy and government, even Gavelkind lands are forfeitable, and always were. See title *Forfeiture*.

A rent in fee granted out of Gavelkind land, shall descend in Gavelkind to all the heirs male, as the lands would have done; it being of the same nature with the land itself. 2 *Lev.* 138: 1 *Mod.* 97.

All lands in *Kent* shall be taken to be Gavelkind, except those which are disgavelled by particular statutes. 1 *Mod.* 98. If lands are alleged to be in *Kent*, it shall be intended that they are Gavelkind; if the contrary doth not appear. 2 *Sid.* 153. By *Hale* Ch. J. Gavelkind law, is the law of *Kent*, and is never pleaded, but presumed; and it has been held, that the superior courts may take notice of Gavelkind generally without pleading: though not of the special custom of devising it, which ought to be pleaded specially. 1 *Mod.* 98: *Cro. Car.* 465: *Lutw.* 236, 754.

The Gavelkind descent of lands in *Ireland* was an incident to the custom of *Tanistry*: and as such fell to the ground with its Principal, in consequence of a solemn judgment against the latter in a case *Ann. 5 Jac. 1.* See *Dav. Rep.* 28. But in the reign of Queen *Ann* the policy of weakening the Roman-Catholic interest in *Ireland* was the cause of an *Irish* statute to make the lands of Papists descendible according to the gavelkind custom unless the heir conformed within a limited time. See *Rob. on Gavelk.* c. 17. However now by an *Irish* statute of the present reign (17 & 18 *Geo. 3. c. 49.*) the descent of the lands of Papists is again reduced to the course of the Common law. 1 *Infl.* 176. n. 1.

GAVELMAN, A tenant liable to tribute.—*Somner of Gavelkind*, pag. 33. And hence Gavelkind has been thought to be land in its nature taxable. *Flount.* See *Tenures* III. 12.

GAVELMED, The duty or work of mowing grass, or cutting of meadow land, required by the lord from his customary tenants; *Consecutio falcandi quæ vocatur gavelmed.* *Somn.*

GAVELCESTER, Sax. *Sextarius Vestigalis.*] A certain measure of rent-ale: and among the articles to be charged on the stewards and bailiffs of the manors belonging to the church of *Canterbury* in *Kent*, according to which they were to be accountable, this of old was one; *de gavelceller cujuslibet braci ni braciati infra libertatem maneriorum, viz. unam lagenam & dimidiam cervise.* This duty elsewhere occurs under the name of *tolsester*; in lieu whereof the *Abbot of Abingdon* was wont of custom to receive the penny mentioned by *Selden* in his *Dissertation* annexed to *Fleta*, cap. 8. Nor does it differ from what is called *wak-gavel* in the Glossary at the end of *Hen. 1. Law's Sax. Dict.*

GAVELWERK, Sax.] Was either *manu opera*, by the hands and person of the tenant, or *carropera*, by his carts or carriages. *Philips of Purvey.*

GAUGEIUM, A gauge or gauging, done by the gauger; and the true *English* gauge is mentioned, in *Rot. Parl.* 32 *Ed. 1.*

GAUGER,

GAUGER, *Gaugator*, Fr. *gauchir*, i. e. *in gyrum torquere*.] An officer appointed by the King, to examine all tuns, pipes, hogheads, barrels and terces of wine, oil, honey, &c. and to give them a mark of allowance, as containing lawful measure, before they are sold in any place: and because his mark is a circle made with an iron instrument for that purpose, it seems to have its name from thence. Of this officer and his office, there are many statutes; as by *Stat. 27 Ed. 3. cap. 8*, all wines, &c. imported, are to be gauged by the King's *gaugers*, or their deputies. By *Stat. 31 Ed. 3. c. 5*, Selling wine before gauged, incurs forfeiture of the value. And by *Stat. 23 Hen. 6. cap. 15*, the *gaugage-penny* is to be paid *gaugers*, on gauging wines. The *Stat. 31 Eliz. c. 8*, ordained, that beer, &c. imported, shall be gauged by the Master and Wardens of the Coopers' company. See *Stat. 12 Car. 2. c. 4*.

The wardens of the Coopers, shall attend to gauge vessels upon request, *23 Hen. 8. c. 4*. *Gaugers* may take samples not exceeding half a pint, *32 Geo. 2. c. 29*. See titles *Brewers*: *Excise*.

GEASPECIA. In a charter of the privileges of *Newcastle upon Tyne*, renewed anno 30 *Eliz.* we find *sturgiones*, *porpicias*, (i. e. *porpoises*) *delphinor*, *geaspecia*, viz. *grampeis*, &c.

GEBURSCIP, *Geburfsipa*] Neighbourhood or adjoining district. *Leg. Edw. Confess. cap. 1*.

GEBURUS, A country inhabitant of the same *geburscip*, or village; from the Sax. *gebure*, a carl ploughman, or farmer. *Cowel*.

GELD, *Geldum*, *Mulctā*; *compensatio delicti & pretium rei*] Hence, in our ancient laws, *wergeld* or *werreild* was used for the value or price of a man slain; and *orfgeld* of a beast: likewise money or tribute; for it is said, *Et sint quieti de geldis, danegeldis, borngeldis, blodwita*, &c. *Chart. Rich. 2. Priorat. de H. in Devon. Pat. 5 E. 4.* *Angeld* is the single value of a thing, *twigeld*, double value, &c.

GELDABLE, *Geldabilis*.] That is liable to pay tax or tribute. *Camden*, dividing *huffok* into three parts, calls the first *geldable*, because subject to taxes; from which the other two parts were exempt, as being *ecclesiæ donate*. The word is mentioned in the *Stat. 27 Hen. 8. cap. 26*. But in an old *MS.* it is expounded to be that land, or lordship, which is *sub distributione curæ vicariorum*. *2 Inst. 701*.

GEMOTE, Sax. i. e. *conventus*] An assembly. *Leg. Edw. Conf. cap. 35*. See *Alderman*: *Ealdorman*: *Folk mote*: *Mote*: *Wittena gemote*: *Parliament*.

GENEATH, *Villanus*; *Regis Geneath*, is the King's villain. *LL. Ince, MS. cap. 19*.

GENERAL ISSUE, Is a plea to the fact of *Not Guilty*, in criminal cases, in order to trial by the country, or by peers, &c. *H. P. C. 254*. In civil suits, there are various pleas, which are general issues, according to the species of the action, as in *Trespass*, *Not Guilty*, in Case on *promises*, *non assumpsit*, &c. See title *Pleading*.

GENERATIO. When an old abbey, or religious house had spread itself into many colonies, or depending cells, that issue or offspring of the mother monastery was called *generatio*; *quasi proles & joboles matris domus*. *Annal. Waverl. 1232*.

GENERALE. The single commons, or ordinary provision of the religious, were termed *generale*, as their general allowance, distinguished from their *pretantiae*, or pittances; which on extraordinary occasions were thrown

in as over commons. These are described amongst other customs. *Curialar. Glasfow. MS. fol. 10*.

GENERALS OF ORDERS, Chiefs of the several orders of *monks*, *friars*, and other religious societies.

GENEVA, A strong water or spirit. Vide *Distillers*.

GENTLEMAN, *Generosus*.] Is compounded of two languages, from the Fr. *gentil*, i. e. *honestus*, vel *honesto loco natus*, and the Sax. *mun*, a man; thus meaning a man well born. The *Italians* call those *gentil homini* whom we style *gentleman*; the *French* (*ben quantum mutati*!) under their ancient monarchy, distinguished such by the name of *gentilhomme*: and the *Spaniards* keep up to the meaning of the word, calling him *hidalgo* or *hijo d' alga*, who is the son of a man of account; so that gentlemen are such whom their blood or race doth make known.

Under the denomination of *Gentlemen*, are comprised all above yeomen: whereby noblemen are truly called *Gentlemen*. *Smith de Rep. Ang. lib. 1. cc. 20, 21*. A *Gentleman* is generally defined to be one, who, without any title, bears a coat of arms, or whose ancestors have been freemen; and by the coat that a *Gentleman* giveth, he is known to be, or not to be, descended from those of his name, that lived many hundred years since.

There is said to be a *Gentleman* by office, and in reputation, as well as those that are born such. *2 Inst. 668*. And we read that *J. Kingston* was made a *Gentleman* by King *Rich. II. Pat. 13 R. 2. par. 1*. *Gentilis homo* for a *Gentleman*, was adjudged a good addition. *Hil. 27 Ed. 3*. But the addition of esquire, or *Gentleman*, was rare before *1 Hen. 5.* tho' that of knight is very ancient. *2 Inst. 595, 667*. See title *Precedency*.

GENTLEWOMAN, *generosa*.] Is a good addition for the estate and degree of a woman, as *generosa* is for that of a man; and if a *Gentlewoman* be named *spinster* in any original writ, appeal, &c. it hath been held that she may abate and quash the same. *2 Inst. 668*. But it seems that *Spinster* is in general, a good addition, for an unmarried woman, as *single woman* is, for one who being unmarried hath had a *bastard*.

GENTILITY, *gentilitas*] Is lost by attainder of treason, or felony, by which persons become base and ignoble, &c.

GENU. A generation.—*Succesit Ethelbaldo Offa quinta Genu. Malmf. lib. 1. c. 4*.

GENUS, Lat.] The general flock, extraction, &c. as the word office in law is the *genus*, or general; but the Sheriff, &c. is the *species* of it, or particular. *2 Litt. Abr. 528*.

Genus, among metaphysicians and logicians, denotes a number of beings, which agree in certain general properties, common to them all; so that a *genus* is, in fact, only an *abstract* idea, expressed by some general name or term; or rather a general name or term, to signify what is called an *abstract* idea.

GEORGE NOBLE, A piece of gold, current at six shillings and eight-pence, in the reign of King *Hen. VII.* *Locundes's Essay upon Coins, p. 41*.

GEORGIA, In *America*, its colony established, by *Stat. 6 G. 2. c. 25. § 7*. See title *Plantations*.

GERSUMA, See *Garsummun*.

GESTU ET FAMA, An ancient writ where a person's good behaviour was impeached, now out of use. *Lamb. Elen. lib. 4. cap. 14*. See *Surety for the Peace*.

GEWINEDA,

GEWINED A, Sax.] The public convention of the people, to decide a cause: *et pater quam altermannus Regis in quibus hegorum gewineda dabit emendatur 12 libris.* LL. Ethelred. cap. 1.

GLWITNESSA, The giving of evidence. *Leg. Ethel. cap. 1. apud Brompton.*

GIFT, *donum, donatio*] A conveyance, which passeth either lands or goods. A Gift is of a larger extent than a Grant, being applied to things moveable and immoveable; yet as to things immoveable, when strictly taken, it is applicable only to lands and tenements given in tail; but gifts and grants are said to be alike in nature and often confounded. *Wood's Inst. 260.*

The conveyance of *lands* by Gift is properly applied to the creation of an estate-tail, as Feoffment is to that of an estate in fee, and Lease to that of an estate for life or years. It differs in nothing from a feoffment but in the nature of the estate passing by it: for the operative words of conveyance in this case are *Do*, or *De di*—*I give*, or *Have given*; and Gifts in tail are equally imperfect without livery of seisin as feoffments in fee simple. *Lit. § 59.* And this is the only distinction that *Littleton* seems to take when he says, "it is to be understood that there is feoffor and feoffee; donor and donee; lessor and lessee." *Litt. § 57*; viz. feoffor is applied to a feoffment in fee-simple; donor to a Gift in tail, and lessor to a lease for life or years or at will. In common acceptance Gifts are frequently confounded with Grants. See title *Grant*. 2 *Comm.* 316. c. 20.

Gifts or Grants for the transferring of *personal property* are thus to be distinguished from each other: that Gifts are always gratuitous; Grants are upon some consideration or equivalent: and they may be divided with regard to their subject matter into Gifts or grants of chattels real, and Gifts or grants of chattels personal. Under the former head may be included all leases for years of land, assignments and surrenders of these leases; and all the other methods of conveying an estate less than freehold. See this Dict. titles *Deed*; *Conveyance*; *Estate*. These however very seldom carry the outward appearance of a Gift, however freely bestowed: being usually expressed to be made in consideration of blood, or natural affection; or of 5*s.* or 10*s.* nominally paid to the Grantor: and in case of leases, always reserving a rent, though it be but a pepper corn; any of which considerations will in the eye of the law convert the gift, if executed, into a grant: if not executed, into a contract. 2 *Comm.* 440 c. 30.

Grants or Gifts of chattels-personal are the act of transferring the right and the possession of them, whereby one man renounces, and another immediately acquires, all title and interest therein: which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious: and is usually construed to be fraudulent, if creditors or others become sufferers thereby; and particularly, by *Stat. 3 H. 7. c. 4.* all deeds of gift of goods, made in trust to the use of the donor shall be void, because otherwise persons might be tempted to commit treason or felony without danger of forfeiture: and the creditors of the donor might also be defrauded. And by *Stat. 13 Eliz. c. 5.* every grant or gift of chattels as well as lands with an intent to defraud creditors or others, shall be void as against such persons

to whom such fraud would be prejudicial, but as against the grantor or giver himself shall stand good and effectual: and all persons, partakers in, or privy to such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the King, and the other to the party grieved; and also on conviction suffer half a year's imprisonment. See 3 *Rep.* 82: and this Dict. title *Fraud*.

A true and proper Gift or Grant is always accompanied with delivery of possession, and takes effect immediately: as if *A.* gives to *B.* 100*l.* or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompence; *Jenk.* 109; unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like: or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the Gift does not take effect by delivery of immediate possession, it is then not properly a Gift but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration. 2 *Comm.* 441. c. 30. See this Dict. title *Assumpsit*: *Consideration*. *Contract*.

A Gift may be by deed, in word, or in law: all goods and chattels personal may be given without deed, except in some special cases; and a free Gift is good without a consideration. *Perk.* 57.

Whenever any Gift shall be made, in satisfaction of a debt, it is proper to make it in a public manner before neighbours, that the goods and chattels be appraised to the full value, and the Gift expressly made in satisfaction of the debt; and that on the Gift, the donee take possession of them, &c. *Hob.* 230. See title *Fraud*.

If a man intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it*, &c. and with his own hand delivers it to the party, this will be a good gift; notwithstanding the ring bear any other jewel, being delivered by the party himself, to the person to whom given. And if a person give a horse to another, being present, and bid him take the horse, though he call the man by a wrong name, it will be a good Gift; but it would be otherwise, if the horse were delivered for the use of another person, being absent: there a mistake of the name would alter the case. *Bac. Max.* 87. A Gift must be certain; therefore to give or grant another his horses or cows, that may be spared, will be void; though if one give to *A. B.* his horse, or his cow, he may take which he will. *Bro. Dine* 90.

As to *Gifts in law*, when a man is married to a woman, all her goods and chattels by gift in law become the husband's; but then he is liable for her debts: so if a man is made executor, the law gives him all the goods and chattels of the testator, subject to his debts. 1 *Inst.* 351. See titles *Baron and Feme*: *Executor*.

If a person make a suit of cloaths for another, and put it upon him to use and wear, this will be a gift or grant in law of the apparel made. *Co. Lit.* 351. This must mean if there was not any employment, and if the taylor, therefore, meant to give the cloaths.

A man by deed did give and grant, bargain and sell, alien, enfeoff and confirm to his daughter certain lands: but no consideration of money was mentioned, nor was the deed enrolled; there was likewise no consideration of natural affection expressed, (other than what was implied

implied in naming the grantee his daughter,) and there was no livery indorsed, or any found to have been made; nor was the daughter in possession at the time of the deed made: and in *B. R.* it was adjudged by the court that the deed was good, and carried the estate to the daughter by way of covenant to stand seised, *3 Mod. 157.*

The words *give* and *grant*, in deeds of Gift, &c. of things which lie in grant, will amount unto a grant, a feoffment, a Gift, release, confirmation or surrender, at the election of the party, and may be pleaded as a Gift, or grant, release, &c. at his election *Co. Lit. 301.* And words shall be marshalled so in Gifts and grants, that where they cannot take effect according to the letter, the law will make such construction as that the Gift by possibility may take effect: *benigne sunt interpretationes charitatum propter simplicitatem laicorum. Co. Lit. 183.* If a person gives or grants land, and does not say in what parish or county it lies; yet if there be any other thing to describe it, as lately belonging to such a person, &c. or other circumstantial matter, it may be averred where the land lieth, and so the Gift be good. *B. R. Grant 53; 9 Rep 47.* All corporeal and immoveable things that lie in livery, such as manors, messuages, cottages, lands, woods, and the like, may be given and granted in fee, for life, or years at first; and be assignable over after, from man to man *in infinitum.* *1 Rol. Abr. 44.* And where a man gives and grants wood to another on his lands, or 20 s. for it to be received out of the same lands, &c. here the wood passes by the Gift presently, with power to choose to have the money. *1 Rol. Abr. 47.* A deed of Gift of lands or goods may be made upon condition; and on a Gift or sale of goods, the delivery of 6 d. or a spoon, &c. is a good *seisin* of the whole. *Wood's Inst. 234.* See titles *Conveyance; Fraud; Deed; Grant; Estate; Limitation, &c.*

GIFTA AQUÆ, The stream of water to a mill.—*Mon. Angl. tom. 3.*

GIGMILLS, A kind of fulling mills for fulling and burling of woollen cloth, prohibited by *Stat. 5 & 6 Ed. 6. c. 22.*

GILD, A fraternity, or company, &c. See *Guild.*

GILDA MERCATORIA, A mercantile meeting or assembly. If the King grants to a set of men to have *gildam mercatoriam*, this is alone sufficient to incorporate and establish them for ever. *10 Rep. 30; 1 Ro. Ab. 513.* See titles *Corporation; Guild.*

GILDING METALS. By certain ancient statutes, now obsolete, the gilding any metal but silver, and church ornaments; or silversing any thing except the apparel of peers, &c. and metal for knights' spurs, is liable to forfeiture of ten times the value, and a year's imprisonment. None shall gild rings or other things made of copper or latten, on pain to forfeit 5 l. to the King, and damages to the party deceived. For gilding silver wares, no person may take above 4 s. 8 d. for a pound of troy weight, under penalties. *Stats. 5 H. 4. c. 13; 2 H. 5. c. 4; 8 H. 5. c. 3.* See titles *Gold Lace; Goldsmiths.*

GISARMS, or GUI SARMS, An halbert or hand-ax, from the Lat. *his arma*, because it wounds on both sides. *Skene—Spelm.* It is mentioned in the statute *13 Ed. 1. c. 6.*

GIST OF ACTION, From the Fr. *gist*, is the cause for which the action lieth; the ground and foundation

thereof, without which it is not maintainable. *3 Mod. 305.* See title *Action.*

GLADIOLUM, A little sword or dagger; also a kind of sedge. *Mutt. Paris. 1206.*

GLADIUS. *Jus gladii*, is mentioned in our Latin authors, and the Norman laws; it signifies a supreme jurisdiction. *Cambd.* And it is said that from hence, at the creation of an earl, he is *gladius succinctus*; to signify that he had a jurisdiction over the county of which he was made earl. See *Plas of the Sword.*

GLAIRE, Fr.] A sword, lance, or horseman's staff. *Gleye* was one of the weapons allowed the contending parties in a trial by combat. *Orig. Jurist. 79.*

GLASS, Certain duties granted on all glass ware, &c. by *Stat. 6 & 7 W. 3;* which duties were continued for ever by a subsequent act; But were afterwards taken off, by *Stat. 10 and 11 W. 3. cap. 18.* By *Stat. 19 Geo. 2. cap. 12,* An excise duty is laid upon glass of 8 d. per pound, upon all crown, plate, and flint glass imported; 2 d. per pound on green glass imported, and 2 s. per dozen on flasks and bottles imported; and on all materials or metal used in making crown, plate or flint glass 9 s. 4 d. per hoghead; and for making common bottles, or green glass 2 s. 4 d. per hoghead; and higher duties by subsequent acts.

GLASS-MEN, Are reckoned amongst wandering rogues and vagabonds, by the old statutes, *39 Eliz. c. 17; 1 Jac. 1. c. 7.*

GLAVERA, An hand dart. *Blount.*

GLEANNING, LEASING OR LESING, From Fr. *Glainer, quasi graner; colligere grana*—*Leuson. Abrislen, ex ahr, spha, & lesen, colligere.*—*Minshew in v. Glean.*] It hath been said, that by the Common law and custom of England, the poor are allowed to enter and glean upon another's ground, after the harvest, without being guilty of trespass; which humane provision seems borrowed from the Mosaic law. *3 Comm. 212, 213; Trials per pais c. 15. p. 438, 534.*

But it is now positively settled by a solemn judgment of the Court of Common Pleas that a right to glean in the harvest-field cannot be claimed by any person at Common-law. Neither have the poor of a parish, legally settled, such right. *Gould J.* dissented from this opinion, quoting the passages in the Mosaic law, (*Levit. c. 19. vv. 9, 10; c. 23. v. 22.* and See *Deut. c. 24. v. 19.*) and *4 Burr. 197,* together with the recognition of the custom or privilege in a private act of parliament for an inclosure in *Basingstoke* parish. The other Judges however were of opinion that it would be dangerous and impolitic to admit Gleaning to be a right, and in fact would be prejudicial to the poor themselves, now provided for under various positive statutes. They also remarked that the custom of Gleaning or Leasing was various in various places, and was in many places restricted to particular corn, and could not therefore be set up as an universal Common-law right; that it would be opening a tempting door, to fraud and idleness, and had never been specifically recognized by any judicial determination. *1 H. Black. Rep. 51—63.*

GLEBE, gleba.] Church-land; most commonly taken for the land belonging to a parish church, besides the tithes. If any parson, vicar, &c. hath caused any of his Glebe-land to be manured and sown at his own costs, with any corn or grain, the incumbents may devise all

GLEBE.

the profits and corn growing upon the said Glebe by will, under *Stat. 28 Hen. 8. c. 11*. And if a parson sows his Glebe and dies, the executors shall have the corn sown by the testator. But if the Glebe be in the hands of a tenant, and the parson dies after severance of the corn, and before his rent due; it is said, neither the parson's executors, nor the successor, can claim the rent, but the tenant may retain it, and also the crop, unless there be a special covenant for the payment to the parson's executors proportionably, &c. *Wool's Inst.* 163. *See* *qu*; If this case would not come within the equity of *Stat. 11 Geo. 2. c. 19. s. 15*, which gives right of action to the representative of *tenant for life*, for any portion of rent in arrear at the time of his death?

Exchange of Glebe land, will not bind the successor. *Noy* 5.

* Prohibition was moved for to a parson for digging new coal-mines in his Glebe, and also for felling trees; for it was waste, and prohibited by the statute *de non profuerend' a. bores, &c.* The court held it lay not for the mines; for then no mines in Glebe could ever be opened. *Lev.* 107.

By the said *Stat. 28 H. 8. c. 11*, Every successor, on a month's warning, after induction, shall have the mansion-house and the Glebe belonging thereto, not sown at the time of the predecessor's death. He that is instituted may enter into the Glebe-land before induction, and has right to have it against any stranger; *per Coke Ch. J. Roll. R.* 192.

There is a writ grounded on the *Stat. articuli cleri*, cap. 6; where a parson is distrained in his Glebe-lands by sheriffs, or other officers; against whom attachment shall issue. *New Nat. Br.* 386, 387. See titles *Parson*; *Vicar*; *Church*; *Tithes, &c.*

GLEBARIÆ, Turfs dug out of the ground.—In *Sylvis*, *Campis*, *S. mitis*, *Moris*, *Glebariis*, &c.

GLISCYWA, An old Saxon word for a Fraternity. *Leg. Athelstan.* cap. 12.

GLOMERELLS, Commissaries appointed to determine differences between scholars of a *School* or *University*, and the townsmen of the place: in the edict of the bishop of *Ely*, anno 1276, there is mention of the *Master of the Glomerells*.

GLOVE-SILVER. Money customarily given to servants to buy them gloves, as an encouragement for their labours.—*Glove money* has been also applied to extraordinary rewards given to officers of courts, &c. It is now given on the circuits, by the barristers, to the judges' crier.

GLOVES. The *Stat. 6 Geo. 3. c. 19*, restrains the importation and sale of foreign Gloves and mitts: and one session of the *Stat. 25 Geo. 3. c. 55*, also restrains the importation of foreign leather not completely made into Gloves, but cut into shapes, or trunks.—By this latter act a stamp duty was imposed on Gloves sold, which is now repealed.

GLYN, A valley; according to the book of *Domesday*.

GO. This word is sometimes used in a judicial signification, as to go without day, is to be dismissed the court; so in old phrase, to go to God. *Bicke Kitch.* 150.

GOATS, No man may common goats within the forest without especial warrant. *Nota*, *Capriolus non est lesia venationis forestæ*. *Mauwood's Forest Laws*, cap. 25. *manib.* 3. See title *Common*.

*GOAT'S HAIR, To what duties liable, 4 *W. 3. M. c. 5*.

GOLD

GOD-BOTE, *Sax*] An ecclesiastical or church fine, paid for crimes and offences committed against God.

GOD GILD, That which is offered to God, or his service. *Sax.*

GOD AND RELIGION, *Offences against*. *Apostacy* is an offence against God and religion. It was formerly the object only of the Ecclesiastical courts, which corrected the offender *pro salute an. m. r.* But now, by *Stat. 9 & 10 W. 3. c. 32*. If any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching, or *advised* speaking, deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room however for repentance, if within four months after the first conviction the delinquent will in open court publicly renounce his error, he is discharged for that once, from all disabilities.

Heresy is another offence, for which the offender is subject only to ecclesiastical censure, by *Stat. 29 Car. 2. c. 9*. See 4 *Comm* 42, 65. As to *Reviling of the ordinances*, *Non-conformity*, *Blasphemy*, *Swearing and Cursing*, *Witchcraft*, *Religious Imposters*, *Simony*, *Sabbath-breaking*, *Drunkenness* and *Lewdness*; and this Dict. under those several titles.

GOLDA, A mine, according to *Blount. Mon. Angl.* tom. 2. p. 610.

GOLD AND SILVER LACE and *Thread*. Persons that sell orrice lace, mixed with other metal or materials than gold, silver, silk and vellum, shall forfeit 2s. 6d. for every ounce: and there shall be allowed at least six ounces of gold and silver prepared and reduced into plate, to cover four ounces of silk, except large twist, frize, &c. And laying the same on greater proportions of the silk, or in any other manner than directed, incurs the like forfeiture of 2s. 6d. the ounce. Copper, and lace inferior to silver, is to be spun upon thread, yarn or incle, and not on silk; but this does not extend to *Tinsel* apparel, used in theatres. No gold or silver lace, thread, fringe or wire, &c. may be imported, on pain of being forfeited and burnt, and 100*l.* penalty. *Stat. 15 Geo. 2. c. 20*. See 28 *Geo. 3. c. 7*. The importation and making up of gold and silver lace, embroidery, brocade, &c. is prohibited, by *Stat. 22 Geo. 2. c. 36*. See further titles *Wire-Drawers*; *Embroidery*; *Navigation Acts*.

GOLDSMITHS. Gold and silver manufactures are to be assayed by the warden of the *Goldsmiths' Company* in *London*, and marked; and gold is to be of a certain touch. *Stat. 23 E. 1. c. 20*. By *Stat. 37 E. 3. c. 7*, *Goldsmiths* were to have their own marks on plate, after the surveyors have made their assay; and false metal was to be seized and forfeited to the King. Work of silver made by *Goldsmiths*, &c. is to be as fine as *Sterling*, except the solder necessary; and marking other work, incurs a forfeiture of double value. *Stat. 2 H. 6. c. 14*.

Goldsmiths, shall not take above 1*s.* the ounce of gold beside the fashion, more than the buyer may be allowed for it at the King's exchange; and if the work of any *Goldsmith* be marked and allowed by the master and wardens of the mystery, and afterwards found faulty; the wardens and

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and corporation shall forfeit the value of the thing so sold or exchanged. *Stat. 18 Eliz. c. 15.*

Molten silver is not to be transported by *Goldsmiths* before it is marked at *Goldsmiths' Hall*, and a certificate made thereof on oath; and officers of the Customs may seize silver shipped otherwise. *Stat. 6 & 7 W. 3. c. 17.* The cities of *York*, *Exeter*, *Bristol*, *Chester*, *Norwich*, and town of *Newcastle*, are also appointed places for assaying and marking wrought plate of *Goldsmiths*, &c. *Stats. 12 W. 3. c. 4; 1 Ann. c. 9.*

A duty is granted on silver plate of 6 *d.* per ounce; and *Goldsmiths* are to make entries thereof with the weight, on pain of 100 *l.* &c. And *Goldsmiths* must work their plate according to the old standard; which is to be touched, assayed and marked before exposed to sale. *Stat. 6 Geo. 1. c. 11.*

Gold plate made by *Goldsmiths* shall contain 22 carrrats of fine gold: and silver plate 11 ounces and two penny-weight of silver, in every pound troy, or they forfeit 10 *l.* And no *Goldsmith* shall sell any such plate, until marked with the first letters of the maker's christian and surname, the marks of the city of *London* being the leopard's head, lion passant, &c. and those made use of by the assayers at *York*, *Exeter*, &c. All persons making plate, are to enter their marks, names and places of abode in the assay-office; they are likewise to send with the plate required to be marked, a particular account thereof, in order to be entered, &c. or forfeit 5 *l.* The *Assayers* determine what folder is necessary about plate, and judge of the workmanship, and for good cause may refuse to assay it; and if any parcel be discovered of a coarser alloy than the standard, it may be broke and defaced; also the fees for assaying and marking are particularly limited, &c. *Stat. 12 Geo. 2. c. 26.* See further title *Wine-drawers*.

GOLDWIT, or GOLDWICH, Perhaps a golden mullet; in the records of the *Tor. n.*, there is mention of *consuetudo vocata, Goldwith vel Goldwich.*

GOLIARDUS, A jester or buffoon. *Mat. Paris. 1229.*

GOOD ABEARING, Bonus Gestus.] Signifies an exact carriage or behaviour of a subject towards the King and the people; whereunto some persons, upon their misbehaviour are bound; and he that is bound to this, is said to be more strictly bound than to the peace; because where the peace is not broken, the surety *de bono gestu* may be forfeited by the number of a man's company, or by their weapons. *Lamb. Eiren. lib. 2. c. 2: See Stat. 34 Ed. 3. c. 1.*

GOOD BEHAVIOUR, Surety for the *Good behaviour* is surety for the peace, and differs very little from *Good abearing.* A Justice of peace may demand it *ex officio*, according to his discretion, when he sees cause; or at the request of any other under the King's protection: his warrant also is to be issued when he is commanded to do it by writ of *supplicavit* out of *Chancery* or *B. R.* See further titles *Justices of Peace* and *Surety of the Peace*; at large.

GOOD CONSIDERATION, See *Consideration.*

GOODS AND CHATTELS, *Bona & cattalia,* See *Chattels.*

GOOLE, Fr. Goulet.] A breach in a sea-bank or wall; or a passage worn by the flux and reflux of the sea. *Stat. 16 & 17 Car. 2. c. 11.*

GORCE, From Fr. Gort.] A wear: by *Sat. 25 E. 3. & 4. c. 4.* it is ordained, that all *Gorces*, mills, wears, &c.

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levied and set up, whereby the King's ships and boats are disturbed and cannot pass in any river, shall be utterly pulled down, without being renewed. Sir *Edward Coke* derives this word from *Gorges*, a deep pit of water, and calls it a *Gors*, or *Gulf*; but this seems to be a mistake, for in *Domesday* it is called *Gourt* and *Cort*, the *Ficuch* word for a wear, *Co. Lit. 5.*

GORE, A narrow slip of ground. *Paroch. Antiq. 393.*

GOTE, Sax. Grotan, i. e. Funterr.] A ditch, sluice or gutter, mentioned in *Stat. 23 H. 8. c. 5.*

GOVERNMENT.

By this word, in common speech, is understood the Constitution of our country as exercised, according to the principles of *Limited Monarchy*, under the Legislature of *King, Lords* and *Commons.* For the principles of this Government and Constitution, and its peculiar excellencies in preference to all others, see this Dict. *passim*; and particularly under titles *King*; *Parliament*; *Treason*; *Tenure*; *Habeas Corpus*; *Liberties*; *Jury*; and other apposite titles.

When Civil Society is once formed. Government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some Superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature without any judge upon earth to define their rights and redress their wrongs. But as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of Government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that Government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled *The Supreme Being*; the three grand requisites of wisdom, of goodness and of power: wisdom to discern the real interest of the community; goodness to endeavour always to pursue that real interest: and strength or power, to carry this knowledge and intention into action. These are the natural foundations of Sovereignty, and these are the requisites that ought to be found in every well constituted frame of Government.

How the several forms of Government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. However they began, or by what right soever they subsist, there is and must be in all of them a Supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of Sovereignty reside. And this authority is placed in those hands wherein, (according to the opinion of the founders of such respective States, either expressly given or collected, from their tacit approbation,) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government. The first when the Sovereign Power is lodged in an aggregate assembly consisting of all the free-members of a community, which is called a *Democracy*; the second when it is lodged in a council, composed of select members, and then it is

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filed an *Aristocracy*; the last when it is entrusted in the hands of a single person, and then it takes the name of a *Monarchy*. All other species of Government, they say are either corruptions of, or reducible to, these three.

By the Sovereign Power, is meant the power of making laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the Government may put on. For it is at any time at the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one or a few, or many executive magistrates: and all the other powers of the State must obey the legislative power in the discharge of their several functions, or else the Constitution is at an end.

In a *Democracy*, where the right of making laws resides in the People at large, public virtue, or goodness of intention is more likely to be found, than either of the other qualities of Government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In *Aristocracies* there is more wisdom to be found, than in the other frames of Government; being composed, or intended to be composed, of the most experienced citizens. But there is less honesty than in a Republic, and less strength than in a Monarchy. A *Monarchy* is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of Government are knit together, and united in the hand of the Prince; but then [in absolute Monarchies] there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of Government have, all of them, their several perfections and imperfections. *Democracies* are usually the best calculated to direct the end of a law, *Aristocracies* to invent the means by which that end shall be obtained; and *Monarchies* to carry those means into execution. The ancients, had in general no idea of any other permanent form of Government but these three: for though Cicero declares himself of opinion, "*esse optimè constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa*," yet Tacitus treats this notion of a mixed Government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But, happily for us of this *Island*, THE BRITISH CONSTITUTION has long remained, and it is to be hoped will long continue, a standing exception to the truth of this observation. For, as with us, the Executive Power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute Monarchy: and as the Legislature of this kingdom is intrusted to three distinct powers, entirely independent of each other; first the King; secondly the Lords spiritual and temporal, which is an Aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the House of Commons, freely chosen by the People from among themselves, which makes it a kind of Democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes

the *British Parliament*, and has the supreme disposal of every thing; there can be no inconvenience attempted by either of the three branches, but which will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the *Sovereignty of the British Constitution*; and lodged as beneficially as is possible for Society. For in no other shape could we be so certain of finding the three great qualities of Government so well and so happily united. If the supreme power were lodged in any of the three branches separately, we must be exposed to the inconveniences, of either Absolute Monarchy, Aristocracy, or Democracy, and so want two of the three principal ingredients of good policy, either virtue wisdom, or power. If it were lodged in any two of the branches; for instance in the King and house of Lords, our laws might be providentially made, and well executed, but they might not have always the good of the people in view: If lodged in the King and Commons, we should want that circumspection and mediatory caution which the wisdom of the Peers is to afford: if the supreme rights of Legislature were lodged in the two houses only, and the King had no negative upon their proceeding, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the Executive Power. But the constitutional Government of this *Island* is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the Legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our Constitution. 1 *Comm.* 48,—52. *Intro.*

The effect of so dire a change, or the means of judging whether in any supposable event, it may or may not have taken place, is a theme that may serve to agitate politicians, but which it would not be proper to discuss in this place. Revolutions in Government are subject to no fixed previous laws; and the dreadful experience of *France* at this moment, (October 1794) will teach every true lover of the *British* Constitution to be cautious of violating its principles, either through too fond an attachment to the person or privileges of the Monarch, or too ardent and dangerous a zeal for the Liberties of the People. These, in our Constitution are not opposed to, but dependent on, each other, and an exaggeration of either would inevitably lead to the ruin of both.

Contempts and misprisions against the King's person and Government, may be by speaking or writing against them; cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has also been held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion. And for this species of contempt, a man may not only be fined and imprisoned, but suffer the pillory, or other infamous corporal punishment. 1 *Hawk. P. C.*: 4 *Comm.* 13. c. 9.

In cases of conspiracy or meditated treason against the King and Government, it is not unusual to vest a power in the King of apprehending and detaining suspected persons without bail or mainprise; which as to them operates as a suspension of the *Habeas Corpus* Act. For this purpose the *Stats.* 1 *W. & M. c.* 2: 6 *Anne c.* 15: 1 *Geo.* 1. cc. 8, 39, and divers others have been from time to time passed: The last of this kind was *Stat.* 34 *Geo.* 3. c.—when, after the example of *France*, several conspiracies were carrying on to establish a *Democracy* in these kingdoms to the overthrow of that Constitution; which is the deserved subject of panegyrick by the learned Commentator, from whom the preceding extracts on this subject are submitted to the attention of the Student.

GOVERNORS of the *Chest at Chatham*, Officers appointed to take care of, and relieve the poor and maimed *Seamen* belonging to the Royal Navy.

GRACE. Acts of parliament for a general and free pardon, are called *Acts of Grace*.

GRADUATES, *Graduati*.] Are scholars who have taken degrees in an university.

GRAFFER, *Fr. Griffier*, i. e. *Scriba*.] A notary or scrivener, used in the ancient *Stat.* 5 *H. 8. c.* 1.

GRAFFIO, **GRAVIO**, A landgrave, or earl—*Nec princeps, nec Graffio, hanc lenitatem mutare audeat. Mon. Angl. tom.* 1. p. 100.

GRAFFIUM, A writing-book, register, or cartulary of deeds and evidences. *Annal Eccl. Menevensis apud. Angl. Sacr. par.* 1. p. 653.

GRAIL, *Gradale*, or *Graduale*.] A gradual or book, containing some of the offices of the *Romish* church.—*Gradale, sic dictum, a gradalibus in tali libro contentis. Lyndewood. Provincial. Ang. lib.* 3. It is sometimes taken for a mass-book, or part of it, instituted by *Pope Celestine*, Anno. 430.

GRAIN, The twenty-fourth part of a penny-weight. *Merch. Dict.* Also grain signifies any corn sown on ground; and there is what is so called in the top of the ear, less than corn. *Lit. Alyn's Rep.* 80.

GRAND ASSISE, A writ in a real action to determine the right of property in lands. See titles *Jury*; *Magna Assisa*.

GRAND CAPE, A writ on plea of land, where the tenant makes default in appearance at the day given, for the King to take the land into his hands, &c. *Reg. Jud.* 1. See *Cape Magnum*.

GRAND DAYS, Those days in the *Terms* which are solemnly kept in the *Inns of Court* and *Chancery*, i. e. *Candlemas Day* in *Hilary term*, *Ascension Day* in *Easter term*, *St. John the Baptist's Day* in *Trinity term*, and *All Saints Day* in *Michaelmas term*; which days are *Dies non Juridici*, or no days in court.

GRAND DISTRESS, is a writ so called, not for the quantity of it, for it is very short, but for its quality; for the extent thereof is very great, being to all the goods and chattels of the party distrained within the county: it lies in two cases, either when the tenant or defendant is attached, and appears not, but makes default; or where the tenant hath once appeared, and after makes default, then this writ is had by the *Common law* in lieu of a *Peccat Cape. Stats. West.* 1. cap. 44: 52 *H.* 3. c. 9.

GRAND JURY, The jury that find bills of indictment before justices of peace, and gaol-delivery or of *Oyer & Terminer*, &c. They ought only to hear wit-

nesses for the King; and to find a bill on probable evidence; because it is but an accusation, and the party is to be put upon his trial afterwards. But if the bill be against *A.* for murder, and the *Grand Jury*, on the evidence before them, be satisfied it was *se defendendo*, &c. and so return it specially; the court may remand them to consider better thereof, or hear the evidence at the bar, and accordingly direct the *Grand Jury*. 2 *Hale's Hist. P. C.* 157, 158. Where a *Grand Jury* refuses to present things, within their charge, &c. a new *Grand inquest* may be impanelled, to inquire of the concealment of the former; on whose defaults presented, they shall be amerced. 2 *Hale's P. C.* 155. A *Grand Juror* disclosing to any one indicted, the evidence that appeared against him, is guilty of a high misprision, and liable to be fined and imprisoned. 4 *Comm.* 126. See at large titles *Indictment*; *Jury*.

GRAND SERJEANTY, An ancient tenure, by military service. See titles *Chivalry*; *Tenure*; *Serjeanty*.

GRANGE, *Grangia*.] A house or farm where corn is laid up in barns, granaries, &c. and provided with stables for horses, stalls for oxen, and other things necessary for husbandry. This definition is agreeable to *Spelman*. According to *Mr. Warton*, *Grange* is strictly and properly the farm of a monastery, where the religious reposit their corn. *Grangia Lat.* from *Granum*. But in *Lincolnshire*, and other Northern counties, they call every lone house, or farm, which stands solitary, a *Grange*. *Steevens's Shakspear*.

Dr. Johnson in his dictionary derives the word from *Grange*, French, and defines it, a farm, generally: a farm with a house, at a distance from neighbours.

GRANGEARIUS, Is the person who has the care of such a place, for corn and husbandry: and there was anciently a *granger*, or *grange-keeper* belonging to religious houses, who was to look after their *granges*, or farms in their own hands. *Fleta, lib.* 2. c. 8: *Cartular. St. Edmund.* MS. 323.

GRANT.

DONATIO; **CONCESSIO** In the *Common-law*, a conveyance in writing of incorporeal things, not lying in livery and which cannot pass by word only; as of reversion, advowsons in gross, tithes, rents, services, common in gross, &c. It has also been taken generally, for every gift and *Grant* of any thing whatsoever. *Co. Litt.* 172: 3 *Rep.* 63. *Grants* are made by such persons as cannot give but by deed: he that granteth is termed the Grantor, he to whom the *Grant* is made is the Grantee: *West. Symb.* 234.

Grant is the regular method, by the *Common-law*, of transferring the property of incorporeal hereditaments or such things whereof no livery can be had. *Co. Litt.* 9. For which reason all corporeal hereditaments as lands and houses are said to lie in livery, and the others as advowsons, commons, rents, reversion, &c. to lie in *Grant*. *Ib.* 172. And the reason is given by *Bracton*, "*Traditio*, [livery] nihil aliud est quam rei corporalis, de personâ in personam, de manu in manu translatio, aut in possessionem inductio: sed res incorporales quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur." *Bract. l.* 2. c. 18. Incorporeal hereditaments therefore pass merely by delivery of the deed. And in seignories or reversion of lands, such *Grant*, together with the attornment of the tenant,

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tenant, (while attainments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter, for the operative words therein commonly used are *Dedi et concessi*; *Have given and granted*; *a Comm.* 316. c. 20. See further this Dict. titles *Conveyance*; *Deed*; *Gift*.

I. *What Things and Interests may be granted; by what Description; and how Grants shall be construed.*

II. *Who may make Grants; and who may take by Grant.*

I. A Man cannot *grant* that which he hath not, or more than he hath: though he may covenant to purchase an estate, and levy a fine to uses, which will be good. A person may *grant* a reversion, as well as a possession; but the law will not allow *Grants* of titles only, or imperfect interests, or of such interests as are merely future. *Bac. Max.* 58. A bare possibility of an interest, which is uncertain; a right of entry, or thing in action, cause of suit, &c. may not be granted over to a stranger. *Perk.* Sect. 65: 2 *Inst.* 214: 4 *Rep.* 66.

It was formerly held, that by a *Grant* of all a man's goods and chattels, bonds would pass; now it is held the contrary, that the words *Goods and Chattels* do not extend to bonds, deeds or specialties, being things in action, unless in special cases. 8 *Rep.* 33: *Co. Lit.* 152: *The stat.* 2 *Geo.* 2. cap. 25, was found necessary to make the dealing such bonds, &c. felony, as in case of other goods and chattels.

In *Grants* there must be a foundation of interest, or they will not be binding: If a person *grants* a rent-charge out of lands, when he hath nothing in the land, the grant will be void. *Perk.* 15. Though it is said, if a man *grant* an annual rent out of land, wherein he hath no kind of interest, yet it may be good to charge the person of the *grantor*. *Owen Rep.* 3. A man may *grant* an annuity for him, and his heirs, to commence after his death, and it shall charge the heir. *Bac. Max.* 58. And after the *Grant* of an annuity, &c. is determined, debt lies for the arrears; and the person of the tenant will be charged. 7 *Rep.* 39. If a common person *grants* a rent, or other thing that lies in *Grant*, without limitation of any estate, by the delivery of the deed, a freehold passes: but if the *King* make such a *Grant* of a rent, &c. it is void for uncertainty. *Darv. Rep.* 45 a.

A *Grant* to a man, with a blank for his christian name is void, except to an officer known by his office, when it must be averied: and it is the same where the *grantee's* christian name is mistaken. *Cro. Eliz.* 328.

Grants may be void by uncertainty, impossibility, being against law, on a wrong title, to defraud creditors, &c. *Co. Lit.* 183. Such things as lie in *Grant*, may not be granted or held without deed: and if any thing not grantable, is granted with other things, the *Grant* will be void for all. 2 *Edw. Abr.* 269, 271, 273. Trusts and confidences are personal things, and may not be granted over to others in most cases; as offices of trust, and the like: but all kinds of chattels real and personal, are grantable, *Perk.* § 93: *Plowd.* 141, 379.

If one *grant* any thing that lies in livery, or *Grant*, and that is in *esse* at the time of the *Grant*, in fee, or for life,

and the estate is to begin at a day to come; this for the most part will be void: but a lease or *Grant* for years, may be good *in futuro*; and may be to one for term of years, or years determinable on lives, and after to another, to begin at the end of that estate. 5 *Rep.* 1: *Dyer* 58. Where a man hath a reversion after an estate for life of land, and he *grants* a rent out of it; the *Grant* is good, and will taken upon the land after the estate of the tenant for life is ended: and if a person *grant* rents, &c. and a stranger take them at that time; in this case the *Grant* will be good, for one may not be out of possession of these things but at his pleasure. *Perk.* 92, 98. If a man *grants* that to one, that he hath granted before to another, for the like term, &c. the second *Grant* will be void. *Dyer* 23: *Perk.* § 102. *Grants* are usually made by these words, viz. *Have Given, Granted and Confirmed, &c.* And words in *Grants* shall be construed according to a reasonable sense, and not be strained to what is unlikely. *Hob.* 304. Also it hath been adjudged, that *Grants* shall be expounded according to the substance of the deed, not the strict grammatical sense; and agreeable to the intention of the parties. *Co. Lit.* 146, 313.

To every good *Grant* the following things are requisite:

1. That there be a person able to *grant*. 2. A person capable of the thing *granted*. 3. That there be a thing grantable. 4. That it be *granted* in such manner as the law requires. 5. That there be an agreement to, and acceptance of, the thing granted, by him to whom made. And 6. There ought to be an attainment where needful. *Co. Lit.* 73. But *Grants* and conveyances are good without attainment of tenants, notice being given them of the *Grants*, by *stat.* 4 *Ann.* c. 16. § 9. *Grants* are taken most strongly against the *grantor* in favour of the *grantee*: the *grantee* himself is to take by the *Grant* immediately, and not a stranger, or any *in futuro*; and if a *Grant* be made to a man and his heirs, he may assign at his pleasure, though the word *Assign* be not expressed. *Lit.* 1: *Saund.* 322. The use of any thing being *granted*, all is *granted* necessary to enjoy such use: and in the *Grant* of a thing, what is requisite for the obtaining thereof is included. *Co. Lit.* 56. So that if timber trees are *granted*, the *grantee* may come upon the *grantor's* ground to cut and carry them away. 2 *Lift.* 309: *Plowd.* 15.

Where the principal thing is *granted*, the incident shall pass; but the principal will not pass by the *Grant* of the incident. *Co. Lit.* 152. A lord of a manor cannot *grant* the same, and receive the Court Baron, it being inseparably incident. *Co. Lit.* 313. A *Grant* of a manor, without the word *cum pertinentiis*, will pass all things belonging to, the manor: the *Grant* of a farm will also pass all lands belonging to it; but a *Grant* of a messuage passes only the house, out-houses and gardens. *Owen's Rep.* 51. *Tot' il' maner' de A.* may be taken in the singular, or plural number; and dashes and abbreviations in *Grants* shall be so taken that the *Grant* be not void. 9 *Rep.* 48. When lands are *granted* by deed, the houses which stand thereon will pass; houses and mills pass by the *Grant* of all lands, because that is the most durable thing on which they are built. 4 *Rep.* 86: 2 *And.* 123. By *Grant* of all the lands, the woods will pass: and if a man *grant* all his trees in a certain place, this passeth the soil; though an exception of wood extends to the trees only, not the soil. 1 *Roll. Rep.* 33. *Dyer* 19: 5 *Rep.* 11.

Trees in boxes will not pass by the grant of the land, &c. as they are separate from the freehold. *Mod. Cases*, 170. A man grants all his wood that shall grow in time to come; it is a void grant, not being in esse. 3 *Leon.* 37. A grant de usufructu terre passeth not the freehold; therefore the grantee hath no authority to dig in it by virtue of such a grant. *Ow.* 37. By the grant of lands in the possession of another, it is good if such other be in possession, let the possession be by right, or wrong. 1 *Rel. Rep.* 23. If a grant is general, and the lands granted restrained to a certain vill, the grantees shall have no lands out of the vill. 2 *Rep.* 33. It has been held, that where a grant is made of lands and tenements in D. copyhold lands will not pass; for they cannot pass otherwise than by surrender. *Owen*, 37.

Where lands are certainly described in a Grant, with a recital as granted to A. B. &c. though they were not thus granted, it has been adjudged, that the grant was good. 10 *Rep.* 30. If a first description of lands in a grant is false, notwithstanding the second be true, nothing will pass by it; though if the first be true, and the second false, the grant may be good. 3 *Rep.* 10. The word grant, where it is placed among other words of demise, &c. shall not enure to pass a property in the thing demised; but the grantee shall have it by way of demise. *Dyer*, 56.

Of grants some charge the grantor with something he was not charged with before; others discharge the grantee of something wherewith he was before charged, or chargeable. If a man grant to me a rent-charge; and after I grant to him, that he shall not be sued for this rent; this is good to bar me of bringing an action, though I may still distrain for the rent: And if one grants to his lessee for life or years, that he shall not be impeached for waste; it will be a good discharge, and may be pleaded 7 *H. 6.* 43: *Bro. Grant*, 145: *Keilw.* 88. See 1 *Rep.* 147: 10 *Rep.* 48. and this Dict. tit. *Condition*.

II. Any Natural Person, or Corporate Body, (not prohibited by law, as infants, feme covert, monks, &c.) may make a grant of lands, and be a grantor; and an infant, or woman covert, may be a grantee. Though the infant at his full age may disagree to the grant, and the husband disagree to the grant to his wife. *Perk.* 3, 4, 43. See titles *Infant*: *Baron and Feme*, &c.

But herein the law distinguishes between such grants as are void, and only voidable; the first of which are all such gifts, grants or deeds, made by an infant, which do not take effect by delivery of his hand; as if an infant give a horse, and no delivery of the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void. But if an infant enters into an obligation, makes a feoffment, levies a fine, or suffers a recovery, these are not void, only voidable. *Perk.* §§ 12, 13, 19. See title *Infant*.

A grant by a feme covert is void, for no act of her's can transfer that interest which the inter-marriage has veiled in the husband. See 2 *New Abr.* 648: *Perk.* §6. See title *Baron and Feme*.

Grants made by persons non sane memorie, are good against themselves; but they are voidable by their heirs, &c. A man that is born dumb, or dumb and deaf, if he have understanding, by making signs, he may grant

his land to another; not one who is born deaf, dumb, and blind also. *Co. Lit.* 2. See title *Idiot*. A person attainted of treason, or felony, may make a deed of gift, or grant, and it shall be good against all persons, except the King, and the lord of whom the lands are held; and for relief in prison, they may be good against them likewise. *Co. Lit.* 2: *Perk.* § 26, 31.

The grants of persons under duress are void; that is, if they were made under an apprehension of some bodily hurt, or if the grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such grant. 2 *Inst.* 483. But menacing to burn houses, or spoil or carry away the party's goods, are not sufficient to avoid the grant; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him. 4 *Inst.* 485: *Perk.* § 18. See title *Duress*.

If there be father and son of the same name, and the father grants an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition; yet the grant is good, for he cannot deny his deed. *Perk.* § 37.

There are but few (if any) persons excluded from being grantees, therefore a man attainted of felony, murder, or treason, may be a grantee; so the King's villain, an alien, one outlawed in a personal action, or a bastard, may be grantees. *Perk.* § 48. A bastard who is known to be the son of such a one, may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation. *Co. Lit.* 3. 2 *Rel. Abr.* 43, 4.

A feme covert may be a grantee, therefore if a rent-charge be granted to a feme covert, and the deed is delivered to her without the privity of her husband, and the husband dies before any disagreement made by him, and before any day of payment, the grant is good, and shall not be avoided, by saying, that the husband did not agree, &c. but the disagreement of the husband ought to be shewn. *Perk.* § 43. See title *Baron and Feme*.

Although aggregate Corporations are invisible, and exist only in supposition of law, yet they are capable of taking by grant, for the benefit of the members of the corporation. *Co. Lit.* 9: 1 *Saund.* 344.

GRANTS OF THE KING.—The King's grants are matters of public record: for the King's excellency is so high in the law, that no freehold may be given to, nor derived from him, but by matter of record. *Doct. and Stud.* 6. 1. 2. 8.—To this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the King's grants must pass, and be transcribed and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants whether of lands, honors, liberties, franchises, or aught besides are contained in charters or letters patent; that is open letters, *literæ patentes*; so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom: and are usually directed or addressed by the King to all his subjects at large. And therein they differ from certain other letters of the King, sealed also with his great seal, but directed to particular persons and for particular purposes: which

GRANT OF THE KING.

which therefore not being designed for public inspection are closed up and sealed on the outside, and are thereupon called writs close, *litera clausa*; and are recorded in the close-rolls, in the same manner as the others are in the patent rolls. 2 *Comm.* 346. c. 21.

Grants or letters-patent must first pass by *h.l.*; which is prepared by the Attorney and Solicitor-General, in consequence of a warrant from the crown: and is there signed, that is subscribed at top, with the King's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal Secretary of State: and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, *per ipsum regem, By the King himself*.—Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal* who makes out a writ or warrant thereupon to the Chancery, so that the sign manual is the warrant to the *privy seal*, and the *privy seal* is the warrant to the great seal: and in this last case the patent is subscribed, *per breve de privato sigillo*; *By writ of privy seal*. But there are some grants which only pass through certain offices, as the *Admiralty* or *Treasury*, in consequence of a sign manual, without the confirmation of either the signet, the great, or the *privy seal*. 2 *Comm.* c. 21. See 9 *Rep.* 18: 2 *Inst.* 555.

The manner of granting by the King does not more differ from that by a Subject, than the construction of his grants when made. A grant made by the King *at the suit of the grantee*, shall be taken most beneficially for the King, and against the party; whereas the grant of a Subject is construed most strongly against the grantor. Wherefore it is usual to insert in the King's grants, that they are made, not at the suit of the grantee, but *ex speciali gratia, certa scientia, et mero motu regis*; of the King's special favour, certain knowledge, and mere motion, and then they have a more liberal construction. *Finch L.* 100: 10 *Rep.* 112.

A Subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress and regress to cut and carry away those profits are also inclusively granted; and if a feoffment of land was made by a lord to his vassal, this operated as a manumission, for he was otherwise unable to hold it. *Co. Litt.* 56: *Litt.* § 206. But the King's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant. *Bro. Ab. Patent*, 62: *Finch L.* 110.

When it appears from the face of the grant that the King is mistaken, or deceived, either in matter of fact or of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law, in any of those cases the grant is absolutely void. *Freem.* 172. For instance, if the King grants lands to one and his heirs-male, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be, because it may reasonably be

supposed that the King meant to give no more than an estate-tail: the grantee is therefore, if any thing, nothing more than tenant at will. *Finch*, 101, 2: *Bro. Ab. Estates*, 34: *Patents*, 104: *Dy.* 270: *Dav.* 45: 5 *Rep.* 94: *Moor* 293.

To prevent deceits of the King with regard to the value of estates granted, it is particularly provided by *stat. 1 H. 4. c. 6*, that no grant of his shall be good, unless in the grantee's petition for them, express mention be made of the real value of the lands. Other statutes have also been passed relative to this subject. The King's grantee shall not forfeit for non-payment of rent, where the rent has been answered before process issued. *Stat. 21 Jac. 1. c. 25*. Grants of felons' goods how to be enrolled.—*Stat. 4 & 5 W. & M. c. 22. § 1*. The Crown restrained from granting lands, except for thirty-one years, &c. Forfeited estates excepted. *Stat. 1 Ann. stat. 1. c. 7. §§ 5, 8*. See title *Forfeiture*.

Before the statute de *privativa Regis*, dower, advowsons, and other things, have passed by the general grant of the King; but by that statute they are to be granted in express words. 1 *Rep.* 50.

The King's grant is good for himself and successors, though his successors are not named. *Telv.* 13.

The King may not grant away an estate tail in the Crown, &c. And the law takes care to preserve the inheritance of the King for the benefit of the successor. 2 *And.* 154: *Style* 263: See *Jenk. Cent.* 307. A grant may not be made by the King which tends to a monopoly, against the interest and liberty of the Subject: Nor can the King make a grant *non obstante* any statute made, or to be made; if he doth, any subsequent statute prohibiting what is granted, will be a revocation of the grant. 11 *Rep.* 87: *Dyer* 52. Where the King is restrained by the Common law to make a grant, if he makes a grant *non obstante* the Common law, it will not make the grant good: but when he may lawfully make a grant, and the law requires he should be fully apprised of what he grants, and not be deceived, a *non obstante* supplies it, and makes the grant good: If the words are not sufficient to pass the thing granted, a *non obstante* will not help. 4 *Rep.* 35: *Nels. Abr.* 904. If a grant is made by the King, and a former grant is in being of the same thing, if it be not recited, the grant will be void: And reciting a void grant, when there is another good, may make the King's grant void. *Dyer* 77: *Cro. Car.* 143. And there may be a *non obstante* to a former grant. 5 *Rep.* 94: *Moor*, 293.

The King's grants may be void, by reason of uncertainty; as if debts and duties are granted, without saying in particular what duties, &c. 12 *Rep.* 46. But where there is a particular certainty preceding they shall not be destroyed by any uncertainty or mistake which follows: and there is a distinction where a mistake of title is prejudicial to the King, and when it is in some description of the thing which is supplemental only, and not-material or issuable, 1 *Mod.* 195. The King grants the manor of D. which he has by the attainder of a certain person, &c. and in fact the King hath it not so; this grant is void. 10 *Rep.* 109.

If the King grants a messuage of the value of 5*l.* a year to A. B. and it be of the yearly value of 10*l.* the value being in the same sentence with the grant, will make it void: Though if it be mentioned in another sentence it may be good. *Jenk. Cent.* 261. The grant of the

GROOM.

GROOM-PORTER, An officer or superintendant over the royal gaming-tables; in Latin he is styled *Aule Regie Janitor Primarius*.

GROSS, *Grossus*.] In gross, absolute, intire, not depending on another; as anciently a *villain in gross* was such a servile person as was not appendant or annexed to the Lord, or manor, nor to go along with the tenure as appurtenant to it; but was like the other personal goods and chattels of his lord, at his lord's pleasure and disposal: so also *advowson in gross* differs from *advowson appendant*, being distinct from the manor. *Co. Lit.* 120. See 2 *Comm.* 22.

GROSSE BOIS, Fr. *Gros bois*, i. e. great wood.] Signifies such wood as by the common law or custom is reputed timber. 2 *Inst.* 642.

GROSS, (*COMMON IN*, or *Common at large*.) is such as is neither appendant nor appurtenant, to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property. See tit. *Commons*.

GROSS-WEIGHT, The whole weight of goods or merchandise, dunt and dross mixed with them, and of the chest, bag, &c. out of which *tare* and *tret* are allowed. *Merchant's Dict.*

GROT, Fr.] A den, cave, or hollow place in the ground; also a shady woody place, with springs of water. *L. Fr. Dict.*

GROUNDAGE, A custom or tribute paid for the standing of a ship in a port.

GROUSE, The red and black *beast game*, for preserving of which, no heath, furze or fern shall be burnt on any heaths, moors or other wastes, between the 2d of February and 24th of June. *Stat. 4 & 5 W. & M. c. 23*. See title *Game*.

GROWME. An engine to stretch woollen cloth after it is woven; See the ancient *Stat.* 43 *Ed.* 3. c. 10.

GROWTH-HALFPENNY, A rate so called; and paid in some places for the *tithe* of every fat beast, ox, or other unfruitful cattle. *Clayton's Rep.* 92.

GRUARI, From the Fr. *Gruyer*.] The principal officers of the forest in general.

GUARD, Fr. *Garde*, Lat. *Custodia*.] A custody or care of defence. And sometimes it is used for those that attend upon the safety of the Prince, called the *life guard*, &c. sometimes such as have the education and *guardianship of infants*; sometimes for a *writ touching wardship*, *us droit de garde*, *ejectione de gard*, and *ravissement de gard*. *F. N. B.* 139. See title *Guardian*.

GUARDIAN.

Fr. *Gardein*, Lat. *Custos*, *Guardianus*.] One who hath the charge or custody of any person or thing; but commonly he who hath the custody and education of such persons as are not of sufficient discretion to guide themselves and their own affairs, as children and idiots; (usually the former); being as largely extended in the common law as *Tutor* and *Curator* among the civilians. *Blount*.

GUARDIAN. I.

I. *The several kind of Guardians; who may be Guardians; and how Appointed.*

II. *Of the Guardian's Interest in the Body and Lands of the Ward, and what he may lawfully do, so as to bind the Infant.*

III. *Of the Infant's remedy against the Guardian, and of obliging him to Account.*

I. A *Guardian* is either *legitimus*, *testamentarius*, *datus*, or *custumarius*: he that is a legitimate or lawful *Guardian* is *so jure communi*, or *jure naturali*; the first as *Guardian in chivalry*, in fact; or in right; the other *de jure naturali*, as father or mother: A *testamentary Guardian* was allowed even by the common law; the body of the minor was to remain with him who was appointed, till the age of fourteen; and as for his goods it might be longer, or as long as the testator appointed; *Guardianus datus*, was one appointed by the father in his life-time, or by the Lord Chancellor after the death of the father; and where there is a *Guardianship* by the common law, the Lord Chancellor can order and intermeddle; but where by statute, he cannot remove either the child, or the *Guardian*: *Guardianship by custom*, is of orphans by the custom of London, and other cities and boroughs; and in copyhold manors, by the custom it may belong to the lord of the manor to be guardian himself, or to appoint one. 3 *Salk. Rep.* 176, 177.

The *Guardianships* by the common law, were *Guardians in chivalry*; *Guardians by nature*, such as the father or mother; *Guardians in socage*, who are the next of blood, to whom the inheritance cannot descend, if the father does not order it otherwise; and *Guardian* because of *nurture*, when the father by will appoints one to be *Guardian* of his child. *Co. Lit.* 18: 2 *Inst.* 305: 3 *Rep.* 37.

The several *Guardians* now in use, may be thus enumerated: 1. By Nature; 2. For Nurture; 3. In Socage; 4. By Statute; 5. By Custom of London and other cities and boroughs; (which however, from particular exceptions, do not fall under the general law.) 6. By Election of the Infant; 7. By appointment of the Chancellor; 8. *Ad litem*; 9. By appointment of the Ecclesiastical Court.

1. The Father and (in some cases) the Mother of the child are *Guardians by nature*. For if an *estate* be left to an infant, the father is by common law the *Guardian*, and must account to his child for the profits. 1 *Inst.* 88. But an executor may not pay to a father a *legacy* left to an infant; 1 *P. Wms.* 285. See titles *Executor*: *Legacy*. And with regard to daughters it seems by construction of *Stat. 4 & 5 P. & M. c. 8*, that the father might by deed or will assign a *Guardian* to any woman child under the age of 16; and if none be so assigned, the mother shall in this case be *Guardian*. 3 *Rep.* 39.

The said *Stat. 4 & 5 P. & M.* provides, under severe penalties, as fine and imprisonment for years, "That nobody shall take away any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid, or woman child by his last will and testament, or by any other act in his life-time, hath [appointed] or shall appoint, assign, bequeath, give or grant, the order, keeping, education and governance of such maid or woman child." See this *Dict.* titles *Marriage*: *Rape*.

The

The direct object of the above statute, was to prevent the taking away or marrying maidens under 16, against the consent of their parents. But the statute has prohibited it in terms which imply that the custody and education of such females should belong to the father and mother, or the person appointed by the former. It is observable on this statute that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under 16 generally. See *1 Inst.* 88 *b. n.* 14. For determinations on this statute see *Kitchiff's Ca.*; *3 Co.* 57; *Poph.* 204; *Cro. Car.* 465; *1 Sid.* 362; *2 Mod.* 128; *3 Mod.* 84, 168.

Many books, especially some of modern date, are very indiscriminate when they mention Guardianship by nature. Sometimes the Father is styled Guardian by nature, of his heir apparent, for the time, in general terms; such as at first appear to intimate that no other ancestor except the father, not even the mother, is entitled to the Guardianship in that right: and accordingly *Comyns* makes this inference from the language of the books; though perhaps too hastily. See *Com Dig.* tit. *Guardian*, (C) *3 Co.* 38. *a.* 6 *Co.* 22 *b.*; there cited. In other cases it appears that the father being dead, the mother may have a writ of trespass *quare consanguineum et heredem cepit*; which imports that she may also be Guardian by nature of her heir apparent. The silence in one book as to other ancestors, and the express exclusion of the grandfather in another book, without the necessary explanation, tend to an opinion that all ancestors, except the father and mother, are really excluded. See *1 Inst.* 84 *b.*; *6 Co.* 22 *b.* However in another place it appears that the grandfather and other ancestors may be Guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be postponed to others, where the father is not, both they and the mother have a title distinguishable from his, in point of inferiority. *3 Co.* 38 *a.* Further, some modern books do not confine Guardianship by nature to heirs apparent, but denominate the father and mother the natural Guardians of all their children: and sometimes even the parents of illegitimate issue, seem to have been treated as their natural Guardians. *1 Fern.* 158 *2 Atk.* 15, 70; *9 Mod.* 117. Sometimes also the Guardianship of female children under 16, as impliedly given to the father and mother, by the above mentioned *stat. 4 & 5 P. & M. c. 8*, is said to be *jure nature*. See the *stat. & 3 Co.* 38 *b.*

On the whole it seems, that not only the Father but also the Mother and every other ancestor may be Guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the first title to Guardianship by nature, the mother the second: as to other ancestors, if the same infant happens to be heir-apparent to two, perhaps priority of the possession of the person of the infant might probably be allowed to decide the question. While the tenure by Knight's service continued there was another difference, which more strongly marked the superiority of the father's claim: for he was intitled to the custody of the infant's person even against the Lord in chivalry; a preference not allowed to the mother or other relations, and this diversity appears to reconcile the determinations in the old books, which apply only to cases in which the

right to the infant's person was in contest with the Lord in chivalry. *3 Co.* 38 *b.* *Ratcliffe's Ca.* According to the first language of our law, only an heir apparent can be the subject of Guardianship by nature: which restriction is so true that it hath even been doubted, whether such Guardianship can be of a daughter whose heirship, though denominated *apparent*, yet being liable to be superseded by the birth of a son, is in effect rather of the *presumptive* kind. *3 Co.* 38 *b.*; *1 Inst.* 84 *a.* Therefore when the term of Guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to its legal sense, but must be understood to have reference to some rule independent of the common law; as the dictates of nature, and the principles of general reason. Yet we must not however conclude that parents have not a right to the custody of their other children, for the law gives them this custody till the age of 14 by the Guardianship for nurture, next mentioned, which though it differs from that by nature, not only in name, but also in duration, and some other particulars, is founded on a like conformity to the order of nature. *1 Inst.* 88 *b. n.* 12.

This Guardianship by nature continues till the infant attains the age of 21; it extends no further than the custody of the infant's person. *Carth.* 386; *1 Inst.* 84. It yields, as to the custody of the person, to Guardianship in socage, where the title to both Guardianships concur in the same individuals. *1 Inst.* 88 *b.* (See *post* 3.) but Guardianship in socage ending at 14, it seems that after that age the father, or other ancestor having a like title to both Guardianships becomes Guardian by nature till the infant's age of 21. See *Carth.* 384. Lastly the father may disappoint the mother and other ancestors of the Guardianship by nature, by appointing a testamentary Guardian under the *stat. 4 & 5 P. & M. c. 12 Car. 2.* See *post* 4.

2. Guardians for nurture are of course the Father or Mother till the infant attains the age of 14 years. *Moor.* 738; *3 Rep.* 38. In default of father or mother the Ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. *2 Jones*, 90; *2 Lev.* 163. See *post* 9. This Guardianship by nurture, only occurs where the infant is without any other Guardian; and it has been said that none can have it except the father or mother. *8 B. 4. 7 b.* *Bro. Gard.* 70; *3 Co.* 38. It extends no further than the custody and government of the infant's person; and determines at 14 in the case both of males and females. *ibid.* *Comyns* refers to *Fluta*, as if according to that ancient book, grandfathers and great grandfathers might be Guardians by nurture. But the statute cited by him doth not point at this species of Guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the *Roman Law*; nor will it bear the least application to Guardianship as our own law regulates it. *1 Inst.* 88 *b.* in *n.* 13. *ad fin.*

3. Guardians in Socage, are also called Guardians by the common law. Wardship is incident to tenure in socage, but of a nature very different from that which was formerly incident to knight-service. For if the inheritance descend to an infant under 14, the wardship of him does not, nor ever did, belong to the lord of the fee: because in this tenure no military or other personal service being required, there was no occasion for the lord to take the

profits in order to provide a proper substitute for his infant tenant. See this Dict. title *Tenure*.

This kind of Guardianship takes place only when the minor is entitled to some estate in lands; and then by the common law the Guardianship devolves upon his Next-of-kin, to whom the inheritance cannot possibly descend; as where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the Guardian. *Litt. § 123*. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. 1 *Comm. c. 17*. And though this provision has been considered as arising from harsh and barbarous principles, experience shews that it is founded in sound policy and humanity. See 2 *P. Wms. 262*: 1 *Inst. 88*.

Guardianship in socage, like that in chivalry, springs wholly out of tenure. It is for this reason that the title to it cannot arise, unless the infant is seized of lands, or other hereditaments, lying in tenure, holden by socage. 1 *Inst. 87 b*. Like Guardianship in chivalry, it is deemed to take place on a descent only, though the contrary has been argued. 2 *Mut. 176*. The title to this Guardianship is without any distinction between the whole and the half blood. If there are two or more disinterested relations in equal degree, he who first gains possession of the heir shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands both by descent *ex parte paternâ* and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side first seizing the infant is entitled to the custody of his person; and the custody of the lands coming *ex parte paternâ* goes to the maternal heir, and *vice versa*. Should, however, the infant derive lands by descent in such a way, as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former, it seems unsettled who shall have the Guardianship. If the person entitled to be Guardian in socage is himself under custody of a Guardian, the latter is entitled to the custody of both, to the former in his own right, and to the latter *per cause de Ward*, that is, in right of his wardship of the former; A species of Guardianship distinct from all others above enumerated. And it seems that only Guardian in chivalry and in socage could be Guardian *per cause de Ward*. See 2 *Ro. Ab. 35, 40*: *Vaugb. 184*.

Guardianship in socage, being wholly for the infant's benefit and not in any respect for the Guardian's profit, is not a subject either of alienation, forfeiture or succession, as Wardship in chivalry was; and consequently if the Guardian in socage becomes incapable or dies, the Wardship devolves on the person next in degree of kindred to the infant, not being inheritable to him. Some ancient cases seem to shew that under certain circumstances Guardianship in socage might be assignable. See *F. N. B. 143. P.*: *Fitz. Ab. Garde 161*. But according to the doctrine and practice of later times, the acknowledged qualities of Guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, they are not consistent with its being assignable; and there is Lord

Chief Justice *Vaugb.*'s authority for saying, that even in his time common experience proved the contrary. See *Plowd. 293*: *Vaugb. 181*: *Gill. Rep. Eq. 177*.

This Guardianship extends not only to the person and socage-estates of the infant, but also to his hereditaments not lying in tenure; and even to his copyhold estates, unless there is a special custom for the Lord's appointing a Guardian of them. 1 *Inst. 87 b*: 2 *Ro. Ab. 40*: *Egleston's Ca. Hutt. 17*: 2 *Lutw. 1181*. But whether the Guardian in socage is intitled to take into his custody the infant's personal estate, is not ascertained by any express authority. It seems however that personalty is included except where by the custom of a particular place it happens to be liable to a different custody: and this opinion is founded on the idea that the custody of an infant's person draws after it the custody of every species of property for which the law hath not otherwise provided: which receives some countenance from the instances of copyholds, and hereditaments not lying in tenure: for including which it will be difficult to account by any other reason than that above given for including personalty. It is also strongly confirmed by the manner in which the *Stat. 12 C. 2. c. 24*, regulates the power of the Guardian, which it enables a father to appoint: after authorising such Guardian to take the custody of the infant's *personal estate*, as well as of his lands, tenements, and hereditaments, it provides that he may bring such action or actions in relation thereunto, as by law a Guardian in common socage might do; words almost necessarily importing that the personal estate is equally an object of the custody of Guardian in socage with the infant's real property; though a contrary opinion is hinted by *Vaugb. C. J.* See *Vaugb. 186*.

Guardianship in socage is superseded both as to the body and lands, if the father exercises his power, of appointing a testamentary or other Guardian according to *Stat. 12 C. 2. c. 24*. (See *post. 4*.) And regularly it ends, when the infant whether male or female, attains 14: though some say that this must be understood only where another Guardian, either by election of the infant or otherwise, is ready to succeed; and that the Guardianship in socage continues in the mean time. *Andr. 313*. At that age however it seems the heir may oust the Guardian in socage and call him to account for the rents and profits. *Litt. § 123*: *Co. Litt. 89*. It was in this particular of Wardship as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. See *tit. Tenure*. But as the Wardship ceased at 14, this disadvantage attended it; that young heirs being left at so tender an age to choose their own Guardians till 21, might make an improvident choice. Therefore when almost all the lands in the kingdom were turned into socage tenures, by the *Stat. 12 Car. 2. c. 24*, that statute, gave the power of appointing the testamentary Guardian next mentioned. If no such appointment be made, the Court of Chancery will frequently interpose, and name a Guardian, to prevent an infant heir from improvidently exposing himself to ruin. 2 *Comm. 88. c. 6*. See *post. 7*.

4. The *Statute 12 Car. 2. c. 24*, considering the imbecility of judgment in children of the age of 14, and the abolition of Guardianship in chivalry; (which lasted till 21. See *post. 11*;) enacts, that any Father, under age or of full age, may by deed or will attested by two witnesses, dispose

dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion till such child attains the age of 21. These are called Guardians by statute; or Testamentary Guardians.

The substance of this Parliamentary regulation is, that the father shall have the power, though under 21.—That he shall have it as to all his children under 21, and unmarried at his decease, or born after.—That he may appoint any person except popish recusants.—That the appointment may be either in possession or remainder.—That he may appoint the Guardianship to last till 21; or any less time.—That the appointment shall be effectual against all claiming as Guardians in socage or otherwise.—That the Guardian so appointed shall have ravishment of ward or trespass, and recover damages for the Ward's benefit.—That the Guardian shall have the custody of the infant's estate both real and personal, and have the same actions in relation to them as a Guardian in socage.—Finally, that the statute shall not prejudice the custom of London, or any other city or corporate town. For cases on the construction of this statute, See *Vin. Ab. and Com. Dig. tit. Guardian*. The nature of this new kind of Guardianship, which the statute professedly models after that in socage, except as to duration, is particularly discussed in the case of *Bedell v. Constable*; *Vauqb. 177*; and in Lord *Skeffsbury's Case*, 2 P. Wms. 102; *Gilb. 172*.

A father cannot appoint Guardians under this statute to a natural child; but where he has named Guardians by his will to an illegitimate child, the Court of Chancery will appoint the same persons Guardians without any reference to a master for his approbation. 2 Bro. C. R. 383.

Though there is no decided case that Guardians can be appointed for a child, by a *Stranger*, during the life of the parent, yet the law will take care that the child shall be educated according to his expectations; in cases where the child is benefited by the will, &c. of such stranger. See *Powell v. Clever*, 2 Bro. C. R. 500.

A grandfather cannot appoint Guardians to his grandson under this statute: but he may give his estate to him on condition that certain persons be his Guardians; and if the father of the legatee do not submit to the will, the Chancery will make the father's opposition work a forfeiture of his son's estate. *Ambl. 306*.

5. We may here just mention that there is another species of *customary Guardianship* besides that in London and certain cities and boroughs; where by the special custom of a manor the Lord names, or is himself the Guardian of an infant copyholder. See *Com. Dig. tit. Copyhold. (K. 5)*.—The nature of this Guardianship, depends wholly on the custom of the particular manor; and though it is not expressly saved by the *Stat. 12 Car. 2*; yet it has been held that the father's appointment of the custody of his child under that statute, will not extend to copyhold estates. 2 Lutw. 1181; 3 Lev. 395; *Comb. 253*.

6. The right of *electing* a Guardian by an infant, arises only when from a defect in the law, (or rather in the execution of it,) the infant finds himself wholly unprovided with a Guardian. This may happen either before 14, when the infant has no such property as attracts a Guardianship by tenure, and the father is dead without having executed his power of appointment, and there is no mother; or after 14, when the custody of the Guar-

dian in socage terminates, and there is no appointment by the father under the *Stat. 12 Car. 2*. Lord *Coke* only takes notice of such election where the infant is under 14; and as to this omits to state how, and before whom it should be made; see 1 *Inst. 87 b*; nor does this defect seem supplied by any prior or cotemporary writer. As to a Guardian after 14, it appears from the ending of Guardianship in socage, at that age, as if the common law deemed a Guardian afterwards unnecessary. However since the *Stat. 12 Car. 2. c. 24*, it has been usual in defect of an appointment under the statute, to allow the infant to elect one for himself; and this practice appears to have prevailed even in some degree before the Restoration. Such election is said to be frequently made before a Judge on the circuit. 1 *Ves. 475*. But this form does not seem essential. The late Lord *Baltimore*, when he was turned of 18, having no Testamentary Guardian, and being under the necessity of having one for some special purposes relative to his proprietary government of *Maryland*, named a Guardian by deed; a mode adopted by the advice of Counsel.—It seems in fact as if there was no prescribed form of an infant's electing a Guardian after 14, any more than there is before, and therefore election by parol, though unsolemn, might be legally sufficient. The deficiency in precedents on this occasion is easily accounted for; this kind of Guardianship being of very late origin, unnoticed as it seems by any writer before *Coke* except *Swinburn*; (*Testam. edit. 1590 97 b*;) and there being yet no cases in print to explain the powers incident to it, or whether the infant may change a Guardian so constituted by himself. *Coke*, though professing to enumerate the different sorts of Guardianship, omits this in one place; whence perhaps it may be conjectured that in his time it was in strictness scarcely recognised as legal. 1 *Inst. 88 b. in n.*

7. As to Guardian by appointment of the Lord Chancellor; it is not easy to state how this jurisdiction was acquired: It is certainly of no very ancient date, though now indisputable. The first instance of such a Guardian, appointed on petition without bill, was in the year 1696, in the case of one *Hampden*. But since that time the Court of Chancery has exercised this power, without its being once called in question; therefore in the case of *Lady Teynham v. Leonard*, in *Dom. Proc. An. 1724*, the Counsel for the respondent stated it as a thing fixed, that the Lord Chancellor was entrusted with that part of the Crown's prerogative, which concerned the Guardianship of infants. Bro. P. C. Under the same idea too, the marriage Act, *Stat. 26 Geo. 2. c. 33. (§ 11)*, refers to the Chancellor for the appointment of a Guardian, to consent to marriage, where the infant is without a Guardian and the mother is not living. 1 *Inst. 88 b. in n.* See also 1 Bro. C. R. 356. The Court never appoints a Guardian to a woman after marriage. 1 *Ves. 157*.

8. All Courts of Justice have a power to assign a Guardian to an infant to sue, or defend actions, if the infant comes into court and desires it: or a Judge at his chambers, at the desire of the infant, may assign a person named by him to be his Guardian; but this last is no record until entered and filed by the clerk of the rules; *F. N. B. 27. L: 1 Inst. 88 b. n. (16): 135 b. n. (1): 1 Lil. 656: 2 Lpm. 238*. And this is called a Guardian *ad litem*. See title *Equity*.

Guardian by appointment of the Ecclesiastical Court seems now perfectly insignificant, and merely on a par with other Guardians *ad litem*. The right of appointment is however claimed by that Court, as to personal estate; and, if there is no other Guardian by tenure or otherwise, for the person also; but the following detail will show with how little effect.

Seivburne takes notice of such a Guardian; but confines his observations on the appointment, and his extent of power, to the custom within the province of York. *Tessam. 1st ed. c. 9 b.* In a case in the court of K. B. Lord Hale admitted the right of the Ecclesiastical Court to appoint a Curator of the personal estate; and after that Judge's death the Court inclined to the same opinion. 2 *Lev. 162: 7. Jo. 90.* In another case, soon after, the same court allowed the right as to the infant's portion but denied it over the person. 3 *Keble. 384.* In the next case, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law, used and approved in England, if any person by his will devises any goods to his children, the Ordinary before whom the will is proved hath used to commit the custody of the sons and their portions till 14, and of the daughters and their portions till 12, except where they are in the custody of any other by reason of tenure, or by the father's appointment: and if any person detained such infants, or their portions, the Ordinary hath also used to compel the delivery of them by Ecclesiastical censures. 2 *Lev. 217.* But on a demurrer this plea was over-ruled, and the prohibition ordered to stand, the latter being founded on the libel in the suit in the Ecclesiastical Court, which had stated the right in a more extensive way, viz. that by the Ecclesiastical Law, every person having the tuition of any infant under age, by the will of the father, or *per judicem competentem*, ought to have the custody of the infant and suit in the Ecclesiastical Court for the detainer. After this case nothing appears in the books on the subject for a long time, but a cursory notice by *Lee, J.* of the Ecclesiastical Court's appointment without objection, saying the course of that court is, that if the infant is under seven years of age, they choose a Curator, but if he is seven, he chooses. *Fitzgib. 164.* By a loose note of a later case it appears that Lord Hardwicke said, that only Guardians *ad litem* can be appointed by the Ecclesiastical Court. 14 *Fin. Abr. 176. pl. 7. in n.* In another case however, reported more at length, the same Judge reprobated it as a presumption in the Ecclesiastical Court to appoint a Guardian of the person and estate, and declared their appointment except when a suit was depending to be an interference with his power as Chancellor; and even recommended to the Attorney General to consider whether a *quo warranto* would not lie in such a case against the Ecclesiastical Court. 3 *Atk. 631.* In a subsequent case in B. R. (*Miss Cutler's*) the power of appointment in the Ecclesiastical Courts was considered as confined to Guardians *ad litem*, and therefore perfectly insignificant. 3 *Ent. 1436.* See 1 *Inst. 88 b. in n.*

The above recapitulation, as to Guardians, is exclusive of any thing relative to the Royal family. See the arguments in the case on the King's right, in respect to the education and marriage of his grand-children, which was referred to the Judges in the reign of Geo. I. *Forr. 401.* See also the *Stat. 12 Geo. 3. c. 11*; and this *Dict. tit. King.*

The following miscellaneous observations may serve further to illustrate the above propositions:

Guardianship is a thing cognisable by the temporal courts, where a devise is made of it, which courts are to judge whether the devise be pursuant to the statute. 1 *Vent. 207.*

The husband of a woman under age cannot disavow a Guardian made by the court for his wife. 1 *Kent. 185.* An infant, it is said, cannot revoke the authority of the Guardian: but the court may discharge one Guardian, and assign another at their discretion; and the justices of Nisi prius, &c. may assign a new Guardian. *Palm. 252: Style 456: Noy. 49: 1 Danv. Abr. 604.*

The eldest son of the half blood shall be Guardian in socage, to a son by a second yenter; and when the minor attains the age of fourteen years, he may chuse his Guardian before a judge, at his chambers, or in court, or in the Chancery. *Cro. Jac. 219.* Though a father is Guardian by nature, yet a man may be Guardian to an infant against his father, for prevention of waste; which is a forfeiture of Guardianship. *Hard. 96.*

If a woman hath issue a son by a former husband, and marries a second husband, seized of socage lands, by whom she has issue another son, and the husband and wife die, leaving the second son under fourteen, his brother of the half blood shall be Guardian in socage; as next of kin, to whom the inheritance cannot descend. *Cro. Eliz. 825: 2 And. 171: Moor 635: 2 Jon. 17.*

An infant, idiot, lunatick, non compos, one blind and dumb, deaf and dumb, or leper removed, cannot be Guardian in socage. *Co. Lit. 88 b.*

It is clearly agreed, That the King, as *pater patriæ*, is universal Guardian of all infants, idiots and lunaticks, who cannot take care of themselves; and as this care cannot be exercised otherwise than by appointing them proper curators or committees, it seems also agreed, that the King may, as he has done, delegate the authority to his Chancellor; therefore at this day, the court of Chancery is the only proper court which hath jurisdiction in appointing and removing Guardians, and in preventing them and others from abusing their persons or estates. 2 *Inst. 14: 4 Co. 126: Staundf. Præ. 37.* See title *Idiots and Lunaticks*, and ante 7.

And as the Court of Chancery is now invested with this authority, hence in every day's practice we find that court determining, as to the right of Guardianship, who is the next of kin, and who the most proper Guardian; as also orders are made by that court on petition, or motion, for the provision of infants during any dispute herein; as likewise Guardians removed or compelled to give security; they and others punished for abuses committed on infants, and effectual care taken to prevent any abuses intended them in their persons or estates; all such wrongs and injuries being reckoned a contempt of that court, it having by an established jurisdiction, the protection of all persons under natural disabilities. 2 *Mod. 177.*

II. THOUGH Guardianship in Chivalry is now abolished by *Stat. 12 C. 2. c. 24*, already so often mentioned; it may be useful as well as curious to consider the following summary concerning it. See 1 *Inst. 88 b; n. 11.*

This guardianship could only be where the estate vested in the infant by descent.—All males under 21 at the ancestor's death were liable to it; but not females unless they were under 14.—It extended not only to the

the person of the infant, but also to all such of his lands and tenements as were within the Guardian's feignory; and if the King was Guardian in respect of a tenure *in capite*, then to the whole of the infant's estate of whomsoever holden, whatever the tenure; and whether lying in tenure or not.—If the infant heir held lands by knight's service of several lords, each had the wardship of the land within his feignory; and as to the body, the wardship of it belonged to that lord of whom the tenure was most ancient, he being styled the lord by priority, and the others lords by posteriority: but if any lands of the infant were holden of the King by knight's service *in capite*, he was intitled to the wardship both of the infant's body and all his lands so held of the crown or of others by knight's service.

This guardianship continued over males till 21, over females till 16 or marriage, when it determined; if the tenure were of a Subject, the heir might enter on the lord immediately; but if the King had the wardship, then the heir was not entitled to take possession of the land without suing for livery to the Crown, which was a process both nice and expensive. See 1 *Inst.* 77 a.—I. had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the father where the infant was his heir apparent; even the mother being excluded.—It entitled the lord to make sale of the marriage of the infant, subject only to the restriction of not disparaging; and if the infant refused the marriage tendered by the lord, or married after such a tender and against the lord's consent; in the former case the infant was liable to the payment of a sum equal to the value of the marriage, that is to the profit which the lord might have made by the sale of it; in the latter case, the heir female paid the same sum as for a refusal, but the heir male was charged the double value, which was called a forfeiture of marriage.—The Guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant.—Lastly, Guardianship in chivalry being deemed more an interest for the profit of the Guardian, than a trust for the benefit of the Ward, was saleable and transferrable like the ordinary subjects of property, to the best bidder; and if not disposed of was transmissible to the lord's personal representatives.

The above general explication of the nature of wardship in chivalry may well excite a strong idea of the evils necessarily incident to it: and it is natural to wonder how this species of Guardianship should be patiently endured for several centuries after the conquest, and even remain unaltered by any effectual checks to soften its rigour till it was wholly taken away at the Restoration; the true period when Britons gained more real liberty, than any other that can be named in history; by no means even excepting the Revolution: and of this proposition the *Habeas-corpus-act* and the statute for abolishing tenures are most pregnant proofs; statutes both made in the reign of Car. II. and as far preferable to the vaunted *Bill of rights*, as practical liberty is to theoretical doctrines.

Perhaps the facility of evading this Guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost

necessarily incident to it. Various modes of preventing the descent were practised. One was enfeoffing the heir in the ancestor's life-time: another, the enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See *Stat. Mulebridge*, 52 H. 3 c. 6; 2 *Inst.* 109. When these modes were declared to be fraudulent, and therefore checked by the said statute, a third more fit to attain the same end succeeded; for *uses* and *trusts* being invented, and Guardianship in chivalry being only of *legal* estates, it became the fashion to make *trustments* to *uses*, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent, instead of becoming the legal tenant, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. VII, when the Legislature thought proper once more to interfere, in favour of the lord, and made the heir of *cestui que use* liable to wardship in chivalry. See *Stat.* 4 Hen. 7. c. 17; 1 *Inst.* 84 b; 2 *Inst.* 110. For some time after this there seems to have been no other means of preventing wardship in chivalry than the ancestor's making a lease for life, with remainder to his heir apparent in fee; but this protection of wardship in chivalry was soon followed by a great diminution of its profits, for in the succeeding reign the statutes of Wills gave the power of devising, so as to deprive the lord of the wardship of two thirds of the land holden by knight's service: in which contracted state this odious species of Guardianship was suffered to languish, till it was entirely abolished, with the other oppressive appendages of military tenures, by the famous statute 12 Car. 2. c. 24.—See 2 *Inst.* 110, 111: *Smith's Rep. Angl. (English edit.)* b. 3 c. 5; *Staunf. P. C.* 4 *Inst.* 188: *Crompt. Jurisd.* 112 a.—125: *Mad. Exch.* 221: *Ley on Wards*, and *Liv.* 1 *Inst. lib.* 2. c. 4: and the abridgments tit. *Garde and Gardian*.

Guardian in Socage shall make no waste, nor sale of the inheritance, but keep it safely for the heir: and where there hath been some doubt of the sufficiency of a Guardian in socage, the Chancery hath obliged him to give security. 2 *Mod.* 177. Also a Guardian may be ordered to enter into security by recognisance, nor to suffer a female infant to marry whilst in his custody; and to permit other relations to visit her, &c. 2 *Lev.* 128. And the court of Chancery will make such Guardian give security not to marry the infant without the court is first acquainted with it. 2 *Chan. Rep.* 237.

Before the *Stat.* 12 Car. 2. c. 24. Tenant in socage might have disposed of his land, in trust for the benefit of the heir; but it is said he could not devise or dispose of the Guardianship or custody of the heir from the next of kin to whom the land could not descend, because the law gave the Guardianship to such next of kin. *Kirke.* 186. But now tenant in socage may nominate whom he pleases to have the custody of the heir; and the land shall follow the Guardianship, as an incident given by law to attend the custody; and such special Guardian cannot assign the custody by any act, the trust being personal; nor shall it go to the executor or administrator of the Guardian, but determines by his death. *Taugh.* 180: *Dyer.* 189.

As the law hath invested *Guardians* not with a bare authority only, but also with an interest till the *Guardianship* ceases; so it hath provided several remedies for *Guardians* against those who violate that interest: at Common-law there were remedies both droiturel and possessory, to recover the *Guardianship*. 2 *Inst.* 90: 9 Co. 71.

A *Guardianship* of a minor is an interest in the body and lands, &c. of one within age. *Guardians* to infants, appointed by the court to sue, may acknowledge satisfaction upon the record, for a debt recovered at law for the infant. *Trin.* 23 Car. 2. B. R. A *Guardian* in socage may keep courts, in the infant's manors, in his own name, grant copies, &c. He is *dominus pro tempore*, and hath an interest in the lands. *Cro. Jac.* 91. Such *Guardian* may let the land for years, and avow in his own name and right; and his lessee for years may maintain ejectment: but he cannot present to an advowson, for which he may not lawfully account; and the infant must present of whatsoever age. *Cro. Jac.* 98, 99. Though it is said, if the infant be within the age of discretion, his *Guardian* may present. 8 E. 2. 10. See 1 *Inst.* 89 a; and this *Dict. tit. Advocat.*

In another place Lord Coke extends the doctrine so far as to say that the infant shall present whatsoever his age may be. 3 *Inst.* 136. But some suppose the *Guardian* to have the right of presenting in the name of the infant, in general; others admit the right of the infant; but add that if he be of such tender years as not to have any discretion, then the *Guardian* should present for him. *Fin. Abr. tit. Guardian* 2 pl. 2. But the law seems now settled in the full extent of Lord Coke's opinion; by a determination of Lord Chancellor King. An advowson was conveyed to trustees on trust to present such person as the grantor his heirs and assigns should by deed appoint: and, on the principle that an infant of any age may present, the Chancellor confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the *Guardian* guided the child's hand in making his mark and putting his seal. 2 *Eq. Ab.; Infant B* pl. 3: *Fin. Abr.*; *Collat. An. A. pl.* 10. and see 3 *Aik.* 710. It still remains however undecided whether the want of discretion might not induce a court of equity to controul the exercise of this right by an infant, in case a presentation should be obtained without the concurrence of his *Guardian*. 1 *Inst.* 89 a. in n. 1.

A *Guardian* for nurture of the minor, appointed by will, hath power to make leases at will only. *Co. Eliz.* 678, 734. A testamentary *Guardian* cannot make a lease of the infant's lands; but such lease is absolutely void. 2 *Willf.* 129, 135. *Guardians* are to take the profits of the minor's lands, &c. to the use of the minor, and account for the same: they ought to sell all moveables in a reasonable time, and turn them into land or money, except the minor is near of age, and may want such goods himself: and they shall pay interest for money in their hands, which might have been put out at interest; in which case it shall be presumed the *Guardians* made use of it themselves. 3 *Salk.* 177.

III. THE POWER and reciprocal duty of a *Guardian* and Ward are the same *pro tempore* as that of a parent and child; but the *Guardian* when the Ward comes of age is bound to give him an account of all that he has trans-

acted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contents with young gentlemen, it has become a practice for many *Guardians*, of large estates especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction and accounting annually before the officers of that court. And that court in case any *Guardian* abuses his trust will check and punish him, and sometimes proceed to the removal of him and appoint another in his stead. 1 *Sid.* 424: 1 *P. Wms.* 703. See 1 *Comm.* 463. c. 17, and ante I. 7.

At Common-law, both a prohibition of waste, and an action of waste, lay against a *guardian* in chivalry and a *guardian* in socage, for voluntary, but not for permissive waste, or waste done by a stranger: 2 *Inst.* 305.

By the Common-law, *guardians* in socage are accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit. *Co. Lit.* 87. And so is one who is *Guardian* by nature after the infant's age of 21. See ante I. 1; and 1 *Inst.* 886. n. 9. But the *Guardian* on his account, shall have allowance of all reasonable expences; and if he is robbed of the rents and profits of the land, without his default or negligence, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity. *Co. Lit.* 89 a.

But against a testamentary or other *Guardian*, whose authority doth not determine till the infant is 21, or being a female attains that age or marries, the infant cannot have action of account before; for the rule of the Common-law is that account shall not lie while the *Guardianship* continues. But in equity the infant may by *prochein amis* sue his *Guardian* for an account during the minority. 2 *Vern.* 348: 2 *P. Wms.* 119: 1 *Vez.* 91: 3 *Aik.* 621.

A *Guardian* cannot be charged in account as a receiver: because then he would lose his costs and expences: these it is said being in general allowed only to *Guardians* and bailiffs and not to receivers. See 1 *Inst.* 89 a: n. 2; 172 a.

If a *Guardian* takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it. 2 *Chan. Rep.* 97. If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. 1 *Eq. Abr.* 280. A receiver to the *Guardian* of an infant, who has had his account allowed him by the *Guardian*, shall not be obliged to account over again to the infant when he comes of age. *Preced. Chan.* 535.

A *Guardian* shall answer for what is lost by his fraud, negligence or omission; but not for any casual events, as where the thing had been well but for such an accident. *Litt.* 123. By statute *Mag. Cart.* 9 H. 3. c. 3, *Guardians* were to retain the lands till the heir comes of age, and then restore the same as fully stocked, &c. as received, By *stat.* 6 An. c. 18, Persons who are *Guardians* or trustees for infants holding over, without the consent of the person next intitled, shall be adjudged trespassers, and be accountable for profits, &c. By *stat.* 4 Ann. c. 16. § 27, Action of account may be brought against the executors or administrators of a *Guardian*, &c.

FORM of ELECTION of a GUARDIAN by a MINOR.

K NOW all Men by these presents, That I A. B. of and heir, of, &c. deceased, being now about the age of eighteen years, have elected and chosen, and by these presents do elect and chuse C. D. of &c. to be Guardian of my person and estate, until I shall attain the age of twenty-one years, and I do hereby promise to be ruled and governed by him in all things touching my welfare; and I do authorise and empower the said C. D. to enter upon and take possession of all and every my messuages, lands, tenements, hereditaments and promises whatsoever, situate, lying and being in, &c. in the county of, &c. or elsewhere, whereunto I have or may have any right or title, and to let and set the same, and receive and take the rents, issues and profits thereof, for my use and benefit, during the term aforesaid; giving and hereby granting unto the said C. D. my full power in the said premises; and whatsoever he shall lawfully do or cause to be done in the premises, by virtue hereof, I do hereby promise to ratify and confirm. In witness, &c.

As to Orphans under the custom of London, See that title.

GUARDIAN DE L' ESTEMARY, The Guardian or warden of the *Stannaries*, or mines in the county of Cornwall, &c. See title *Stannaries*.

GUARDIANS DE L' EGLISE, Churchwardens. See that title.

GUARDIANS OF THE PEACE, Those that have the keeping of the peace; wardens or conservators thereof. *Lamb. Eiven. lib. 1. c. 3.* See title *Justices of the Peace*.

GUARDIAN (OR WARDEN) OF THE CINQUE PORTS. A Magistrate that hath the jurisdiction of the ports or havens, which are commonly called the *Cinque Ports*, who has there all the authority and jurisdiction the Admiral of England has in places not exempt: and *Camden* believes this *Warden of the Cinque Ports* was first erected among us in imitation of the Roman policy, to strengthen the sea coasts against enemies, &c. *Camd. Br. 238.* See title *Cinque Ports*.

GUARDIAN OF THE SPIRITUALTIES, The person to whom the spiritual jurisdiction of any diocese is committed, during the vacancy of the see, is called by this name. See *stat. 25 H. 8. cap. 21.* and also *stat. 3 E. 1. c. 21*, in which the word *Guardian* seems applicable to this officer. The Archbishop is Guardian of the Spiritualties on the vacancy of any see within his province; but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are Guardians of the Spiritualties, viz. the spiritual jurisdiction of his province and diocese is committed to them. *2 Rol. Abr. 22, 223.* The Guardian of the Spiritualties it is said may be either Guardian in law, *jure magistratus*, as the archbishop is of any diocese in his province; or Guardian by delegation, being he whom the archbishop or vicar general doth for the time appoint. The Guardian of the Spiritualties hath all manner of ecclesiastical jurisdiction of the courts, power of granting licences and dispensations, probate of wills, &c. during the vacancy, and of admitting and instituting clerks presented; but such Guardians cannot, as such, consecrate or ordain, or present to any benefices. See *stat. 13 Elix. c. 12: Wood's Inst. 25, 27.*

GUARDIAN OF THE TEMPORALTIES. [*Temporarium.*] The person to whose custody a vacant see or abbey was committed by the King.—Who as steward of the goods and profits was to give an account to the escheator, and he unto the Exchequer.—His trust continued till the vacancy was supplied, and the successor obtained the King's writ *de restitutione temporarium*, which was usually after consecration. *Dist.*

GUEST, Sax. *Gest*, Fr. *Gist*. a stage of rest in a journey. A lodger or stranger in an inn, &c. See titles *Inns* and *Innkeepers*.

GUIDAGE, *Guidagium*.] An old legal word, signifying that which is given for safe conduct through a strange land, or unknown country. *Est guidagium quod datur alicui, ut tuto conducatur per terram alienius. Consuetud. Burgund. p. 119: 2 Inst. 526.*

GUILD, from Sax. *Gildan*, to pay.] A fraternity or company, because every one was *gildare*, i. e. to pay something toward the charge and support of the company. The original of these guilds and fraternities is said to be from the old Saxon law, by which neighbours entered into an association and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured, for which purpose they raised a sum of money among themselves, and put into a common stock, whereout a pecuniary compensation was made according to the quality of the offence committed. From hence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them: though at this day they are a company combined together, with orders and laws made by themselves, by the prince's licence. *Camd.*

Gilda Mercatoria, or the *Merchants' Guild*, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land, &c. within their own precinct. *37 Ed. 3: 15 R. 2. King Ed. III.* in the 14th year of his reign, granted licence to the men of *Cowert* to erect a *Merchants' Guild*, and also a fraternity of brethren and sisters, with a master or warden, and that they might make chantries, bestow alms, do other works of piety, and constitute ordinances touching the same, &c. And *King Hen. IV.* in the 4th year of his reign gave licence to found a *Guild of the Holy Cross* at *Stratford upon Avon*. *Antiq. Warwicksh. 119, 522.* *Guild*, or *Gild*, is also used for a tribute, or tax, an amercement, &c. *27 Ed. 3: 11 H. 6: 15 Car. 2.* See *Geld*; and more fully title *Corporation: Londn.*

GUILD HALL, The chief hall of the city of London, for the Meeting of the Lord Mayor and Commonalty of the city, making laws and ordinances, holding of courts, &c. *Gildarum nomine continentur non solum minores fraternitates, sed ipse etiam civitatum communitates. Spelm.* It also signifies the chief hall of other cities and corporate towns; the *Sessions-hall* in *King-Street, Westminster*, is called the *Guild-hall*.

GUILDHEDA TEUTONICORUM. The fraternity of *Easterling* merchants in London, called the *Still-yard*. See *Stat. 22 Hen. 8. c. 8.*

GUILD-RENTS, Rents payable to the crown, by any guild or fraternity; or such rents as formerly belonged to religious Guilds, and came to the crown at the general dissolution of monasteries, being ordered to be sold by the *Stat. 22 Car. 2. cap. 6.*

GUILDER, A Foreign coin: the German guilder is 3 s. 8 d. and the golden one in some parts of Germany 4 s. 9 d. In Portugal it passes for 5 s. but the Poland and Holland guilder is but 2 s. In Holland, merchants keep their accounts in Guilders, &c.

GULE or **AUGUST**, *Gula Augusti, Goule d' Aout.*] The day of St. Peter ad Vincula, which is celebrated on the 1st of August, and called the Gule of August, from the Lat. *Gula* a throat; for this reason, (as pretended) that one *Quirinus*, a tribune, having a daughter that had a disease in her throat, went to Pope Alexander, (the sixth from St. Peter,) and desired of him to see the chains that St. Peter was chained with under Nero, which request being granted, she the said daughter kissing the chains, was cured of her disease; whereupon the Pope instituted this feast in honour of St. Peter; and, as before, this day was termed only the *calends of August*, it was on this occasion called indifferently either St. Peter's day ad Vincula, from what wrought the miracle, or the *Gule of August*, from that part of the virgin whereon it was wrought. *Durand's Rationale Divinorum, lib. 7. cap. 19.* It is mentioned F. N. B. 62: *Plowd. 316: Stat. Westm. 2. cap. 30.*

GUNS. See titles *Arms: Game.*

GUNPOWDER. It is lawful for all persons, as well strangers as natural born subjects, to import any quantities of Gunpowder or salt-petre, brimstone, and other materials for the making thereof, and to make and sell Gunpowder, &c. *Stat. 16 Car. 1. cap. 21.*

To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, incurs the penalties of *præmunire* by *Stats. 16 Car. 1. c. 21: 1 Jac. 2. c. 8.*

The *Stat. 12 Geo. 3. c. 61*, reduces into one and repeals all former acts relative to the making, keeping, and carrying of Gunpowder.

By this act it is provided, that no person shall make gunpowder but in the regular manufactories, established at the time of making the statute, or licensed by the Sessions pursuant to the provisions in § 13, &c. on forfeiture of the Gunpowder and 2 s. per pound, § 1.—*Pestle mills* not to be used; on the like penalty, § 2.—Only 40 pounds of powder to be made at one time under one pair of stones; except *battle-powder* a fine sowing powder so called, made at *Battel* and elsewhere in *Suffex*, §§ 3. 5.—Not more than 40 hundred weight to be dried at one time in one stove. § 6.—only the quantity absolutely necessary for immediate use to be kept in or near the place of making, except in brick or stone magazines 50 yards at least from the mill, § 7. All Gunpowder makers to have a brick or stone magazine near the *Thames* below *Blackwall* to keep the Gunpowder when made, on penalty of 25 l. per month; and 5 l. a day for not removing it when made; with all possible diligence. § 8. Charcoal not to be kept within 20 yards of the mill, § 10.—No dealer to keep more than 200 pounds of powder, nor any person not a dealer more than 50 pounds, in the cities of *London* and

Westminster or within 3 miles thereof; or within any other city, borough or market town or one mile thereof; or within two miles of the King's palaces or magazines, or half a mile of any parish church; on pain of forfeiture and 2 s. per pound; except in licensed mills; or to the amount of 300 pounds for the use of collieries within 200 yards of them. § 12.—§§ 13, 14, 15, 16, contain provisions respecting the licensing mills, building magazines, &c.—Not more than 25 barrels to be carried in any land carriage, nor more than 200 barrels by water (unless going beyond sea or coastwise;) each barrel to contain not more than 100 pounds.—Various means are directed for the safe conveyance, in both cases, and to prevent all danger and delay, § 18.—22. Justices of peace may search mills, houses, carriages, &c. § 23.—Outward bound ships to take in, and homeward bound to discharge their gunpowder at or below *Blackwall*; and be searched by the officers of the *Trinity house*. § 24, 5. Penalties to be recovered before two justices; and prosecutions to be within 14 days, § 26, 7.—General exceptions are made as to his majesty's mills, storehouses and magazines; and as to powder sent with the army or militia; and exported or carried coastwise below *Blackwall* § 29, 30.

It seems that erecting powder mills, or keeping magazines near a town is a nuisance at Common-law, punishable by indictment or information. *Sira. 1169:* And see § 15, of the above mentioned statute.

GURGITES, Wears. *Black Book Hereford, f. 20.* See *Gorce.*

GUTI AND **GOTTI**, Eng. *Goths*, called sometimes *Juta*, and by the Romans *Getae*, is derived from the old word *Jet*, which signifies a *Giant*: they were one of those three nations or people who left Germany, and came to inhabit this island. *Lrg. Edw. Confess cap. 35.*

GUTTERA, A gutter or spout to convey the water from the leads and roofs of houses: and there are *gutter-tiles*, especially to be laid in such gutters, &c. mentioned in the *Stat. 17 Ed. 4.* See title *Bricks.*

GWABR MERCHED, A British word, which signifies a payment or fine, made to the lords of some manors, upon the marriage of their tenant's daughters; or otherwise on their committing incontinency. See *Marchett.*

GWALSTOW, Sax.] A place of execution: *omnia gwalltowa, i. e. occidendorum loca, totaliter regis sunt in Joca sua.* *Lrg. H. 1. cap. 11.*

GYLPUT, The name of a court held every three weeks, in the liberty or hundred of *Pathberw* in the county of *Warwick.* *Inquisit. 13 Ed. 3.*

GYLIWITE, A compensation or amends for trespass, &c. *Multa pro transgressionibus.* LL *Edgar. Regis, Ann. 964.*

GYPSIES, See tit. *Egyptians.*

GYROVAGI, Wandering monks, who pretending great piety left their own cloisters, and visited others. *Matt. Paris. p. 490.*

H.

HABEAS CORPUS,

THE SUBJECT'S WRIT OF RIGHT, in cases where he is aggrieved by illegal imprisonment: Founded on the Common law, and secured by various statutes; of which the last and most powerful, the *stat. 31 Car. 2. c. 2.* is emphatically styled THE HABEAS CORPUS ACT; and is at least next in importance, if not indeed as relates to modern times, superior in its beneficial effect, to *Magna Charta*. See 2 *Inst* 55, 615: 4 *Inst.* 182: *Cro Jac.* 543: 2 *Ro Ab.* 69: *Com. Journ.* April 1st, 1628.

Next to *Personal Security* the law of England regards, asserts, and preserves, the *personal Liberty* of individuals against all imprisonment or restraint, unless by due course of law.—This is a right strictly natural, and the laws of England have never abridged it without sufficient cause; nor can it ever be abridged in this kingdom at the mere discretion of the magistrate, without the explicit permission of the laws.—The language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. *Mag C c. 29* And many subsequent old statutes expressly direct that no man shall be taken or imprisoned by suggestion or petition to the King or his Council, unless it be by legal indictment, or the process of the Common law. See *Stats. 5 E. 3. c. 9*: 25 *E. 3. R. 5. c. 4*: 28 *Ed. 3. c. 3*. By the *Petition of Right*, 3 *Car. 1.* it is enacted that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law.—By *stat. 16 Car. 1. c. 10*, if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the King's Majesty in person, or by warrant of the council board, or of any of the privy council, he shall upon demand of his counsel have a writ of *Habeas Corpus*, to bring his body before the court of King's Bench or Common Pleas; who shall within three court days determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by the *Habeas Corpus Act*, *stat. 31 C. 2. c. 2.* the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no Subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer: And lest this act should be evaded by demanding unreasonable Bail or sureties for the prisoner's appearance, it is declared by *stat. 1 W & M R. 2. c. 2.* that excessive bail ought not to be required. 1 *Comm.* 135. c. 1.

Of great importance to the Public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, Magistrate to imprison arbitrarily, whenever he or his officers thought proper, there would soon be an end of all other rights and immunities.

And yet sometimes when the State is in real danger, even this measure may be necessary. But the happiness of our Constitution is, that it is not left to the Executive Power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only, or Legislative Power, consisting of King, Lords and Commons, that, wherever it sees proper, can authorize one branch of it, the Crown, by suspending the *Habeas Corpus Act* for a short and limited time, and in certain specified particulars, to imprison suspected persons without giving any reason for so doing. An experiment which ought only to be tried, and which we believe has never been tried, but in cases of extreme emergency: and in these the nation parts with a portion of its liberty for a while in order to preserve the whole for ever. See 1 *Comm. c. 1*: 136,—and this Dict. title *Government*; *ad fin.*

Having said thus much in general we may pursue our enquiries under the following heads.

- I. *The Nature, various kinds, and Effects of this Writ.*
- II. *Further, by whom, and in what cases, it is grantable.*
- III. *What shall be a Proper return of such Writ.*
- IV. *Of Bailing, Discharging or Remanding a Prisoner, brought up on a Habeas Corpus.*

For other matters connected with this subject see this Dict. titles *Bail*; *Commitment*; *Arrest*; *Gaoles*, &c. and as to the *Habeas corpus Furatorum*, See title *Jury*. 1.

I. THE WRIT of *Habeas Corpus* is the most celebrated writ in the English law. Various kinds of it are made use of by the courts at Westminster for removing prisoners from one court into another for the more easy administration of justice.

One of those is the *Habeas corpus ad respondendum*, when a man hath a cause of action against one, who is confined by the process of some inferior court; in order to remove the Prisoner and charge him with this new action in the court above, 2 *Mol.* 198. For inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue in another court; but it seems, that regularly a person confined in B. R. cannot be removed to C. B. by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have consueance as well of local, as transitory actions. *Dyer* 197 a: 249. pl. 84; 296, 307: 1 *Med.* 235: *Styl. Prae. Reg.* 330.

The *Habeas corpus ad satisfaciendum*, is used when a Prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. 2 *Lill. Prae. Reg.* 4.

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*On this writ the attorney for the plaintiff must endorse the number roll of the judgment on the back of the writ. *Style Regis.* 331.

Habeas Corpus upon a *cepi*, where the party is taken in execution in the court below—So upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *Habeas Corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the King's writ. *Dist.*

Of the same nature are writs of *Habeas Corpus ad prosequendum, ad faciendum, deliberandum, &c.* which issue when it is necessary to remove a prisoner, in order to *prosecute, or bear testimony* in any court, or to be *tried* in the proper jurisdiction wherein the fact was committed. See *Sty. Reg.* 331, 119, 126, 230: *Comb.* 17, 48.

Lastly, as relates to writs of *Habeas Corpus* for these confined purposes, may be mentioned the common writ *ad faciendum et recipiendum*; which issues only in civil cases out of any of the courts in *Westminster Hall*, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer; whence this writ is frequently denominated an *Habeas Corpus cum causa*; to do what *recipere* whatsoever the King's court shall consider in that behalf.—In this case the body is to be removed by *Habeas Corpus*; but the proceedings, by *certiorari*. 3 *Bac. Abr.* This is a writ grantable of common right without any motion in court; and instantly supercedes all proceedings in the court below. 2 *Mod.* 306. But in order to prevent the surreptitious discharge of prisoners, it is ordained by *Stat. 1 & 2 P. & M. c. 13*, that no *Habeas Corpus* shall issue to remove any prisoner out of any gaol, unless signed by some Judge of the Court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by *Stat. 21 Jac. 1. c. 23*, that where the Judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *Habeas Corpus* or other writ, after issue or demurrer deliberately joined—That no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of 5*l.*—But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards; (when by the course of the Court the *Habeas Corpus* removed both actions together;) it is therefore enacted by *stat. 12 Geo. 1. c. 29*, that the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the same defendant to a greater amount. And by *stat. 19 Geo. 3. c. 70*, no cause under the value of 10*l.* shall be removed by *Habeas Corpus*, or otherwise, into any superior court unless the defendant so removing the same shall give special bail for payment of the debt and costs. See 3 *Comm.* c. 8.

No writ of *Habeas Corpus*, or other writ to remove a cause out of an inferior court, shall be allowed, except delivered to the Judge of the court, before the jury to try the cause have appeared, and before any of them are sworn. *Stat. 3 Eliz. cap. 5.*

See further, *Impey's Practice in K. B.* as to the mode of suing out a *Habeas Corpus* for the purpose of removing a Debtor to the King's Bench prison.

But the *Great and efficacious Writ* in all manner of illegal confinement, is that of *HABEAS CORPUS AD SUBJICIENDUM*: directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*; to do, submit to, and receive whatsoever the Judge or court awarding such writ shall consider in that behalf. 8 *St. Tr.* 142.

This is a high prerogative writ, and therefore, by the Common law, issuing out of the court of *King's Bench*, not only in term time, but also during the vacation, by a *fiat* from the Chief Justice or any other of the Judges; and running into all parts of the King's dominions: for the King is at all times entitled to have an account why the liberty of any of his Subjects is restrained, whenever that restraint may be inflicted. *Cra. Jac.* 543. If it issues in vacation, it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and then it may be returned in Court. *Burr.* 856, 460, 542, 606.

If the party were privileged in the Courts of *Common Pleas* and *Exchequer*, as being, or supposed to be, an officer or suitor of the Court, this *Habeas Corpus ad subjiciendum* might also by Common-law have been awarded from thence. 2 *Inst.* 55: 4 *Inst.* 290: 2 *Hal. P. C.* 144: 2 *Vent.* 22. And if the cause of imprisonment were palpably illegal, they might have discharged him. *Vaugb.* 155. But if he were committed for any criminal matter, they could only have remanded him or taken bail for his appearance in the Court of *K. B.* which occasioned the *Common Pleas* for some-time to discountenance such applications. *Carter* 221: 2 *Jon.* 13. But since the *Stat. 16 Car. 2. c. 10*, above recited, expressly mentioned the Courts of *K. B.* and *C. P.* as co-ordinate in this jurisdiction, it hath been holden that every Subject of the kingdom is equally entitled to the benefit of the Common law writ in either of those courts at his option. 2 *Mod.* 198. It hath also been said that the like *Habeas Corpus* may issue out of the Court of Chancery in vacation; but upon the famous application to Lord Nottingham by *Jenks*, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his Lordship refused it. See 4 *Inst.* 182: 2 *Hal. P. C.* 147: 3 *Comm.* 132. c. 8.

In the *King's Bench* and *Common Pleas* it is necessary to apply for it by motion to the Court, as in the case of all other prerogative writs; (as *Certiorari*, *Prohibition*, *Mandamus*, &c;) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. 2 *Mod.* 306: 1 *Lev.* 1. For, as was argued, by Lord Chief Justice *Vaughan*, "it is granted on motion because it cannot be had of course; and there is therefore no necessity to grant it: for the Court ought to be satisfied that the party hath a probable cause to be delivered." 2 *Jon.* 13. And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. *Cra. Jac.* 543. So that if it issued of mere course, without shewing to the court or Judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the

HABEAS CORPUS. I.

the King's service, a wife, a child, a relation, or a domestick confined for insanity or other prudential reasons might obtain a temporary enlargement by suing out an *Habeas Corpus*, tho' sure to be remanded as soon as brought up to the Court. And therefore *Coke* when Chief Justice did not scruple to deny a *Habeas Corpus* to one confined, by the Court of Admiralty, for piracy; there appearing on his own shewing sufficient grounds to confine him. 3 *Bullst.* 27; and see 2 *Ro. Rep.* 138. On the other hand if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *Habeas Corpus* is then a *Writ of Right* which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained tho' it be by command of the King, the privy council, or any other." *Com. Journ.* Ap. 1, 1628. See 2 *Inst.* 615.

The personal liberty of the Subject, as has been already observed, is a natural inherent right which cannot be surrendered or forfeited, unless by the commission of some great and atrocious crime; and which ought not to be abridged in any case without the special permission of law. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's protection impossible: but the glory of the *English* law consists in clearly defining the times, the causes, and the extent, when, wherefore, and in what degree, the imprisonment of the Subject may be lawful. 'Tis it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the Court upon an *Habeas Corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.—Yet early in the reign of *Charles I.* the Court of *K. B.* determined that they could not upon an *Habeas Corpus* either bail or deliver a prisoner, tho' committed without any cause assigned, in case he was committed by the special command of the King, or by the Lords of the privy council. 7 *St. Tr.* 156. This drew on a parliamentary enquiry, and produced the *Petition of Right* 3 *Car. I.* already mentioned; which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. Some evasions however of this statute, in favour of the Crown, gave rise to the *stat.* 16 *Car. I. c. 10.* already stated; and even after this some shifts and devices, not very creditable to the Judges of that time, were made use of to the same unpopular end. See 3 *Comm.* 134, 5; § 8.

Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain State Prisoners in custody. But whoever will attentively consider the *English* History may observe, that the flagrant abuse of any power, by the Crown or its ministers, has always been productive of a struggle which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *HABEAS CORPUS ACT*,

31 *Car. 2. c. 2*; which is frequently considered as another *Magna Charta* of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs, (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of Law and Liberty.

The *Statute* itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime; (unless committed for Treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any *petit* treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process;) the Lord Chancellor or any of the twelve Judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement,) award a *Habeas Corpus* for such prisoner, returnable immediately before himself, or any of the Judges; and upon the return made, shall, within two days, discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of Judicature.—2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them.—3. That the writ shall be returned, and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days; upon tender of the charges not exceeding 1s. per mile, and security by his own bond to pay the charges of his return, if remanded, and not to escape.—4. That any officer or keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason on authority (specified in the act) shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office.—5. That no person once delivered by *Habeas Corpus*, shall be recommitted for the same offence on penalty of 500*l.*—6. That every person committed for Treason or Felony shall, if he requires it, the first week of the next term, or the first day of the next session of *Oyer and Terminer*, be indicted in that term or session, or else admitted to bail; unless the King's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person after the assizes shall be opened for the county, in which he is detained, shall be removed by *Habeas Corpus*, till after the assizes are ended; but shall be left to the justice of the Judges of assize.—7. That any such prisoner may move for and obtain his *Habeas Corpus*, as well out of the Chancery or Exchequer, as out of the King's Bench or Common Pleas; and the Lord Chancellor or Judges denying the same, on sight of the warrant, or oath that the same is refused, shall forfeit severally to the party grieved, the sum of 500*l.*—8. That this writ of *Habeas Corpus* shall run into the counties Palatine, Cinque-ports, and other privileged places, and the islands of *Jersey* and *Guernsey*.—9. That no inhabitant of *England* (except persons contracting, or convicted praying, to be transported; or persons having committed some capital offence in the place to which they are sent

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to be tried;) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the King's dominions: on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l.* to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of perjury; and shall be incapable of the King's pardon.

This is the substance of that great and important statute, which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *Habeas Corpus* at common law. But even upon writs at the common law it is now expected by the Court, agreeable to ancient precedents, and the spirit of the act of Parliament, that this writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. 4 *Burr.* 8.6.

By all these admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of Government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. 3 *Comm.* 135, 8; c. 8.

II. IT IS CLEAR, that both by the Common law, as also by the statute, the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *Habeas Corpus*, and that without any privilege in the person for whom it is awarded; but it seems, that by the common law the court of King's Bench could only have awarded it in term time, but that the Chancery might have done it as well out of as in term, because that court is always open. 2 *Inst.* 55: 4 *Inst.* 290: 2 *And.* 297: 2 *J. n.* 13, 14, 17. Any of the courts at Westminster may award it. See *Vaugh.* 155; and the *Habeas Corpus Act*; *Ante* I.

If the *Habeas Corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful, he may bail him; but then it must be to appear in the court of King's Bench, for the Chancellor hath no power in criminal causes; or the Chancellor may commit the party to the Fleet, and in term time may *proprio manibus* deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge, or commit the prisoner. 2 *Hal. Hist. P. C.* 247: 2 *Harw. P. C.* 114, 115.

No *Habeas Corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324. Nor for a prisoner of war, the subject of a Neutral Power, taken in the enemy's service, into which he was forced, when taken prisoner by them in an English ship. 2 *Burr.* 765.

If sailors on board a ship are to be produced as witnesses, and have been served with a subpoena, and say they will not attend; a *Habeas Corpus ad testificandum* may be applied for to the Chief Justice, on affidavit of that fact, and that they are material witnesses; but without which no *Habeas Corpus* can issue. *Cowp.* 672.

The Court thought there could be no *Habeas Corpus* to bring up a prisoner at war to be a witness. Lord Mansfield said the presence of witnesses who are prisoners of war, was generally obtained by an order from the Secretary of State; and an application was made for a *Habeas Corpus* to bring up such a prisoner, but without success. Afterwards a rule was granted to shew cause why the defendant should not consent either to admit of the fact of the capture, or that the prisoner should be examined upon interrogatories. *Dougl.* 420. (403) *Furley v. Newham.*

Besides the efficacy of the writ of *Habeas Corpus* in liberating the Subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband, or a father; but when women or infants are brought before the Court by a *Habeas Corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to chuse where they will go; and if there be any reason to apprehend they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. See 2 *Burr.* 1434; where all the prior cases are considered by Lord Mansfield. See also 1 *Black. Rep.* 386: *Str.* 982: 2 *Lord Raym.* 1354: 4 *Burr.* 1391.

If a party be imprisoned against law, though he is intitled to a *Habeas Corpus*, yet he may have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causa* 2: 9 *H. 6.* 44*a*: 2 *Inst.* 55: 10 *H. 7.* 17: 5 *Co.* 64: 11 *Co.* 98, 99.

If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the *Habeas Corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *Habeas Corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; therefore, although upon the *Habeas Corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment; and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *Habeas Corpus* give any judgment, without the record itself be removed by *certiorari*: but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist. P. C.* 210, 211: 1 *Salk.* 352: *Comb.* 2.

If the Chief Justice of the King's Bench, commit one to the Marshall by his warrant, he ought not to be brought to the bar by rule, but by *Habeas Corpus*. 1 *Salk.* 349.

III. In extrajudicial commitments, the warrant of commitment ought to be returned *in hæc verba* on a *Habeas Corpus*: but when a man is committed by a court of record, it is in the nature of an execution for a contempt, and in such case the warrant is never returned,

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5 *Mod.* 156. The cause of imprisonment must be particularly set forth in the return of the *Habeas Corpus*, or it will not be good, for by this the court may judge of it; and with a *paratum habeo*, that they may either discharge, bail, or remand the prisoner. 2 *Nels. Abr.* 915: *Cro. Jac.* 543. If a commitment is without cause, or no cause is shewn, a prisoner may be delivered by *Habeas Corpus*. 1 *Salk.* 348.

It has been adjudged, that on a commitment by the House of Commons, of persons for contempt and breach of privilege, no court can deliver on a *Habeas Corpus*: but *Holt Ch. J.* was of a contrary opinion. 2 *Salk.* 404, 503. See this Dict. tit. *Bail II: Commitment* — A writ of error may be allowed by the King in such a case, &c. and it is not to be denied *ex debito justitiæ*; though it has been a doubt, whether any writ of error lay upon a judgment given on a *Habeas Corpus*. 2 *Silk* 404, 503. A man may not be delivered from the commitment of a court of *Oyer* and *Terminer*, by *Habeas Corpus*, without writ of error: and where there appears to be good cause, and a defect only in the form of the commitment, he ought not to be discharged. 1 *Salk.* 348.

For a false return there is regularly no other remedy against the officer, than an action on the case at the suit of the party grieved, and an information or indictment at the suit of the King. 6 *Mod.* 90: 1 *Salk.* 349. But no action lies until the return be filed. 1 *Salk.* 352.

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law, or against it; so the officer or party in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof, the day, cause of caption, and detainer. *Vaugb.* 137.

Where a man is committed for any crime either at common law or by act of Parliament, for which he is punishable by indictment, a return that he was committed, *et discharged by due course of law*, is good. But if the commitment be in pursuance of a special authority, the terms of the commitment must be special and exactly pursue that authority; and therefore if it do not appear on the return to have been according to that authority, the return will be bad. 2 *Black Rep.* 806, 7.

It seems to be agreed, that no one can in any case controvert the truth of the return to a *Habeas Corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. *Cro. Eliz.* 821: 5 *Co.* 71 b. 2 *Hawk. P. C. c.* 15. § 78.

It seems, that, before the return filed, any defect in form, or the want of an averment of a matter of fact, may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment. 1 *Mou.* 102, 103.

But after the return is filed, it becomes a record of the court, and cannot be amended. 1 *Mod.* 102, 103.

IV. UPON THE RETURN of the *Habeas Corpus* the prisoner is regularly to be discharged, bailed or remanded; but if it be doubtful which the Court ought to do, it is said that the prisoner may be bailed to appear *de die in diem* till the matter is determined. 5 *Mod.* 22: *Style* 16.

By the Petition of Right, 16 *Car.* 1. *cap.* 10, already mentioned, the court must within three days after the return of the *Habeas Corpus*, either discharge, bail or remand the prisoner. But it seems that a commitment by the court of King's Bench to the Marshalsea, is a remanding, being an imprisonment within the statute. 5 *Mod.* 22.

Also it hath been ruled, that the court of King's Bench, may, after the return of the *Habeas Corpus* is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely. 1 *Vint.* 330.

And though in doubtful cases the court is to bail, or discharge the party on the return of the *Habeas Corpus*, yet if a person be convicted, and the conviction on the return of the *Habeas Corpus* appears only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error. 1 *Salk.* 348: 5 *Mod.* 19, 20.

If a person be committed by the Admiralty in execution, he is not removable by *Habeas Corpus* into *B. R.* to answer an action brought against him there; but it might be otherwise if an action had been before depending. 1 *Salk.* 351. Where there is an action in *B. R.* precedent to the King's suit, on which the party is out on bail, *Habeas Corpus* may be brought by the bail, &c. and the prisoner turned over; though this was greatly opposed in favour of the King's execution. *Ibid.* 353.

If the Steward of an inferior court proceeds, after an *Habeas Corpus* delivered and allowed, the proceedings are void; and the court of *B. R.* will award a *superfedeas*; and grant an attachment against the steward for the contempt. *Cro. Car.* 79, 296. An *Habeas Corpus* suspends the power of the court below, so that if they proceed, it is void, and *coram non judice*. And on a *Habeas Corpus*, if the record be filed, no *procedendo* can go to the court below; but where a record below is not filed, or not returned, it may be granted. 1 *Salk.* 352.

A *Habeas Corpus cum causâ* removes the body of the party for whom granted, and all the causes depending against him; (but see *stat.* 12 *Geo.* 1. *c.* 29. *ante* I.); and if upon the return thereof the officer doth not return all the causes, &c. it is an escape in him. 2 *Lil. Abr.* 2. A judge will not grant a *Habeas Corpus* in the vacation, for a prisoner to follow his suits; but the court may grant a special *Habeas Corpus* for a prisoner to be at his trial in the vacation-time. *Ibid.* 3. And the court may grant a *Habeas Corpus* to bring a prisoner, not in prison on execution, out of prison, to be a witness at a trial; though it is at the peril of the party suing out the writ, that the prisoner do not escape. *Style* 119. And where there is no collusion, even a prisoner in execution may be brought up as a witness. 3 *Burr.* 1440. But no person ought to take out a *Habeas Corpus* for any one in prison, without his consent; except it be to turn him over to *B. R.* or charge him with an action in court. 2 *Lil.* A man brought into *B. R.* by *Habeas Corpus*, shall not be removed thence till he has answered there; he shall be detained until then, and after he may be removed. 1 *Salk.* 350.

A person is in custody upon a criminal, and also on a civil, matter; if he would move himself by *Habeas Corpus*, there

There ought to be but one *Habeas Corpus* on the crown side or plea side, and both causes are to be returned. *Mod. Cas.* 133. If there be judgment against a defendant in the court of *B. R.* and another in *C. B.* on which he is in execution in the *Fleet*, he may have an *Habeas Corpus* to remove himself into *B. R.* where he shall be in custody of the Marshal for both debts. *Dyer*, 132.

Where an action is founded on the custom of *London*, for a thing actionable there, and not elsewhere; if it be removed by *Habeas Corpus*, a *procedendo* shall be granted: but the declaration itself ought to be returned upon the *Habeas Corpus*, and then the court will see what was the cause, &c. For the special matter and all the proceedings are to be in the return in this case; as well as in an action on a by-law, to take notice thereof. *Cartb.* 75, 76. Before a *Habeas Corpus* is returned and filed, it may be amended; but not afterwards. 2 *Lil. Abr.* 2.

A *feme covert* was arrested in *London*, as a *sole-trader*, and discharged, by a judge of *B. R.* on *Habeas Corpus*, bail being put in to appear in *B. R.* The next term, on motion, the court granted a *procedendo*, affidavit of plaintiff's cause of action, &c. being made; for plaintiff could only proceed in *London*. See *Lavinia v. Phillips*; 3 *Bur.* 1776; wherein the reason of the *procedendo* being granted, is fully discussed and determined.

HABENDUM. See title *Dead II.* 4.

In a lease or grant to two persons, if the *habendum* be to one for life, and the remainder to the other for life, this alters the general implication of the jointenancy, which would pass by the premises, if the *habendum* were not. 2 *Rep.* 55. And where things which lie in grant are conveyed, to take effect barely on delivery of the deed of grant, without other ceremony; in such case, if the *habendum* be for a less estate than in the premises, or be repugnant to it, the *habendum* is void: but when any ceremony is requisite to the perfection of an estate granted, and not a bare delivery only of the deed; and to the estate limited by the *habendum*, nothing is required to perfect it; there, though the *habendum* is of a less estate than the premises, the *habendum* shall stand good, and qualify the estate granted in the premises. 2 *Rep.* 23.

An *habendum* may not only qualify what is granted in the premises; but may also enlarge what it thus granted, or explain the premises: though the *habendum* shall never introduce one who is a stranger to the premises. 1 *Jones* 4; 3 *Leon.* 60. If a bargain and sale be made without expressing to whom, although it were *habendum* to *A. B.* who is a party to the deed, it is not good; because the *habendum* is only to limit an estate, and not to give any thing. *Co. Eliz.* 585 903; 2 *Ed.* 8: If one thing be granted in the premises of a deed, *habendum* with another thing, which is not appendant, &c. this other thing shall not pass. *H.b.* 161, 172. None can take by any deed, who is not named in the premises; but though an estate limited by the *habendum* to a man that is no party, is void by way of estate, it may be good in remainder. *H.b.* 313; *Godb.* 51.

HABENTIA, Riches: In some ancient charters, *habentes homines* is taken for rich men; and we read, *Nec Rex suum pastum requirat, vel habentes homines quas nos dictimus seallung men.* *Mon. Angl.* tom. 1 p. 100.

HABERDASHERS. If any persons work *bats* with foreign wool, and not having served an apprenticeship to the trade, &c. they shall forfeit the goods and 5*l.*

And no person may dye any *caps* with bark, &c. but only with copperas and gall, or woad and madder. *Stat.* 8 *Eliz.* cap. 7. None shall make *bats* or *felts*, that hath not served seven years in *felt-making*; nor retain any but journeymen who have lawfully served; or have above two apprentices at once, and those not for less than seven years time, &c. on pain of 5*l.* a month: but *bat-makers* may employ their own children in the trade.— And the masters and wardens of *Haberdashers* in *London*, calling to them one of the company of *Cappers*, and another of the *Hat-makers*, and mayors, &c. of towns and corporations, may search all *batters* and punish them that offend, by fines. *Stat.* 1 *Jac.* 1. c. 17. To prevent the exportation of *bats* out of the plantations abroad, which may be seized, and offenders are liable to 500*l.* penalty; and for regulating the trade of *bat-making* there; &c. See *Stat.* 5 *Geo.* 2. c. 28, and this Dict. title *Navigation Acts*.

HABERE FACIAS POSSESSIONEM, A judicial writ that lies where one hath recovered a term for years in action of *ejectione firme*, to put him into possession. *F. N. B.* 167. And one may have a new writ, if a former be not well executed. *Mich.* 21 *Car.* 1. *B. R.* A sheriff delivered possession in the morning, by virtue of an *habere facias possessionem*, and some time in the same day, after he was gone, the defendant turned the plaintiff out of possession; it was held, that if he had been turned out immediately, or whilst the sheriff or his officers were there, an attachment might be granted against the defendant; for this had been a disturbance in contempt of the execution; but it being several hours after the plaintiff was in possession, the court doubted, but agreed to grant a new *habere facias*, &c. 2 *Salk.* 321.

If the sheriff deliver possession of more than is contained in the writ of *habere facias possessionem*, an action on the case will lie against him, or an assize for the lands. *Style* 238. The sheriff cannot return upon this writ that another is tenant of the land by right, but must execute the writ, for that will not come in issue between the demandant and him. 6 *Rep.* 52. See this Dict. titles *Ejectionment*: *Execution*.

HABERE FACIAS SEISINAM. A writ directed to the sheriff, to give *seisin* of a freehold estate recovered in the King's courts, by *ejectione firme*, or other action. *Old Nat. B.* 154. The sheriff may raise the *posse com tatus* in his assistance, to execute these writs: and where a house is recovered in a real action, or by *ejectment*, the sheriff may break open the doors to deliver possession and *seisin* thereof; but he ought to signify the cause of his coming, and request that the doors may be opened. 5 *Rep.* 91. This writ also issues sometimes out of the records of a fine, to give the cognisee *seisin* of the land whereof the fine is levied. *West. Symb. par.* 2. And there is a writ called *Libere Facias Seisnam*, ubi *Rex habuit annum, diem & noctem*; for the delivery of lands to the Lord of the fee, after the King hath had the year, day, and waste in the lands of a person convicted of felony. *Reg. Orig.* 156. See title *Execution*.

HABERE FACIAS VISUM, A writ that lies in divers cases in real actions, as in *formadon*, &c. where a view is required to be taken of the lands in controversy. *Reg. Jud.* 20, 28, &c. *F. N. B.* See title *Jury*.

HABERGEON, From Germ. *Hals*, Collar, & *Bergen*, to gird. An helmet which covered the head and shoulders. *Blount*.

HABERJECTS,

HABERJECTS, *Habergates*.] A sort of cloth of a mixed colour, mentioned in *Magna Charta* cap. 26.

HABILIMENTS or WAR, Armour, utensils, or provisions for the maintaining of war. *3 Edw. cap. 4.*

HABLE, Fr.] A sea-port town; this word is used in *Stat. 27 H. 6. cap. 3.*

HACHIA, A hack, pick, or instrument for digging. *Placit. 2 Ed. 3.*

HACKNEY COACHES AND CHAIRS. See *Coach*.

HADBOTE, Sax.] A recompence or amends for violence offered to persons in holy orders. *Sax. Dist.*

HADE or LAND, *Hada terræ*.] Is a small quantity of land, thus expressed:—*Sursum reddidit in manus domini duas acras terræ continentes decem seliones Et duas Hadas, Anglica ten ridges, and two hades, &c. Rot. Cur. Maner. de Oileton, Anno 16 Jac.*

HADERUNGA, Respect or distinction of persons; from the Sax. *Hud*, *Persona*, and *Arung*, honoured and admired. *Leg. Ethelred.*

HADGONEL, Sax.] Seems to be a tax or mulct.—*Mon. Ang. par. 1. fol. 302.*

HÆREDE PRODUCTO, A writ that anciently lay for the Lord, who having by right the wardship of his tenant under age, could not come by his body, the same being carried away by another person. *Old Nat. Br. 93.*

HÆREDE DELIBERANDO ALTERI, QUI HABET CUSTODIAM TERRÆ, A writ directed to the sheriff to require one that had the body of him who was ward to another, to deliver him to the person whose ward he was, by reason of his land. *Reg. Orig. 161.*

HÆREDE RAPTO, Also a writ; see *Ravishment of Guard*. *Reg. Orig. 163.*

HÆREDIPETA, The next heir to lands.—*Leg. H. 1. cap. 70.*

HÆRETICO COMBURENDO, A writ that lay against an *Hæretick*, who having been convicted of *heresy* by the bishop, and abjured it, afterwards fell into the same again, or some other, and was thereupon delivered over to the secular power. *F. N. B. 69.* By this writ, grantable out of Chancery, upon a certificate of such conviction, *Hæreticks* were burnt; and so were likewise witches, forcerers, &c. But the writ *de hæretico comburendo* lies not at this day. *12 Rep. 93. Stat. 29 Car. 2. c. 9.* See title *Heresy*.

HAFNE, *Danish*, A haven or port.] *Hafne Courts* are granted *inter alia*, by letters patent of Rich. duke of Glouc. admiral of England. *14 Aug. Anno. 5 Edw. 4.*

HAGA, Sax. *Manſio*.] A house in a city or borough. *Domesday*. An ancient anonymous author, expounds *haga* to be a house and shop, *domus cum shopa*; and in a book which belonged to the *Abby of St. Austin* in Canterbury, mention is made of *bagan monachus*, &c. See *Co. Lit. 56.*

HAGIA, Sax. *Hæg*, melted into *hay*, whence *haia*.] A hedge *Mon. Angl. Tom. 2. p. 273.*

HAI, An hedge: sometimes taken for a park, &c. enclosed. *Bract. Lib. 2. c. 40.* And *baieiment* is used for a hedge-fence. *Rot. inq. 36 Ed. 3.*

HAIL-SHOT. The *Stat. 3 Ed. 6.* against shooting of *Hail-Shot*, or more pellets than one, by any person under the degree of a Lord, &c. is repealed. *Stat. 6 & 7 W. 3. c. 13.*

HAIR-POWDER, Not to be mixed with lime, alabaster, &c. under penalties, by *Stat. 4 Geo. 2. c. 14.* Vide *Starch-powder*.

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HAKE, A sort of fish dried and salted; hence the proverb obtains in *Kent*, *As dry as a Hakes' Parch.* *Bract. 575; Specul.*

HAKEON, A military coat of defence. *Walf. in Ed. 3.*

HALF-BLOOD, Is no impediment to *descents of fee-simple lands of the crown*, or to *dignities*, or in descent of *estates tail*; but in other cases it is an impediment. Administration is grantable to the *Half Blood* of the deceased, as well as to the whole blood; and *Half Blood* shall come in for a share of an intestate's personal estate, equally with the whole blood, they being next of kin, in equal degree. *Style 74: 1 Vent. 307: Stat. 22 Car. 2. c. 10.* See titles *Descent: Executor*.

HALFENDEAL, The moiety, or one half of a thing; as *fadingdeal* is a quarter, or fourth part of an acre of land, &c.

HALF-MARK, *Dimidia Markæ*.] A noble, or six shillings and eight-pence in money. If a writ of right is brought, and the seisin of the plaintiff, or his ancestor, be alledged, the seisin is not traversable by the defendant, but he must render the *Half Mark* for the inquiry of the seisin: which is as much as to say, that though the defendant shall not be admitted to deny, that the plaintiff or his ancestors were seised of the land in question, and to prove his denial; yet he may be allowed to tender *half a mark* in money, to have an inquiry made, whether the plaintiff, &c. were so seised, or not. *F. N. B. 5: Old Nat. Br. 26.* But in a writ of advowson brought by the King, the defendant may be permitted to traverse the seisin, by licence, obtained from the King's serjeant; so that the defendant shall not be obliged to proffer the *Half Mark*, &c. *F. N. B. 31.*

HALF-SEAL, Is what is used in the *Chancery*, for sealing of commissions to *delegates*, upon any appeal to the court of delegates, either in ecclesiastical or marine causes. *Stat. 8 Eliz. c. 5.*

HALF-TONGUE. See *Medietas Linguae*, as to pleas and trials of *foreigners*, and titles *Jury: Trial*.

HALKE, From Sax. *Heall*, i. e. *Angulus*.] An hole; seeking in every *Halke*, &c.

HALL, Lat. *Halla*, Sax. *Heall*.] Was anciently taken for a mansion-house or habitation, being mentioned as such in *Domesday*, and other records; and this word is retained in many counties of England, especially in the county palatine of *Chester*, where almost every gentleman of quality's seat is called a *Hall*.

HALL, or **COMMON-HALL**. There is a *Common-Hall* for electing a mayor, sheriffs, and other officers of the city of *London*, assembled at *Guild-Hall* by the Lord-Mayor. *Ord. 7 W. 3*—See titles *Incorporation: London*.

HALLAGE. Toll paid for goods or merchandize vended in a *hall*; and particularly applied to a fee or toll due for cloth, brought for sale to *Blackwell-Hall* in *London*: Lords of fairs or markets, are entitled to this fee. *6 Rep. 62.*

HALLAMAS, The day of *All Hallows* or *All Saints*, viz. *November 1.* and one of the cross quarters of the year was computed in ancient writings from *Hallamas* to *Candlemas*. *Cowel.*

HALLAMSHIRE, A part of the county of *York*, anciently so called in which the town of *Sheffield* stands. See *Stat. 21 Jac. 1. c. 23.*

HALLMOTE or **HALLIMOTE**, Sax *Hcall*, i. e. Aula, & *Gemote*, Conventus.] That court among the Saxons, which we now call a court baron; and the etymology is from the meeting of the tenants of one hall or manor. The name is still kept up in several places in *Hertfordshire*; and in the records of *Hertford*, this court is entered as follows, viz. *Hertford Palatium, ad Halimot ibidem tenet* 11 *Die Octob. Ann. Regis Regi. Hen. 6, &c.* It hath been sometimes taken for a convention of citizens in their public hall, where they held their courts, which was also called *Folkmoete* and *Halmote*. But the word *Halimote* is rather the lord's court held within the manor, in which the differences between the tenants were determined. See *Leg. Hen. 1 cap. 10*.

HALYMOTE, Is properly an holy or ecclesiastical court; but there is a court in *London*, formerly held on the Sunday next before St. Thomas's day, called the *halymote* or *holy court*, *Curia Sanctimotus*, for regulating the bakers of the city, &c. *Blount* See title *London*.

HALYWERC FOLK, *Helywercfolk*, or people who enjoyed lands by the service of repairing or defending a church or sepulchre; for which pious labours they were exempt from all feudal and military services. It did signify such of the province of *Durham* in particular, as held their lands to defend the corpse of St. Cuthbert; and who claimed the privilege not to be forced to go out of the bishoprick, either by the King or Bishop. *Hist. Durclm. apud Warton Ang. Sax. par. 1. p. 749. Mon. Angl. 1, 512. Blount*.

HAM, A Saxon word, used for a place of dwelling; a village or town. hence the termination of some of our towns, as *Nottingham, Buckingham, &c.* Also a home close, or little narrow meadow is called *ham*. *Blount*.

HAMBLING or **HAMELING** or **DOGS**, The ancient term used by foresters for *expeditating*. *Manwood*.

HAMBURGH COMPANY. This, the oldest of our Trading Companies and heretofore more usually called *Merchants Adventurers*, took warning from the repeated complaints made of their monopoly (the last of which was in 1661) and facilitated the admission by private regulations made by themselves. Add to this, it was, like the *Hulstons Bay Company* without any parliamentary sanction, and had not been able even during the reigns of Charles II. and James II. to protect its exclusive privileges against the separate adventurers. See *Reeves's Law of Shipping and Navigation*.

HAMESECKEN Burglary or nocturnal house breaking, was by our antient law called *Hameficken*, as it is in *Scotland* to this day. 4 *Comm* 223. See tit. *Burglary*.

HAMFARE, Breach of the peace in a house. *Brompton in Leicb. H. 1 c. 80. See Hamsoken*.

HAMELI; **HEMEL**; **HAMPSEL**, From the Sax. *Ham*, i. e. *Domus*, and *Gem. Lit. Membrum*.] A little village, or part of a village or parish; of which three words, *hamlet* is now only used; though *Kitchin* mentions the other two, *Hamel* and *Hampfel*. By *Spelman* there is a difference between *villam integram*, *villam dimidiam*, and *hamletam*; a *hamlet* being *quæ mediocritatem friborgi non obstat, hoc est, ubi 5 capitales plegii non deprehensi sunt*. *Stowe* expounds it to be the seat of a freeholder. Several country towns have *hamlets*, as there may be several *hamlets* in a parish; and some particular places may be out of a town or *hamlet*, though not out of the county. *Wood. 3*

HAMSOCA or **HAMSOKEN**. See *Hamsoken*.

HANAPER OFFICE. One of the offices so called, belonging to the Court of Chancery. Writs relating to the business of the Subject and their returns, were, according to the simplicity of ancient times, originally kept in an hamper, in *hanaperio*; and the others, relating to such matters wherein the Crown is immediately, or mediately concerned, were preserved in a little sack or bag, in *parva baga*; and thence hath arisen the distinction, of the *Hanaper Office*, and *petty-bag office*, which both belong to the Common-law Court in Chancery. 3 *Comm*. 49. See title *Chancery*.

HANDEBOROW, A surety or manual pledge, i. e. an inferior undertaker; for *headborow* is the superior or chief. *Spelm.*

HAND IN AND OUT, Is the name of an unlawful Game now disused, and prohibited by statute 17 *Ed. 4. c. 2*.

HANDFUL, In measuring, is four inches by the standard. *Anno 33 H. 8. c. 5*.

HANDGRITH, From Sax. *Hond*, manus, and *Grith*, Pax.] Peace or protection given by the King, with his own hand — *Leg. Hen. 1*.

HAND-GUN, An engine to destroy game. *Stat. 33 Hen. 8* See title *Game*.

HAND-HABEND, A thief caught in the very fact, having the goods stolen, in his hand. *Leg. Hen. 1. cap. 59: Bract. lib. 3. tract. 2. cap. 8, 32 & 35: Fleta lib. 1. c. 38. See Backbitinde*.

HAND-WRITING. See *Similitude*; *Evidence*.

HANDY-WARP, A kind of cloth. *Stat. 4 & 5 Ph. & M. c. 5*.

HANGWITE alias **HANGWIT**, From Sax. *Hangan*, i. e. suspendere, & *wite*, multa.] A liberty granted to a person, whereby he is quit of a felon or thief hanged without judgment, or escaped out of custody. *Rastal*. We read it interpreted to be quit *de laron pendu sans serjeans le Roy*, i. e. without legal trial: and elsewhere, *multa pro latrone præter jussu exigentiam suspensio vel claspso*. And it may signify a liberty, whereby a lord challenges the forfeiture for him who hangs himself within the lord's fee. *Domesday*.

HANIG, A term for customary labour to be done and performed. *Mon. Ang. tom. 2. p. 264*.

HANPER or **HANAPER**, *Hanperium*.] The *Hanaper* of the Chancery; it seems to be the same as *Fiscus* originally in the *Latin*. 10 *R. 2. c. 1*. See *Hanaper*.

HANSE, An old Gothick word.] A Society of Merchants, for the good usage and safe passage of merchandise from one kingdom to another. The *Hanse* or *mercatorum societas*, was and in part yet is endowed with many large privileges by Princes within their territories; and had four principal seats or *Staples*, where the *Almain*, or German and Dutch merchants, being the founders of this society, had an especial house: one of which was here in *London*, called the *Steel Yard*. *Ortelius's Index ad Theat. vno bo Asiatici*.

HANSTOWNS, Probably from the German *Hansa*, i. e. *Societas*.

Towards the middle of the thirteenth century, the nations around the *Baltick* were extremely barbarous, and infested that sea with their piracies: this obliged the cities of *Lubeck* and *Hamburg*, soon after they began to open some trade with these people, to enter into a league of

of mutual defence. They derived such advantages from this union, that other towns acceded to their confederacy, and in a short time eight of the most considerable cities scattered through these vast countries, which stretch from the bottom of the *Sallick*, to *Cologne*, on the *Rhine*, joined in the famous *Hanseatic league*, which became so formidable, that its alliance was courted, and its enmity dreaded by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce, known in the middle ages, and conducted it by common laws enacted in their general assemblies. *Robertson's Hist. Emp. Char. V. 1 P. 79, 80. See Id. fo. 336.*

HANTELODE, An arrest, from the Germ. *Hant*, an hand, and *loed*, i. e. laid; *manus immissio*: As arrests are made by laying hold on the debtor, &c.

HAP, Fr. *Mapper*, i. e. *Rapre*, to catch. Is of the same signification with us as in the *French*; as to *hap* the rent, is where partition being made between two parceners, and more land allowed to one than the other, she that has most of the land charges it to the other, and she *happ*s the rent, whereon assise is brought, &c. This word is used by *Littleton*, where a person *happeth* the possession of a deed poll. *Lit. § 8.*

HAQUE, A little hand-gun, prohibited to be used by *stats. 33 H. 8. c. 6: 2 & 3 Ed. 6. cap. 14.* There is the *half haque* or *demy haque*, within those acts. See titles *Arms: Game.*

HAQUEBUT, A bigger sort of hand-gun than the *haque*, from the Teuton, *hack butse*; it is otherwise called an *arquebuse*, vulgarly a *bagbut*. See *stats. 2 & 3 Ed. 6. c. 14 & 5 P. & M. c. 2.* and titles *Arms: Game.*

HARATUM, From the Fr. *Haras*.] A race of horses and mares, kept for breed; in some parts of England termed a *stud of mares*. &c. *Spelm. Gloss.*

HARBINGER, An officer of the King's house, &c.

HARBOURS AND HAVENS. Upon the principles of our constitution which places the Executive Power in the hands of the Monarch, the King has the prerogative of appointing *Ports* and *Havens* or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom seems proper. By the feudal law all navigable rivers and havens were computed among the *regalia* and were subject to the Sovereign of the State. And in *England* it hath always been holden, that the King is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm. *F. N. B. 113: Dac. 9, 56.* Therefore as early as the reign of King *John*, we find ships seized by the King's officers for putting in at a place that was not a legal port. *Madex Hist. Exb. 530.* These legal ports were undoubtedly at first assigned by the crown, since to each of them a court of portmote is incident, the jurisdiction of which must flow from the royal authority. *4 Inst. 148.* The great ports of the sea are also referred to, as well known and established by *stat. 4 Hen. 4. c. 20*, which prohibits the landing elsewhere under pain of confiscation: and the *Stat. 1 Eliz. c. 11*, recites that the franchise of lading and discharging had been frequently granted by the crown.

But though the King had a power of granting the franchise of havens and ports, yet he had not the power of resumption or of narrowing and confining their limits when once established; but any person

had a right to lade or discharge his merchandise in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the *Stats. 1 Eliz. c. 11: 13 & 14 Car. 2. c. 11. § 14*; which enabled the Crown by commission to ascertain the limits of all Ports, and to assign proper Wharfs and Quays in each port, for the exclusive landing and lading of merchandise. *1 Comm. 264. c. 7.* See further this Dict. tit. *Navigation Acts.*

By the *Stat. 19 Geo. 2. c. 22*, If any master of a ship shall cast out of any ship, riding in any haven, &c. any ballast, &c. but only on land, where the tide never flows or runs, he may be fined by the justices, not more than 5*l.* nor less than 50*s.* As soon as any ship shall be sunk, stranded, or run on shore in any harbour, &c. or be brought or drove in, or be there in a ruinous condition, and there be suffered to remain, and the owner shall begin to carry away the rigging; on summons of the owner, or commander, a justice may seize the ship, &c. and by sale thereof raise money to clear the harbour.

Many other acts of parliament have been made for repairing and improving particular harbours and havens of this kingdom; such as *stats. 23 Hen. 8. cap. 7: 27 H. 8. c. 23*; relating to the havens and ports of *Plymouth*, *Portsmouth*, *Falmouth*, &c. in *Devonshire* and *Cornwall*; and none shall labour in tin works, near rivers of those havens, but shall prevent the fall of stones and gravel therein.—Casting and unloading ballast, rubbish, &c. in any harbour, haven, or road, incurred a penalty of 5*l.* by *stat. 34 Hen. 8. cap. 9.*—The *Stat. 27 Eliz. cap. 1*, was for repairing *Oxford haven* in *Suffolk*; and *Stats. 13 & 14 Car. 2: 4 Geo. 1. c. 13*, &c. for the reparation of *Dorset harbour*, &c. And duties are granted by these statutes, towards effecting thereof. *Stat. 20 Geo. 2. c. 14*, was made for opening *Southwold haven* in *Suffolk*. *Stat. 20 Geo. 2. c. 18*, was made for improving *Sunderland harbour* in *Durham*. See *Stat. 27 Geo. 2. c. 8*, for improving and enlarging the harbour of *Leith*.

HARDWIC, Mentioned in *Domesday*, and by *Spelman*. See *Hardwick*.

HARES See title *Game*.

HARLOTS. If any vintner, alehouse keeper, &c. in *London*, shall permit any harlots, or common women to come into their houses to eat, or drink, or otherwise to be conversant or abide there; they shall be liable to imprisonment, and also the women and harlots. *Stat. 1 Hen. 6. c. 23.* See title *London*.

HARNESS, Fr. *Harnejs*] Signifies all warlike instruments. *Hoved. p. 725. Matt. Paris.* The tackle or furniture of a ship, was also called *harness* or *harnesum*. *Pl. Parl. 22 Ed. 1.*

HARO, HARRON, An outcry after felons and malefactors, and the original of this clamour *de haro* comes from the Normans. *Custom. de Norman. l. p. 104.*

HARPING-IRONS, Are iron instruments for the striking and taking of *Whales*: And those that strike the fish with them are called *Harpners* or *Harpners*. *Merch. Dict.* See titles *Fish, Fisheries and Fishing*.

HARRIERS, *Harcas cant.*] Small hounds, for hunting the hare: Anciently several persons held lands of the King, by the tenure and service of keeping a pack of beagles and harriers. *Cart. 12 Ed. 1.*

HART, A stag, or male deer of the forest five years old compleat; and if the King or Queen do hunt any such, and he escape alive, then he is called an *Hart Royal*: And where by the hunting he is chased out of the forest, proclamation is usually made in the adjacent places, that in regard of the diversion the beast hath afforded the King or Queen, none shall hurt or hinder him from returning to the forest; and then he is called a *Hart Royal* proclaimed. *Manwood's Forest Laws*, par. 2. cap. 4.

HARVEST WORKMEN, May be licensed by justices of peace to go into other counties to work, &c. *Stat. 13 & 14 Car. 2. c. 12*. See title *Labourers: Poor & Vagrants*.

HASTA PORCI, A shield of brawn.—*Paroch. Antiq.* 450.

HATCHES, Certain dams made of clay and earth, to prevent the water issuing from the works and tin washes in *Cornwall*, from running into the fresh rivers: And the tenants of several manors there, are bound to do certain days works *ad le batches*, or *hacches*. *Stat. 27 Hen. 8. c. 23*. And from a *laich*, gate, or door, some houses situate on the highway, near a common gate, are called *Hatches*.

HATS. See title *Manufactures*.—By *Stat. 24 Geo. 3. stat. 2. c. 51*, certain duties (from 3 *d.* to 2 *s.*) are imposed on hats sold by retail, and dealers in hats are to be annually licensed. See tit. *Stamps*.—The *stat. 27 Geo. 3. c. 13*, regulates the importation and exportation of hats, and hare and coney skins and goats wool.—See title *Hatterdusters*.

HAUR, From the *Fr. Hair*.] Hatred. *Leg. W. 1. c. 16*.

HAUTHONER, *Homo Loricator*] A man armed with a coat of mail.—*Charta Galfredi de Dutton*, temp. H. 3.

HAW, A small parcel of land so called in *Kent*; as a *Hempshaw* or *Beanshaw*, lying near the house, and inclosed for those uses. *Sax. Dict.* But Sir *Edward Coke*, in an ancient plea concerning *Feresham* in *Kent*, says *Hawes* are houses. *Co. Lit. 5*. See *Haga*, *Hala*.

HAWGH or **HOWGH**, A green plot in a valley; a word used in the *North of England*. *Camd.*

HAWBERK alias **HAWBERT**, *Fr. i. e. Lorica*.] He who held lands in *France* by finding a coat or shirt of mail, and to be ready with it when he shall be called, was said to have *hauberticum feudum*, *Fief de Haubert*: and *Hawberk*, with our ancestors, had the same signification, and so it seems to be used in the *stat. 13 Ed. 1. cap. 6*.

HAWKS. The stealing of an *hawk*, or concealing it, after proclamation made by the sheriff, is felony with clergy. But this extends only to long-winged *Hawks*, of the kind of *falcons*; and not to *goshawks* or *sparrowhawks*. *Stat. 34 Ed. 3. c. 22*: *37 Ed. 3. c. 19*: *3 Inst. 97*. None shall kill, or scare away, any *hawks* from the coverts where they use to breed, on pain of 10 *l.* to be recovered before justices of the peace, and divided between the King and prosecutor. *Stat. 11 Hen. 7. cap. 17*. A *Hawk* taken up, must be delivered to the sheriff, if taken up by a mean person to be proclaimed in the towns of the county, &c. An action of trover and conversion lies for an *Hawk* reclaimed, and which may be known by her *vervets*, *bells*, &c. See further title *Game*.

HAWKERS. Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandize, which ought to be uttered in open market, were of old so called; and the appellation seems

to grow from their uncertain wandering, like persons that with *Hawks* seek their game where they can find it. They are mentioned in *Stat. 23 Hen. 8. cap. 4*.

HAWKERS, PEDLARS and **CHAPMEN**, are such persons as travel from town to town with goods and merchandize, and are under the control of Commissioners who are to licence them for that purpose under *stat. 8 & 9 W. 3. c. 25*: *24 Geo. 3. c. 26*.

Traders in the linen and woollen manufactures, sending their goods to markets and fairs, and selling them by wholesale; makers of goods, selling those of their own making; and makers and sellers of *English* bone-lace, going from house to house, &c. are excepted out of the acts, and not to be taken as *Hawkers*. *Stat. 3 & 4 Ann. c. 4*: *4 Geo. 1. c. 6*.—and see *stat. 29 Geo. 3. c. 26. § 20*.

Hawkers of news-papers, pamphlets, &c. are expressly excepted in the statutes from the provisions and regulations applied to other hawkers.—See titles *News-papers*, *Stamps*, &c. The *stat. 29 Geo. 3. c. 26*, directs that *Hawkers, Pedlars, &c.* shall pay a duty of 4 *l.* per year for a licence for themselves and 4 *l.* more for every beast employed by them.—Before obtaining this licence each of them is to produce a certificate signed by a clergyman and two reputable inhabitants in his place of residence of his good behaviour. §§ 3, 5, 6, 7.

Selling one parcel of silk handkerchiefs, shall not make a man a hawker or pedlar. *Burr. 609*.

The said *Stat. 29 Geo. 3. c. 26*; also provides that such hawkers shall not sell their things by auction; that the words *Licensed Hawker* shall be marked on all packs, boxes, waggons, shops, and handbills used by such hawkers on penalty of 10 *l.* a like penalty is imposed on unlicensed hawkers for marking their packs, &c. §§ 8, 9.—Hawkers selling smuggled goods shall forfeit their license and be incapable of having another granted them. § 10.—The *Stat. 7 Geo. 3. c. 43*, prohibiting hawkers to carry foreign cambric or lawn is repealed by *Stat. 27 Geo. 3. c. 13. § 23*: *c. 32. § 19*. See title *Cambric*.

Trading without a licence, or refusing to shew it, incurs a penalty of 12 *l.* half to the informer, and half to the poor; or on non-payment to suffer as a vagrant. *Stat. 9 & 10 W. 3. c. 27. § 3*: *3 & 4 Ann. c. 4. § 4*.—Under *Stat. 29 Geo. 3. c. 26. § 11*, the penalty is 10 *l.* half to the King and half to the informer.—Hawkers refusing to produce their licences, or lending or borrowing licences, to forfeit 40 *l.* And they may be detained till they produce their licences. *Stat. 29 Geo. 3. c. 26. §§ 13, 14*.—Counterfeiting licences 50 *l.* *Stat. 9 & 10 W. 3. c. 27. § 5*.—100 *l.* *Stat. 25 Geo. 3. c. 78. § 5*.

Hawkers not to sell in cities or market towns where they do not reside, except on fairs or market days. §§ 16, 17. See 2 *Term Rep. 273*.

If *Hawkers* and pedlars, offer any tea, or spirituous liquors to sale, though they have permits, the same may be seized as forfeited; By *Stat. 9 Geo. 2. c. 35*.

HAY, *Haya*, *Fr. Hays*.] A hedge or inclosure; also a net to take game, See *Hala*.

HAY-BOTE, A liberty to take thorns and other wood, to make and repair hedges, gates, fences, &c. either by tenant for life or years: it is also said to be wood, for the making of rakes and forks, with which men make *hay*. See *Co. Litt. 41*; and title *Bots*.

HAY AND STRAW, AND HAY-MARKET. Carts of Hay, which stand to be sold in the Hay-Market, are to pay 3 d. and straw 1 d. per load; and shall not stand longer with Hay after three o'clock in the afternoon, &c. on pain of forfeiting 12 s. Hay sold in London, &c. between the first of June and the last of August, being new Hay is to weigh 56 pounds a truck; and old Hay the rest of the year offered to sale, &c. See further as to Hay and Straw, *Stats. 2 W. & M. R. 2. c. 8. § 16, 17: 8 & 9 W. 3. c. 17. § 1: 31 Geo. 2. c. 40.—Whitechapel Hay-Market* under *Stat. 11 Geo. 3. c. 35*, is to be held from 7 in the morning to 1 in the afternoon, from *Lady-day* to *Michaelmas*, and from 8 to 12 during the other half-year.

HAYWARD, From the Fr. *Hays, seier, & Garde, Custodia.*] One who keeps a common herd of cattle of a town; and the reason of his being called *Hayward* may be, because one part of his office is to see that they neither break nor crop the hedges of inclosed grounds, or for that he keeps the graze from hurt and destruction. He is an officer appointed in the *Lord's Court*; And is to look to the fields, and impound cattle that do trespass therein; to inspect that no pound breaches be made, and if any be, to present them at the leet, &c. *Kitch. 46.* There may be a custom in a manor, to have a surveyor of the fields or *Hayward*, and for him to distrain cattle damage-feasant. See *Agillarius.*

HAZARD, An unlawful game at dice: and those who play at it are called *Hazarders*; *Plac. Trin. 2 Hen. 4. Suffex 10.* See title *Gaming.*

HEADBOROW, OR HEADBOROUGH, From Sax. *Heads, caput, & Borge, sivejussor.*] Signifies him who is head of the frank-pledge in boroughs; and who had a principal government within his own pledge: as he was called *Headborough*, so he was also styled *boroughhead, borholder, thrid borough, titlingman, &c.* according to the usage and diversity of speech in several places. *Lamb.* These *Headboroughs* were the chief of the ten pledges; the other nine being denominated *handborrows*, or inferior pledges: *Headborrows* are now a kind of *constables*. See this Dict. titles *Constable: Titling.*

HEADLAND, The upper part of ground left for the turning of the plough; whence the *headway*. *Paroch. Antiq. 587.*

HEAD-PENCE, Was an exaction of a certain sum heretofore collected by the sheriff of *Northumberland* of the inhabitants of that county, without any account therefore to be made to the King; which was abolished by *Stat. 23 H. 6. c. 7.*

HEAD-SILVER, Paid to lords of leets. See *Common Fine.*

HEALFANG OR HALSFANG, From Sax. *Hals, Collum, and Fang, capere.*] That punishment, quæ alicui collum fringatur. *Collifrigium.* The Pillory. Sometimes it is taken for a pecuniary mulct, to commute for standing in the pillory; payable to the King or Chief Lord. *Leg. H. 1. cap. 11.*

HEALTH, Injuries to.] Injuries affecting a man's health, are whereby any unwholesome practices of another a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; 1 *Rol. Abr. 90*; by the exercise of a noisome trade, which infects the air in his neighbourhood; 9 *Rep. 57: Har. 135*; or by the neglect, or unskillful management of his physi-

cian, surgeon or apothecary. For it hath been solemnly resolved, that *male praxis* is a great misdemeanor and offence at Common-law, whether it be for an experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to his destruction. *Id. Rayn. 214.* These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by special action of *trespass on the case*. 3 *Comm. 122.*

As to offences against the public health of the nation, there are various provisions, as with respect to the plague. *Stats. 1 Jac. 1. c. 31: 26 Geo. 2. c. 6: 29 Geo. 2. c. 8.* See title *Plague.* As to unwholesome provisions, 51 *Hen. 3. Rast. 6: Ord. pro Pifar. c. 7: 12 Car. c. 25.* See titles *Butchers: Bakers: Wines: Cattle, &c.*

HEARTH-MONEY, A tax formerly levied, but now abolished. *Vid Chimney-Money.*

HEBBER-MEN, Fishermen, or poachers below *London Bridge*, who fish for whittings, smelts, &c. commonly at ebbing water; mentioned in one of the articles of the *Thomas Jury*, at the court of Conservancy of the river *Thames*, printed anno 1632. And those persons are punishable by *Stat. 4 H. 7. c. 15.* See title *London.*

HEBBING-WEARS, Are wears or engines made or laid at ebbing water. *Stat. 23 Hen. 8. c. 5.* See title *Sewers.*

HEBDOMAS, Lat.] A week. See *Week.*

HEBDOMADIUS, The week's man, canon or prebendary in the cathedral church, who hath the care of the choir, and the officers belonging to it, for his own week. *Reg. Episc. Hereford. MS.* See *Hebdomadarius.*

HECK, An engine to take fish in the river *Ouse*, *Stat. 23 H. 8. c. 18.*

HECCAGIUM, Is supposed to be rent paid to the lord of the fee for liberty to use the engines called *Hacks.*

HEDA, A small haven, wharf, or landing place. *Domesd. See Hith.*

HEDAGIUM, Toll or customary duties paid at the hith or wharf, for the landing goods, &c. from which exemption was granted by the King to some particular persons and societies. *Cartular. Abbat. de Radings, MS. f. 7.*

HEDGE-BOTE, Is necessary stuff to make *hedges*, which the lessee for years, &c. may of common right take in his ground leased. See *Hay-bote: Bote.*

HEDGE-BREAKERS. By the *Stat. 43 Elin. cap. 7. Hedge-breakers, &c.* shall pay such damages as a justice of peace shall think fit; and if not able to pay the damages, shall be committed to the constable to be whipped. And by *Stat. 15 C. 2. c. 2*, constables, and others, may apprehend persons suspected of *Hedge-stealing*, and carry them before a justice; where not giving a good account how they came by wood, &c. they are not only to make such recompence as the justice of peace shall adjudge, but pay a sum not exceeding 10 s. for the use of the poor, or be sent to the house of correction for a month; persons convicted of buying stolen wood, shall forfeit treble value to him from whom taken. See title *Woods.*

HEIR.

HEIRE; AS HEIREDAIRE.] Is One ex jussu nuptie procreatus, who succeeds by descent to lands, tenements and hereditaments, being an estate of inheritance. The estate must be Fee, because nothing passeth jure hereditatis but Fee; and by the Common-law a man cannot be Heir to goods

goods and chattels: Tho^t the *ecclesiastics* call him *barrolem*, *qui ex testamento succedit in universum jus testatoris*.

Heirs, are included in the word assigns in grants, &c. If a woman keeps lands from the *Heir*, on pretence of being big with child by the *Heir's* ancestor, her deceased husband, the writ *de ventre inspiciendo* is to be granted to search her, &c. that the *heir* be not defrauded. *F. N. B.* 227.

Heirs may have divers writs, as writ of *Mortdancestor*, *Entre ad communem legem*, *In casu provisio*, and *consimili casu*, quod permittat, &c. The *Heir* may bring an ejectment of copyhold lands before admittance. 2 *Wils.* 14.

- I. The several Kinds of *Heirs*; and of relieving them against imprudent Contracts.
- II. Who may be *Heirs*, what Persons are excluded from being *Heirs*; and of the Effect of the Word *Heirs* in Limitations.
- III. 1. Where the *Heir* shall take Advantage of Conditions, Covenants, &c. entered into to his Ancestor.—2. Where he shall be liable to his Ancestor's Debts and Contracts.—3. What shall go to the *Heir* as Fixtures, &c.—4. Of Suits by and against an *Heir*, and herein of the Regulations by Statute.—5. As to *Affets* in the Hands of an *Heir*.

See further as connected with this subject, this Dict. titles *Agreements*; *Affets*; *Condition*; *Covenant*; *Executor*; *Fraud*; *Limitation*, &c.

1. SOME Writers have made a distinction of *Hæres sanguinis*, & *hæreditatis*; a man may be *hæres sanguinis* to a father or ancestor, and yet upon displeasure, be defeated of his inheritance: And there is an *ultimus hæres*, being he to whom lands come by *escheat*, for want of lawful *heir*, &c. *i. e.* The Lord of whom the lands are held, or the King. *Bract. lib. 7. cap. 17.* See title *Escheat*: *Tenure*. But the most usual division is, that of *Heir apparent*; *Heir presumptive*; (as to both which see title *Descent*. Canon I;) *Heir general*; *Heir special*; *Heir by custom*; and *Heir by devise*, called *Hæres factus*.

Bonds and bargains with an *Heir apparent*, &c. to have double or treble the money lent, after his father's death, &c. are set aside in equity; but it is by paying what was lent *bona fide*, with interest, if the obligor applies for relief; though in case the obligee sues, he shall not recover what was really lent; for that would be to assist fraud. 1 *Vern.* 141, 359. Where young *Heirs* enter into any bond, *Chancery* relieves against it, without evidence of actual imposition; because there is a supposed distress, and presumption of a liability to be imposed on. *Barnardist.* 481. See *Treat. Eq.*

A devisee under a will defectively executed represented the will as duly executed, and for a small sum gained a release from the *Heir*; the release was set aside. 1 *P. Wms.* 239.—So where a son, who on his father's death was remainder-man in tail, sold his remainder at an under rate, the Court of *Chancery* set aside the conveyance. *Id.* 310.

The rule upon which Courts of Equity in these cases proceed, is not merely in respect of the age of the *Heir* contracting. 3 *P. Wms.* 131. In *Wiseman v. Beake*, Mr. *Wiseman* was nearly 40 years of age, and a Proctor in the Commons: In *Curwyn v. Milner* the *Heir* was about 27 years of age; and in *Gwynne v. Heaton* the plaintiff was 23 years old; which tho' not an advanced age, is

beyond that which the law recognises as the age of discretion. But the real object which the rule proposes is, to restrain the anticipation of expectancies, which must from its very nature furnish to designing men an opportunity to practise upon the inexperience or passions of a dissipated man. And this being the object of the rule, its operation is not confined to *Heirs*, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealings. 2 *Vern.* 346: *Forrest.* 111: 2 *Atk.* 34. and see 2 *Vex.* 281. 516: 1 *Wils.* 229; and this Dict. titles *Fraud*: *Agreement*.

It has been said that if the *Heir* has no maintenance from the father, but is turned out upon unreasonable displeasure, there perhaps, the bargain, if not excessively beyond the proportion of such assurances shall stand; because it is not to supply the luxury and prodigality of the *Heir*, but to keep him from starving. *Treat. Eq. c. 2. § 12.* But in *Gwynne v. Heaton*, *Thurlow*, C. was of opinion, that this circumstance was intitled to no weight whatever: nor does there appear to be any case in which such difference has been proceeded upon by the Court of *Chancery*; and there are several cases where it has been entirely disregarded. See 2 *Ch. Ca.* 120: 1 *P. Wms.* 310: 1 *Wils.* 320.

Heir general. The *Heir general* or *Heir at Common-law* is he who after his father or ancestor's death hath a right to, and is introduced into, all his lands, tenements and hereditaments. But he must be of the whole blood, not a bastard, alien, &c.

None but the *Heir general*, according to the course of the Common-law, can be *Heir* to a warranty, or sue an appeal of the death of his ancestor. *Co. Lit.* 14 a; *Cro. Jac.* 217, 218.

If a condition be annexed to Borough-English or Gavelkind lands, and the condition is broken, the *Heir at common law* shall enter; for the condition is a thing of new creation, and collateral to the land: But when the eldest son enters, the *Heir* or *Heirs* by custom, shall enjoy the land; for by breach of the condition they are restored to their ancient estates. *Cro. Eliz.* 204: *Plow.* 28: *Co. Lit.* 11, 12.

Special Heir. Is the issue in tail claiming *per formam donis*; and as the statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any right-ful estate of freehold to another, but for term of his own life. *Lit.* § 613.

Heir by custom. A custom in particular places varying the rules of descent at Common-law is good; such as the custom of Gavelkind, by which all the sons shall inherit and make but one *Heir* to their ancestor; but the general custom of Gavelkind lands extends to sons only, but a special custom, that if one brother dies without issue, all his brothers may inherit, is good. *Co. Lit.* 140.

Heir by devise, or *Hæres factus*, is only a devisee of lands, being made so by the will of the testator, and has no other right or interest than the will gives him. 3 *Co.* 42. a.

It has been held in *Chancery*, that such an *Heir* shall have the aid of the personal estate in discharging the debts of the testator. 1 *Vern.* 36, 7. But this must be understood of an *hæres factus* of the whole estate, who shall have the benefit of the personal estate, but a devisee of particular lands shall not. *Preced. Chanc.* See title *Executor* V. 6; *Affets*.

HEIR II.

II. THE ELDEST SON, after the death of his father, is at Common-law his *heir*, &c. And if there be grandfather, father, and son, and the father die before the grandfather, and after the grandfather die seised; the land shall go to the son or daughter of the father, and not to any other children of the grandfather. *Bro. 303.* And this *heir* is called *heir jure representationis*, because he doth represent his father's person: but if, in this case, the father die without any child; his next eldest brother shall have the land as *heir*, or, for want of a brother, it descends to the sisters of the father. *Ibid.* A man having issue only a daughter, dies, leaving his wife with child of a son, which is afterwards born; here the son after his birth is *heir* to the land, but till then the daughter is to have it. *9 H. 6. 23: Perk. 521.* See at large title *Descent*.

There are some persons who cannot be *heir*; as a bastard born out of lawful wedlock; an alien, born out of the King's allegiance, though in wedlock; a man attainted of treason or felony, whose blood is corrupted; these last cannot be *heirs propter delictum*; and an alien cannot be *heir*, *propter defectum subjectionis*; nor may one made *denizen* by letters patent; though it is otherwise of a person naturalized by act of parliament. *Co. Lit. 8: 2 Darv. Abr. 552.* A bastard by continuance, may be *heir* against a stranger; and an hermaphrodite may be *heir*, and take according to that sex which is most prevalent; but a monster, who hath not human shape cannot be *heir*, although a person deformed may. *Co. Lit. 7. Idiots and Lunatics, persons excommunicate, attainted in premunire, outlaws in debt, &c. may be heirs: 2 Darv. 553.*

The word *heir* is not a good description of a person in the life-time of the ancestor; and an eldest son shall not take by the name of *heir* in the life-time of his father. *2 Leon. 70.* A man cannot raise a fee-simple estate to his right *heirs*, by the name of *heirs*, as a word of purchase by conveyance or otherwise; but in such case the son shall be in by descent: *Fortier & potentior est dispositio leges quam hominis. Hob. 30: 2 Lill. Abr. 11.*

By the law of England, no person can take to himself an inheritance in fee-simple by *deed*, without the word *heirs*; but he may by *devise*, tho' in cases where the word *heir* is wanting, it has been adjudged that if there were other words equivalent, and the interest in the thing granted passeth by the consideration only, without any further ceremony in the law, an estate in fee may pass. *2 Nels. Abr. 928.* In a *devise* by will, or exchange, &c. the word *heirs* is not necessary: but estates of inheritance which are otherwise conveyed, require it. *Jenk. Cent. 196.* See this Dict. titles *Deed*; *Devise*; *Limitation*.

The word *Heir* is *nomen collectivum*, and extends unto all *Heirs*: and under *heirs*, the *heirs* of *heirs* are comprehended in *infinitum*; if lands are given to a man and his *heirs*, all his *heirs* are so totally in him, that he may give his lands to whom he will. *Trin. 23 Jac. 1: Noy. 56.*

The *Heir* is favoured by the Common-law; and the ancestor could not give away his lands by will from his *heir* at law, without the consent of the *heir*, till the statute 32 H. 8. c. 11: *2 Lill. 11.* Dubious words in a will shall be construed for the benefit of the *Heir*; and not to disinherit him: and the *Heir* at law is preferred in *Chancery* in a doubtful case. *Noy 185: Chanc. Rep. 7.* Where lands were devised to the *heirs* of J. S. then living; it was held that his eldest son should have them, though in strictness

HEIR III.

he was not *heir* during his father's life, but *heir apparent*: But this was by reason of the words then living, which make it a description of the person. *Preced. Chanc. 57.*

As a limitation to the *Heirs* of the body of A. then living, shall be good as a *designatio personæ*, notwithstanding the rule *non est hæres viventis*; so a limitation to the *Heirs* of the body of A. then begotten shall prevail. See 1 P. Wms. 229: 1 Bro. P. C. 489: 2 Black. Rep. 1010.

The cases in which it has been held that the person described as an *Heir* special need not answer both parts of the description, by being actually *Heir*, as well as that species of *Heir* denoted by the description, seem to have materially broken in upon the doctrine of Lord Coke on the subject. See 1 Inst. 24 b. and which doctrine has been pursued in many cases exclusive of those on which Lord Coke relied: particularly in *Couden v. Clarke, Hob. 29: Southcot v. Stonewell, 1 Freem. 216: Lord Ossington's case, 3 Salt. 336: and Davies v. Fevers, 2 P. Wms. 1: Starling v. Ettrick, Pre. Ch. 54.* Mr. Hargrave has very ably attempted to vindicate the propriety of Lord Coke's doctrine, observing that it may be doubted whether there is a passage in all his works more capable of standing the severest test of modern criticism; and having examined the circumstances of the cases supposed to have weakened its authority concludes his note, (p. 32 a.) with remarking that Lord Cowper's judgment in *Newcomen v. Barkham*, which was materially shaken in its principle by what fell from Lord Hardwicke, in decreeing upon the bill of review, is the only direct authority against Lord Coke.—In a following note however, (p. 164 a.) Mr. Hargrave candidly admits that since his writing his former note, a case has been published in which the court of King's Bench, after three arguments, decided against applying the above rule to a Will; *Wills v. Palmer, 5 Burr. 2615.* and that in another, which was also three times argued, the Court of Exchequer had refused to apply the rule to a Marriage-settlement. *Evans d. Burrenshaw v. Weston, M. 1774, or H. 1775.*—This concurrence of authority, the result of so much deliberation, for both Courts appear to have weighed the subject with the most anxious attention, seems to have given a weight to the decree in *Newcomen v. Barkham*, beyond that to which Lord Hardwicke thought the principle entitled. It is however well worth the Student's while to consult Mr. Hargrave's observations in support of Lord Coke's doctrine, that to take as a purchaser by description of a special *heir*, every part of the description must unite in the claimant. See also *Fearne on Cont. Rem. 4th edit. p. 319.* and 2 Willf. p. 20.

III. 1. CONDITIONS and Covenants—*real*, or such as are annexed to estates, shall descend to the *Heir*, and he alone shall take advantage of them. *43 Ed. 3. c. 4: 1 And. 55.*

And this is not only where there are express words, but also where there are none; for the law by implication reserves the condition to the *Heir* of the feoffor, &c; for being prejudiced by the disposition, it is but reasonable that he should take the same advantage that his ancestor whom he represents might. *1 Rol. Abr. 407, 472.*

If a man seised of lands in right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the *Heir* of the husband shall enter; for though no right descended to him, yet the title of entry

by

by force of the condition which was created upon the feoffment, and referred to the feoffor and his Heirs, descended. 8 Co. 43: Co. Lit. 202 a: 336 b.

The Heir shall take advantage of a *nomine penae*; for being incident to the rent, it shall descend to the Heir, being a security or penalty to engage the payment of the rent; therefore whoever has a right to the rent, ought in reason to have the penalty, which is to oblige the tenant to pay it. Co. Lit. 162 b.

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave it in good repair at the end of the term, and the lessor dies, &c. his Heir may have an action upon this covenant; for this is a covenant which runs with the land, and shall go to the Heir, though he is not named: and it appears that it was intended to continue after the death of the lessor, inasmuch as his executors, &c. are named. 3 Lev. 92: Skw. 305.

If A. enfeoff B. upon condition that if the Heir of A. pays to B. &c. 20s. then he and his Heirs may re-enter; this is a good condition, of which the Heir of A. may take advantage, and yet A. himself never can. Co. Lit. 214 b.

III. 2. As the Heir-at-law is the proper and only person, who can take advantage of conditions, &c. annexed to the real estate; so he shall be bound by all such conditions, &c. which run with the land, whether such conditions were annexed to the estate by the original feoffor, grantor, or immediate ancestor. 1 Rol. Abr. 421.

If a gift be made in tail on condition, that the donee should not discontinue, and the donee hath issue two daughters, and one of them discontinues, the donor shall enter and evict them both; because it was the original condition annexed to the whole estate, that no part of it should be discontinued. Co. Lit. 165.

But note, that neither tenant in tail, nor his issue can be restrained from aliening by *fine* and *recovery*; though they may be restrained from aliening by feoffment, or other *tortious act*, which amounts to a *discontinuance*.

So where one devised lands to A. and the Heirs male of his body, provided, that if he does attempt to alien, that then immediately his estate shall cease, and B. shall enter, and A. makes a feoffment in fee, and thereupon B. enters; and it was adjudged against B. and that the condition was void, because *non constat* what shall be adjudged an attempt, and how it shall be tried. 1 Vent. 321: 3 Keb. 787, Piers and Winn.

Also where a condition is annexed to the estate given to the Heir, and which goes in abridgment and restraint thereof, the same shall in some cases be construed a *limitation*; for if it were a condition, nobody could take advantage of it but the Heir. Dyer 316: 10 Co. 41: 1 Vent. 299. As if a copyholder in *Borough English* surrender to the use of his will, and after devises to his wife for life, remainder to his eldest son, paying 40s. to each of his brothers and sisters within two years after the death of his wife, &c. this is a *limitation*, and not a condition; for if it should be a condition, it would extinguish in the Heir, and there would be no remedy for the money. Cro. Eliz. 204: 3 Co. 20 b: 2 Leon 114. S. C. Vide farther as to the doctrine of the Heir being bound, &c. Vaughan. 271: 2 Mod. 26. S. C. Cro. Eliz. 833. 919: Mon 644. pl. 894: Noy 51.

But whatever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgment of the estate of the Heir, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his death, or others must do. 8 Co. Francis's case.

If the person of the ancestor be bound in respect of his land, which descends to the Heir, he shall be charged: as, if by a subsidy to be assessed upon every one having 20s. *per annum*, A. be charged and die; his Heir shall pay it, for it runs with the land. R. Mo. 17.

Heir is *non collectivum*; and therefore, if a condition be, that if his Heir does not pay such a rent-charge, the estate shall go to B. if the Heir of the Heir does not pay, the condition is broken. R. Cro. Jac. 145.

It has been held, that the Heir is never chargeable without an express *lien* and *assets*; and even then, no longer than he hath *assets*, for he is not obliged to keep them till he is charged: But if he has *assets*, he ought to plead truly, and confess them; otherwise judgment shall be given against him *de terris propriis*, for it is then his debt. Jones 88: 3 Salk. 179. When a man recovers against an Heir, by default or verdict, on pleading *riens per descent*, a special judgment *de terris descensitis*, may be entered against the Heir, and the plaintiff, (praying it) shall have all the lands by descent in execution: though if the judgment be general against the Heir, without praying such special judgment he can only have a moiety of the lands by *eligut*. Plowd. 439: 2 Leon. 16. Here the plaintiff may surmise, that the Heir hath such land by descent, and pray to have execution of all his land. Dyer 149: Rol. 72. The judgment and execution shall be general, unless the Heir acknowledge the action, and shews that he hath so much by descent; but if he will not shew what he hath by descent, he loses the benefit of the law. Cro. Eliz. 692.

If the Heir, in case where the ancestor hath bound himself and his Heirs, have never so much land come to him by gift in tail, or conveyance of the father, and not by descent, he is not chargeable at all: and so it is for any estate but what is in *fee simple*; as where lands are granted to J. S. and his Heirs during the life of another, &c. the Heir shall not be charged for this, no more than for the land entailed. 10 Rep. 98. See post. 4. No lands can be charged but *fee-simple*; therefore, in a suit against the Heir, the judgment is only for the land descended, and not for other lands, &c. but where it is by his own fault, as by a false plea, or the like. Co. Lit. 102, 376.

A man binds himself and his Heirs in an obligation, and hath lands and Heirs on the part of the father, and the part of the mother; the Heirs and lands of both, and not of one alone, must be charged in debt: and the plaintiff shall have several actions; and the execution shall stay, till it may be had against both of them. 2 Rep. 25: Hob. 25. Also if one bind himself and his Heirs, and leave land at *Common-law*, and lands in *gavelkind*; the obligee must sue all the Heirs. Hob. 25. An Heir sued on a specialty, shall have his age; and if one of the Heirs be within age, the *parol* shall be stayed for all. Moor cap. 203.

A collateral Heir is chargeable for the debt of his ancestor: but the declaration must be special, and he is to be charged as collateral Heir, not as immediate Heir; and if a son happens between, who dies, he must be said uncle

uncle and *Heir* of the son, who was *Heir* of the debtor, &c. *Co. Car.* 131. And a child born, though he lives but an hour, has the fee of lands vested in him as *Heir*. *Hill.* 134. Is a writ a man need not show how he is *Heir*; but he must in a declaration, &c. though it is only for form to set forth how a person is *Heir*, because it is not traversable; and *Heir*, or *an Heir*, is issuable. *Moor* 885. If an *Heir* ought to confess the debt on action brought against him, and the debt be not denied; it must be admitted. 1 *Lutw.* 442.

Debt against the *Heir*, upon the bond of his ancestor, is to be brought in the *debet* and *detinet*, because the *Heir* himself is bound; and not in the *detinet* only, though that is cured by verdict. *Sid.* 342: 1 *Lev.* 224. An *Heir* is not bound by the bond of the ancestor, unless he is expressly bound: and if in a bond a man bind his *Heirs*, but not himself, the bond is void. 2 *Saund.* 136: *Cro. Jac.* 570. Also a man shall never bind his *Heir* to warranty, where he himself was not bound: if he make a feoffment in fee, and bind his *Heirs* only to warranty, the feoffment is void, for the *Heir* shall be bound to warranty in such cases only, where the ancestor was bound, without which it cannot descend upon him. *Co. Lit.* 386. And warranties and estoppels shall descend upon the *Heir* general, and not upon any special *Heir*, &c. So that if a man convey land with warranty against him and his *Heirs*, his *Heir* on the mother's part shall not be vouched by this, so long as there is an *Heir* on the father's part, &c. *Hob.* 24.

A grant of an annuity, must be for a man and his *Heirs*, to bind the *Heir*, although there be assets; and when he is named, the *Heir* shall not be bound except there be assets. *Co. Litt.* 144. Where a person covenants with another to perform any act, if his *Heir* be not named, he is not bound by it: but in covenants of others, that concern the inheritance, the *Heir* shall have the benefit of them, though not named. 5 *Rep.* 8: 1 *Roll. Abr.* 520. An *Heir* may enter for a condition broken, when the condition is annexed to lands, and take advantage of it; because if there had been no condition, the land would have descended to him. And an *Heir* may perform a condition, to save the land. 2 *Nels. Abr.* 929.

The *Heir* must be expressly named, otherwise he is not chargeable, and the reason why the *heir* is not chargeable in this case, as the executor in case of a bond entered into by the testator, without being named, is this; by the Common-law only the goods and chattels of the debtor, and the annual profits of the land as they arose, and not the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative or executor, as well as in the hands of the debtor himself; hence it was, that the executor was bound by the debt of the testator, so far as he had chattels or assets, though he was not named in the contract; but the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of government; therefore the land not being originally liable to the demand in the hands of the obligor, must be much less liable in the hands of the *Heir*, who was not comprehended in the contract. 2 *Lutw.* 19: *Flow.* 440: *Hob.* 60.

But if a man had granted, for him and his *Heirs*, to a third his *Heir*, such a rent out of his lands, in this case the *Heirs* being comprehended in the contract, are bound to make good the grant, so far as they have assets by descent from the grantor; and this was allowed at Common-law, because the grantor of the rent had the land originally in view for his security; and by the grant itself having it in his power to distrain the land for the rent, it was equal to the *Heir*, whether the land answer the rent by distress, or by an execution upon a judgment in a writ of annuity. 1 *Roll. Abr.* 126: *Popham* 37: *Hob.* 58: *Dyer* 344 b: *Co. Lit.* 144 b.

If the ancestor bind himself in a statute, recognizance, &c. the *Heir* is liable, not only as tenant, but also as *Heir*, otherwise he could not have his age; and cannot oblige a purchaser, whether for valuable consideration, or without, to contribute, but one *Heir* may oblige another to contribute; as if a man seised of two acres, the one descendible, according to the course of the Common-law, the other in Borough English, acknowledge a statute, &c. the *Heir* at Common-law shall oblige the Borough English *Heir* to contribute: so one coparcener shall oblige the other to contribute; or if the ancestor had lands, some descendible to the *Heirs* of the father, and some descendible on the *Heirs* of the mother, the *Heir* on the part of the father shall compel the *Heir* on the part of the mother to contribute; & *sic vice versa*. 3 *Co.* 12. *Sir William Herbert's case*. See post. 4.

III. 3. Not only land, but rent not due at the death of the ancestor lessor, shall go to the *Heir*; so corn sown by a tenant for years, where his term expires before the corn is ripe; every thing fastened to the freehold, timber-trees, deeds belonging to the inheritance; deer, conies, pigeons, fish, &c. 2 *Nels. Abr.* 927. An *Heir* shall enforce the administrator to pay debts with personal estate, to preserve the inheritance. *Chan. Rep.* 280, 293. If an executor hath assets, he is compellable in equity to redeem a mortgage, for the benefit of the *Heir*; and it is the same where the *Heir* is charged in debt. *Hard.* 511. For the personal estate received the benefit. When the *Heir* is sued for the debt of his ancestor, and pays it, he shall be reimbursed by the executor of the obligor, who hath personal assets. 1 *Chan. Rep.* 74. But in action of debt brought upon a bond against an *Heir*, it is no good plea for the *Heir* to say, that the executors have assets in their hands. *Dyer* 204. For a creditor may sue either *Heir* or executor, and *Heirs* and executors are both chargeable upon specialties. If an *Heir* hath assets, and the executor also, it is at the election of the obligee to have action of debt against the one, or the other; but he shall not charge them doubly, 2 *Plowd.* 433. See title *Executor*. Whether the *Heir* hath land by descent shall be tried and enquired of, with the value, by a jury, to make the *Heir* answerable. 5 *Moul.* 122.

The *Heir* shall not have money due on mortgages in fee, if he be not particularly named, but the executor; and if the day be past, although the *Heir* be named, the executor shall have it. *Co. Lit.* 230: 1 *Fentr.* 348. See title *Executor*, V: 6: *Mortgage*.

The following is a specification of what goods and chattels go to the *Heir*.

Goods and chattels annexed to the freehold go to the *Heir*, and not to the executor, or administrator. as, the
glais

glass in a window; the doors and locks of an house. *Off. Ex'* 86: 21 *H. 7. 26 b.*; 4 *Co. 63 b.* So the pales, posts, and rails for an inclosure. 12 *H. 7. 26 b.* So, furnaces, coppars, &c. fixed to the freehold. *R. 21 H. 7. 26 b.*; *R. 20 H. 7. 13 b.* unless they are severed in the life-time of the testator. *Semb. 1 Sal. 368. Vide Com. Dig. tit. Execution, (C. 4) tit. Waff, (D. 2)*—So waincot fixed to an house. 4 *Co. 64 a.* So, pictures, glasses, &c. fixed instead of waincot. 2 *Vern. 508.* So, millstones, &c. fixed to a mill. So a term for years to attend the inheritance does not go to the executor, but to the heir. *R. 2 Ch. Ca. 156, 160.* So deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the Heir. So, fish in a pond, or piscary. *Co. Lit. 8. a.*; *R. Owen 20*; 1 *Rel. 916. l. 45, 50.* So, apples, and other fruits growing at the death of the ancestor. *Off. Ex'* 84. So roots, &c. within the soil. *Id. 89.* So a coat-armour, pennons, tombstone, and monuments in a church, in honour of the ancestor. *Co. Lit. 18 b.* So charters, deeds, and evidences of lands, with the chests in which they are preserved. See *Com. Dig. tit. Bicus (B); Charters*; 1 *Bull. 18 b.*—An ancient horn where the tenure is by *corvage*. 1 *Vern. 273.*

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat of arms, and pennons with his arms, and such other emblems of honour as belong to his degree, set up in the church, or if a grave-stone or tomb be laid or made, &c. for a monument of him; in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any, take them, or deface them, but he is subject to the Heir, and his heirs, in the honour and memory of whose ancestor they were set up. *Co. Lit. 18 b.* And see 1 *Rel. Abr. 625*; *Noy. 104*; *Godbolt 200*; *Cro. Jac. 367*; 2 *Bull. 151.*

Where money is covenanted to be laid out in a purchase of land to be settled on A. in fee; on A.'s dying before the money is laid out, his Heir, and not his executor shall have it. 1 *P. Wms. 483.* So where, though by a voluntary contract, money is agreed to be laid out in land, the Court will execute such agreement in favour of the Heir. 2 *P. Wms. 171.* On the same principle where one is obliged to buy land and died; his executor shall have the money, but his Heir shall have the lands. *Id. 615.* And in all cases where it is a measuring call between an executor and an Heir, the latter shall in equity have the preference. *Id. 176.*

A younger brother beyond sea having contracted to buy a real estate of his elder brother, made his will charging his estate with great legacies, but his will was attested by only two witnesses. Afterwards the testator died without issue, leaving his elder brother his executor and Heir the Heir may retain out of the assets the whole purchase money, though intitled to the land again as Heir. 2 *P. Wms. 291.*

III. 4. It is clear, that the Heir may bring any real action *de iudiciali*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets, or personal contracts of his ancestor. *Co. Lit. 164.* If an erroneous judgment be given against the ancestor, by which he loseth the lands, the Heir may bring a writ of error 1 *Rel. Abr. 747*; *Dyer 904*; *Godb.*

337. And if one hath inherited the part of his mother, and loseth by erroneous judgment, and dies, the Heir of the part of the mother shall have the writ of error. 1 *Leon. 261*; 2 *Sid. 56.* So the younger son, when intitled to the land by the custom of Benth English, shall bring the writ of error, and not the Heir at Common-law, for this remedy descends with the land. *Owen 68*; 1 *Leon. 261*; 4 *Leon. 5.* and see *Bridges. 71.* So if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring a writ of error. *Dyn 90*; 1 *Leon. 261*; 1 *Rel. Abr. 747.* See further *Dyer 89*; *Cro. Elze. 469*; 3 *Lev. 36*; and title *Error. I. 1.*

If J. S. binds himself and his Heirs, in a bond, and thereupon judgment is obtained against J. S. and J. S. makes his will, and his Heir at law executor, and dies, leaving lands which descended to his Heir, yet he shall not have a writ of error as Heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant; but after the lands are taken in execution, he may have a writ of error. Because he is prejudiced by the judgment, and by the reversal will receive benefit. *Sey. 38, 9.*

The Heir at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease, made by his ancestor, (accrued after the death of the ancestor) for the rent is part of the lands, and incident to the reversion; but for arrears of rent incurred in the life-time of the ancestor, neither the Heir, nor the executor, could by the Common-law maintain an action; for as to the Heir, they were considered as part of the personal estate, and as to the executor, he could not represent his testator as to any contracts relating to the freehold and inheritance. 21 *H. 6. 15*; 19 *H. 6. 41*; *Co. Lit. 162 a.* But now, by *Stat. 32 H. 8. cap. 37.* an executor may maintain an action of debt for such arrears; for which see *tit. Debt.*

Where the ancestor binds himself, and his heirs, in an obligation, the obligee may sue the Heir, or executor, or the administrator of the executor, at his election, and may have execution of the land descended to the Heir; for the Common-law having allowed the action of debt against the Heir, he could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the Heir. *Flouard. 441*; 3 *Co. 12 a*; *Cro. Jac. 450*; 1 *And. 7.*

But the body of the Heir is protected, for it would be most unreasonable to subject the Heir to the payment of his ancestor's debts, any farther than to the value of the assets descended. *Dyer 81. pl. 62*; 207. *pl. 15*; *Moor pl. 203*; *Co. Lit. 103, 296.*

By the common law, if the heir before an action brought against him had aliened the assets, the obligee was without any remedy; but if he only aliened, pending the writ, the lands, which he had by descent at the time of the original purchase, had been liable. *Co. Lit. 102.*

In consequence of this doctrine, that the lien shall have relation to the time of the original purchase, it hath been adjudged, that if there had been two creditors to J. S. whose Heir is bound, viz. A. and B. and A. files an original in C. B. and hath judgment thereon. *Trin. Term, a Jac. 2.* by default, and thereupon a *general elegit* issues against all the lands of the Heir, and a moiety thereof

the death, and he cannot plead that the *heir* of him who is dead has assets by descent, and demand judgment if he ought to be charged alone: for, at *common law*, the charge upon a judgment, being *personal*, survived, and the statute of *Westm. 2.*, that gives the *elegit*, does not take away the remedy of the plaintiff at *common law*, therefore the party may take out his execution which way he pleases; for the words of the statute are *fit in electione*: but if he should, after the allowance of the writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. 1 *Lev.* 30: *Ra. m.* 26: 1 *Keb.* 92.

As to a *sequestration*, and to shew that a *devise* shall have the same authority to bind the personal assets, as a judgment at law, and therefore shall go *pari passu* to be paid off and discharged. *Vide* 1 *Vern.* 143: 3 *Lev.* 355: 2 *Vern.* 37, 88-9. and this *Dict.* title *Executor*, V. 6.

III. 5. Where the ancestor binds himself and his Heirs, all his lands of freehold, and which descend in *fee simple*, are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations. See *Bro. tit. Assets*: *Fit. tit. Assets*: 1 *Kol. Abr.* 269. *tit. Assets*. A reversion after a lease for years made by the ancestor is present assets, so that the heir cannot plead *non prodijsent* in delay of execution of the rent and reversion, though the plaintiff cannot have benefit of the reversion till the lease be determined. 1 *Salk.* 354-5: 7 *Mod.* 42: 2 *Mod.* 50, 51. *Hen's Plead.* 320.

So a *reversion expectant* upon the determination of an estate for life is *quasi assets*, and ought to be pleaded specially by the Heir, and the plaintiff in such case may take judgment of it *cum accident*. *Carth.* 129. But a reversion in *fee* expectant upon an estate tail is not assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure. 6 *Co.* 58: 1 *Roll. Abr.* 269.

If *A.* hath issue *B.* and *C.* and conveys lands to the use of himself for life, the remainder to *B.* in tail male, the remainder to his own right Heirs, and *A.* dies, and the reversion descends to his son, who dies without issue, so that the tail is spent, and *C.* enters, these lands shall be assets to answer the debt of his father. *Carth.* 127: 3 *Lev.* 286: 3 *Mod.* 223. *S. C.*

The lands (as hath been observed) must descend to the Heir; and therefore it was formerly held, that if he took by *purchase*, as if the testator devised them to him, paying so much, or if he devised lands to one of the two, and his Heirs at law jointly, that those lands were not assets; but if he devised one part to *A.*, another to *B.* and another to his Heir at law, this third part was assets. *Cro. Eliz.* 431: 2 *Mod.* 286.

By the statute of frauds and perjuries, (29 *Car.* 2. c. 3.) it is enacted, That if land come to the Heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in cases of lands in *fee simple*, and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. Also by the said statute, §§ 10, 11. where lands are settled in trust, and descend in *fee* to the Heir of *cestuy que trust*; the same shall be assets in the same manner as lands in possession, but he shall not by reason of any plea or other matter be chargeable to pay the condemnation out of his own estate.—See 2 *Vern.* 248. and this *Dict.* *tit. Fraud*.

An equity of redemption of an inheritance is assets, for the Heir having a right in equity, that ought in equity to satisfy a bond debt. 4 *Chanc. Caf.* 148. Tenant in tail suffers a recovery to let in a mortgage of 500 years, then limits the land to the old uses, and makes his will, and devises all his lands for the payment of his debts; the redemption was limited to him, his Heirs and assigns; and the court thought that the equity of redemption of this mortgage, should be assets to satisfy creditors, or a subsequent grantee of an annuity. *Preced. Chanc.* 39. A right without any estate in possession, reversion or remainder, is not assets till it be recovered and reduced into possession. 6 *Co.* 58.

For more learning on this subject, see 14 *Im. Abr.* and 2 *New Abr.* title *Heir*; and this *Dict.* *tit. Assets*.

HEIRESS, The female heir to to a man, having an estate of inheritance in lands; and where there are several joint heirs, they are called *Co heirs* or *Co-heiresses*. As to stealing an heiress, and marrying her against her will; See *Forcible Marriage*.

HEIR-LOOME, From the Sax. *Heir*, i. e. *Heret*, & *Loom*, *Membrum*.] Comprehends divers implements of household, such as the first best bed and other things, which by the custom of some countries have belonged to a house for certain descents, and are never inventoried after the decease of the owner as chattels, nor do they go to the executor, but accrue to the Heir with the house itself by custom, and not by the Common-law: these are not devisable by testament; for the law prefers the custom before a devise, which takes not effect till after the death of the testator, and then they are vested in the Heir by the custom. *Co. Lit.* 18, 185. But sale in a man's life-time might make it otherwise. The ancient jewels of the Crown are Heir-looms, and shall descend to the next successor; and are not devisable by will. 1 *Inst.* 185. And Heir-looms in general are said to extend to all large household implements not easily moved. See *Spelman*.

It is said, that the word by time hath obtained a more general signification than at first it did bear, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscot, and such like: which, by the custom of some countries, have belonged to a house during certain descents, as before-mentioned.

Per Holt Ch. J. goods in gross cannot be an Heir-loom, but they must be things fixed to the freehold, as old benches, tables, &c. 12 *Mod.* 519, 520. Also on this subject, *vide* 12 *Co.* 104, 105. *Corwen's case*. and *ante* title *Heir*. III. 3.

HEGIRA, The Mahometan *Æra*, or computation of time; beginning from the flight of Mahomet from Mecca, 16 July, anno 622. As the years of the Hegira consist of only 354 days, they are reduced to the Julian calendar by multiplying the year of the Hegira by 354, dividing the product by 365, subtracting the intercalary days, or as many times as there are four years in the quotient, and adding 622 to the remainder.

HELSING, A brass coin among the Saxons, equivalent to our halfpenny.

HELM, Thatch or straw. *Cowell*. Sometimes called *Halm*.—*Helm*, is also a Saxon word, signifying a covering for the head in war. Also, that part of a coat of arms, which bears the crest.—The *steege*, or rudder in a ship, or other vessel.

HELOWE-WALL,

HELOWE-WALL, the bell-wall or end wall, that covers and defends the rest of the building. From Saxon *belan*, to cover or heal; whence a thatcher, slater or tiler, who covers the roof of a house, is in the Western parts called a *belligr*.—*Paroch. Antiq.* p. 573: See *Kenner's Glossary*.

HEMP AND FLAX. By *Stat. 33 H. 8. c. 17*, None may water *hemp* or *flax* in any river, running water, stream, brook, or common pond, where beasts are used to be watered, but only in their several ponds, &c. for that purpose, on pain of 20 s. By *Stat. 15 Car. 2. c. 15*, Any persons may in any place or corporate town privileged, or unprivileged, set up manufactures of *Hemp* or *Flax*, and persons coming from abroad, using the trade of *Hemp* or *flax* dressing, and of making thread, weaving cloth made of *Hemp* or *Flax*, or making tapestry hangings, twine or nets for fishery, cordage, &c. after three years, shall have the privileges of natural-born subjects.

As to the importation and exportation of hemp and flax from *Ireland*, &c. See *Stats. 7 & 8 W. 3. c. 39: 1 Ann. stat. 2. c. 8: 16 Geo. 2. c. 26. § 6. & 19 Geo. 3. c. 37*, the last giving a bounty, and the others allowing importation duty-free.—And see *Stat. 26 Geo. 3. c. 53. § 12*, and this Dict. title *Navigation-Aids*.

By *Stat. 26 Geo. 3. c. 43*, (and see *Stat. 27 Geo. 3. c. 13. § 65*.) bounties are granted for 7 years of 3 d. per stone for hemp, and 4 d. for flax raised in *England*.

The 1st lb. of hemp and flax is by *Stat. 11 & 12 W. 3. c. 16*, ascertained at 5 s. an acre. For penalties on workmen imbezbling it; see *Stats. 1 Ann. stat. 2. c. 18. § 1*. Against frauds in manufactures of hemp, flax, &c. *Stat. 22 Geo. 2. c. 27*.

HENCHMAN, *Qui equo innititur bellicoso*, from the German *henst*, a war horse.] With us it signifies one who runs on foot, attending upon a person of honour or worship. See the ancient *Stats. 3 Ed. 4. c. 5: 24 Hen. 8. c. 14*. It is written *henzman* *Stats. 6 Hen. 8. c. 1*.

HENFDPENNY. A customary payment of money instead of hens at *Christmas*: from the Saxons *ben*, gallina and *penning*, denarius *Monast. 2 tom. 327, 827*. *Du Roesne* thinks it may be *benenny*, gallinagium, or a composition for eggs. But possibly it is misprinted *benedenny* for *bead penny*, or *head penny*. *Cowell*, edit. 1727.

HENEWARD, A duty to the King in *Cambridgeshire*. *Donisday*.

HENGHEN, Saxon *horgen*.] A prison, gaol, or house of correction. *L.L. Hen. 1. c. 65*.

HENGWITH, See *Hangwite*.

HEORDFESTE, The same with *buscassne* or *busfestum*, i. e. the Master of a family: From the Saxon *hearthfæst*, i. e. fixed to the house or hearth: *Leges Canoni.* cap. 40 See *Harderfeld*.

HEORDPENNY, *Olim Romefot & postea Peterpence* from the Saxon *hearth*, focus; and *pening*, denarius. See *Peterpence* and *Romefot*.—*Leges Edgar. Reg. s. cap. 5. apud Bractonum*.

HEPTARCHY, The Kingdom of England was formerly, under the Saxons, divided into an Heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies; These were all reduced into one kingdom by *Egbert* King of the West Saxons in the year 827 or 828.—*Egbert* is therefore stiled the first King of England. See 4 *Can. n. c. 33*.

HERALD, HERALT, or HEROLD, Ital. *heraldo*, Fr. *herault*, quasi *herus altus*.] An officer at arms. *Vesfegian* thinks it may be derived from two Dutch words, *win*. Here, *exercitus* et *Healt*, *pugil magnanimus*; as if he should be called the *Champion of the Army*: and the Romans called *Heralds*, *feciales*. *Polydore*, lib. 19, describes them thus: *Habent insuper apparitores ministros, quos Heraldos dicunt, quorum præfectus Armorum Rex vocatur; hii belli et pacis Nuntii; Ducibus, Comitibusque a Rege factis insignia aptant, ac eorum funera curant*. The function of these officers, as now exercised with us, is to denounce war, proclaim peace, and to be employed by the King in martial messages: they are examiners and judges of gentilemens coat of arms, and conservators of genealogies; and they marshal the solemnities at the coronations, and funerals of princes, and other great men.

The three chief *Heralds*, are called *Kings at Arms*; of which *Garter* is the principal, instituted by King *Henry V.* whose office is to attend the *Knights of the Garter* at their solemnities, and to marshal the funerals of the nobility: and King *Edward IV.* granted the office of *King of Herald*s to one *Garter*, *cum feudis et possessionibus antiquis*, &c. The next is *Clarencieux* or *Clarentius*, ordained by *Edward IV.* who attaining the dukedom of *Clarence* by the death of *George* his brother, (whom he beheaded for aspiring to the crown,) made the *Herald* who belonged to that dukedom a King at arms, and called him *Clarencieux*; his proper office is to marshal and dispose the funerals of all the lesser nobility, knights and esquires, thro' the realm, on the South side of the *Trent*. The third is *Norroy*, quasi *North Roy*, whose office and business is the same on the North side of *Trent*, as *Clarentius* on the South, which is intimated by his name, signifying the Northern King, or King at Arms of the North parts. These three officers are distinguished as follows, viz. *Garter Rex Armorum Anglicorum; insinuat; Clarencieux, Rex Armorum partium Australium; Norroy, Rex Armorum partium Borealiū*.

Besides the *Kings at Arms*, there are six inferior *Heralds*, according to their original, as they were created to attend *Dukes* and great *Lords*, in martial expeditions, i. e. *York, Lancaster, Chester, Windsor, Richmond* and *Somerset*; the four former instituted by King *Edward III.* and the two latter by *Edward IV.* and *Henry VIII.* To these, upon the coming of King *George* to the crown, on account of his *Hanoverian* dominions, a new *Herald* was made, called *Hanover Herald*; and another stiled *Gloucester*, King at Arms. *Anno 11 Geo. 1.* And lastly, to the superior and inferior *Heralds*, are added four others, called *Marshals*; or *Pursuivants at Arms*, who commonly succeed in the places of such *Heralds* as die, or are preferred; and they are *Blue-mantle, Rouge-croix, Rouge-dragon*, and *Percutilli*: all equipped with proper enligas, badges and distinctions.

The ancient *Heralds* have been made a corporation or college under the *Earl Marshall* of *England*, with certain privileges by the Kings of this realm: *Conc. 1^{um} J. R. Heraldus Armorum, et omnes alii Heraldus, prosequentes sine Pursuivandi armorum, qui pro tempore fuerint, imperpetuum, sint unum corpus incorporatum, in re, facta, et non e; habebantque successionem perpetuam, nec non quædam privilegia commune, &c. Dat. &c. Spelm. Gloss. Herald's Court of Honour.* See titles *Honor-Courts*. COURT of Chivalry.

For the ceremony of making the King of Arms, see *Dalrick's case*. *Ley's Reports* 248.

HERBAGE, *Herbagium*.] The green pasture and fruit of the earth, provided by nature for the bite or food of cattle: it is also used for a liberty that a person hath to feed his cattle in the ground of another person, or in the forest, &c. *Crompt. Jurist* 197.

He that hath Herbage of a forest by patent may have trespass for the grass, but not for trees or the fruit of them; and he may take beasts damage feisant, and have *quare clausum fregit*, and by such grant may inclose the forest. Yet grantee of Herbage may inclose, and may have action of trespass *quare clausum fregit*. But though he that hath Herbage may inclose, yet he that hath reasonable Herbage cannot. *Dv.* 295. and see 2 *Ro. Rep.* 356.

Grantee of Herbage of a park cannot dispark it. *Godb.* 413. A lease was made of a manor with all gardens, orchards, yards, &c. and with all the profits of a wood, excepting to lessor forty acres, to take at his pleasure; per *Dyer*. The wood is not comprized within the lease, but the lessee shall only have the profits, as pannage, herbage, &c. 4 *Leon.* 8. See titles *Trespass*. *Lease*, &c.

HERBAGIUM ANTERIUS, The first crop of grass or hay in opposition to after-math and second cutting — *Parish. Antiq.* pag. 459.

HERBERY or **HERBURY**, An Inn. *Cowell*.

HERBENGER or **HERBINGER**, from the French *herberger*, that is *hospitio accipere*.] An officer in the King's house, who goes before and allots the noblemen, and those of the household their lodgings. *Kitchin*, fol. 176. It is also used for an innkeeper.

HERBERGAGIUM, Lodgings to receive guests in the way of hospitality. *Cowell*.

HERBERGATUS, Spent in an inn. *Cowell*.

HERBIGARE, To harbour, to entertain, from *beribergum*, *beriburga*, Saxon *berie berg*, a house of entertainment. — *Sommer's Antiq.* p. 248. Hence our *berberges* or *herbinger*, who provides harbour or house-room, &c.

HERCE, **HERCIA**, an harrow. *Fleta*, lib. 2. c. 77 — It signifies also a candlestick set up in churches, made in the form of an harrow, in which many candles were placed at the head of a *canonaph*.

HERCIARE, from the French *hercer*, to harrow. See 4 *Inst.* fol. 200.

HERDEWICH, or **HERDEWIC**. *Herdewich*.] A grange or place for cattle and husbandry. *Mon. Angl.* 3. part.

HERDWERCH, **HEORDWERCH**. Herdsman's work, or customary labours done by the shepherds, herdsman, and other inferior tenants at the will of their lord. *Cowell*, edit. 1727: *Regist. Eccl. Christi Cant.* MS.

HEREBANNUM, Sax. *Here*, *exercitus*, & *Ban*, *edictum*, *multa*] A mulct, for not going armed into the field, when called forth *Spelm*. Under the feudal policy, every free man, was under an obligation to serve the State. If, upon being summoned into the field, any free-man refused to obey, a full *herabannum*, i. e. a fine of sixty crowns, was to be exacted from him, according to the law of the Franks. This fine was levied with such rigor, that if any person was insolvent, he was reduced to servitude, and continued in that state until such time as his labours should amount to the value of the *herabannum*. The Emperor *Lotharius* rendered the penalty more severe, by confiscating the goods of the person refusing, and banishing him. *Robertson's Char.* V. 1 V. 216, 217.

HERBOTF, From the Sax. *Here*, and *Bode* a messenger.] The King's edict commanding his subjects into the field; from the Saxon *bare*, *exercitus*, and *bode* a messenger. *Cowell*.

HEREDITAMENTS, *Hereditamenta*.] All such immoveable things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance; and which, if they are not otherwise devised, descend to him that is next heir, and fall not to the executor as chattels do. See *stat* 32 *H. 8* cap. 2. It is a word of very great extent, comprehending whatever may be inherited or come to the *Heir*; be it real, personal or mixed, and though it is not holden, or lieth not in tenure. *Co. Lit.* 6 16. And by the grant of *hereditaments* in conveyances, manors, houses, and lands of all sorts, rent, services, advowsons, &c. pass. *Ind. Hereditamentum est omni quod jure hereditario ad heredem transit.*

Hereditaments are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: Incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal Hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only. For *law* says *Coke*, comprehendeth in its legal signification any ground, soil, or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. 1 *Inst.* 4. It legally includes also all castles, houses, and other buildings; for they consist, saith he, of two things; *land* which is the foundation; and the *structure* thereupon so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land which may seem a kind of solecism; but such is the language of the law. and therefore one cannot bring an action to recover possession of a pool, or other piece of water, by the name of *water* only; either by calculating its capacity, as for so many cubical yards; or, by superficial measure, for twenty acres of water, or by general description, as for a pond, a water course, or a rivulet: but he must bring his action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. *Brownl.* 142. For water is a moveable wandering thing, and must of necessity continue common by the law of nature: so that there can only be a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of *A.*'s pond into *B.*'s. *A.* has no right to reclaim it. But the land, which the water covers, is permanent, fixed, and immoveable. and therefore in this there may be a certain substantial property; of which the law will take notice, and not of the other.

Land hath also in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad caelum*, is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word *land* includes not only the face of the earth, but every thing under it or over it. And therefore if a man grants all his lands, he grants thereby

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all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing. *Co. Lit.* 4. Put the capital distinction is this; that by the name of a castle, messuages, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of Land, which is *nomen generalissimum*, every thing terrestrial will pass. *1 Inst.* 4, 5, 6. By the name of a Castle, one or more manors may be conveyed; and *conveyed* by the name of a manor, a castle may pass. *1 Inst.* 5; *2 Inst.* 31. See *2 Comm.* 17, 19.

An *Incorporeal Hereditament* is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. *Co. Lit.* 19, 20. It is not the thing corporate itself, but something collateral thereto; as a rent issuing out of lands, &c. or an office belonging to jewels, &c. Or, according to logicians, Corporeal Hereditaments are the substance which may be always seen, always handled; Incorporeal Hereditaments are but a sort of accidents, which inhere in, and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea, and abstract contemplation, though their effects and profits, which are totally distinct, may be frequently objects of our bodily senses. *2 Comm.* 20. These Incorporeal Hereditaments are stated in the Commentaries to be principally of ten sorts; *Advowsons*; *Tithes*; *Commons*; *Ways*; *Offices*; *Dignities*; *Franchises*; *Corodies*, or *Pensions*; *Annuities*, and *Rents*. As to all which see those several titles in this Dict.

HEREDITARY RIGHT TO THE CROWN, See title *King*.

HEREDITARY REVENUE OF THE KING, see title *King*.

HLREFARE, Saxon.] *Profectio militaris et expeditio* — See *Subsidy*. A military expedition, a going to warfare.

HLREFORD For inclosing of commons in Herefordshire, see *stat. 4 Jac.* 1. c. 11.

HEREGELD, Saxon.] *Pecunia seu tributum militando exercitus collatum*.] A tribute or tax levied for the maintenance of an army. See *Subsidy*.

HERELLUS, A sort of little fish, perhaps minnows, or rather gudgeons *Cowell, edit.* 1727.

HEREMITORIUM, A solitary place of retirement for hermits—*Mon. Ang. Tom.* 3. p. 18.

HERENACH, An archdeacon *Cowell, edit.* 1727.

HEREMONES, or **HERETEAMS**, One who follows an army of rebels. *Lamb. Leges Inæ, cap.* 15. *In exercitu prædatorum*, &c. from *here*, *exercitus*, and *team*, *liquela*.

HERESLITA, or **HLRESSA**, or **HERESSIZ**, A hired soldier, that departs without licence; derived from the Saxon *here*, *exercitus*, and *siten*, to depart, according to *Co.* 4 *Inst.* f. 128.

HERESY, *Hæresis*.] Among Protestants, is said to be a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the Christian faith, or at least of most high importance. *1 Hawk. P. C. c.* 2. § 1.

HERESY.

Anciently, under the general name of Heresy there have been comprehended three sorts of crimes; 1. *Apostasy*, when a Christian apostatizes to Paganism. 2. *Witchcraft*, 3. *Formal Heresy*, which seems to be an apostasy from the established religion; for which, and the several ways of determining, punishing, and the difference between the Civil and Imperial laws, Popish canons, and the laws of England concerning heresy, see a large account in *1 Hal. Hist. P. C.* 33;—410.

It seems difficult precisely to determine what error shall amount to Heresy, and what not; but the statute *1 Edw. cap.* 1. which erected the High Commission court, having restrained it to such as are either determined by scripture, or by one of the four first general councils, or by some other council, by express words of scripture, or by parliament, with the assent of the convocation; these rules are at present generally thought the best directions concerning this matter. *2 Hawk. P. C. c.* 2. § 2.

By the Common-law, one convicted of Heresy, and refusing to abjure it, or falling into it again after he abjured it, might be burnt, by force of the writ of *hæretico comburendo*, which issued out of Chancery upon a certificate of such conviction; but he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. *F. N. B.* 269; *3 Inst.* 43; *Doctor and Student, lib.* 2. *cap.* 29; *1 Hawk. P. C. c.* 2. § 10.

This writ *de Hæretico comburendo* is thought by some to be as ancient as the Common-law itself. However it appears from thence that the conviction of Heresy by the Common-law was not in any petty ecclesiastical court, but before the Archbishop himself in a Provincial Synod; and that the delinquent was delivered over to the King to do as he should please with him: so that the Crown had a controul over the Spiritual Power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ of course, but issuing only by the special direction of the King in council. *F. N. B.* 269; *1 Hal. P. C.* 395.

But in the Reign of Henry IV, when the eyes of the christian world began to be open, and the seeds of the protestant religion (though under the opprobrious name of Lollardy) took root in this kingdom; the Clergy taking advantage, from the King's dubious title, to demand an increase of their own power obtained an act of parliament, (*stat.* 2 *H.* 4. c. 15,) which sharpened the edge of persecution to its utmost keenness. For by that statute the Diocesan alone, without the intervention of a Synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames without waiting for the consent of the Crown. By *stat.* 3 *H.* 5. c. 7, Lollardy was also made a temporal offence, and indictable in the King's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction, with the bishop's consistory.

Afterwards when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated; for though what Heresy is, was not then precisely defined, yet we are told in some points what it is not. The *stat.* 25 *H.* 8. c. 14, Declaring, that offences against the see of Rome are not Heresy; and the Ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be re-

caused by two credible witnesses, or an indictment for Heresy be first previously found in the King's courts of Common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards by Stat. 31 Hen. 8. c. 14, the bloody law of the *Six Articles* was made; which established the six most contested points of popery; transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient Subjects, the Lords Spiritual and temporal and the Commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all opposers of the first to be Hereticks, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of Clergy and Laity for the trial and conviction of Hereticks; the reigning prince being then equally intent on destroying the supremacy of the Bishop of Rome, and establishing all other Romish corruptions of the christian religion.

It would be unnecessary to perplex this detail with the various repeals and revivals of the sanguinary laws in the two succeeding reigns; we may therefore proceed directly to the reign of Queen Elizabeth; when the Reformation was finally established. By Stat. 1 Eliz. c. 1, all former statutes relating to Heresy are repealed, which leaves the jurisdiction of Heresy as it stood at Common-law; viz. as to the infliction of common censures, in the Ecclesiastical Courts; and in case of burning the Heretic in the Provincial Synod only. 5 Rep. 23: 12 Rep. 56, 92. Sir Matthew Hale indeed is of a different opinion, and holds that such power resides in the Diocesan also, tho' he agrees that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the King's discretion. 1 Hal. P. C. 405. But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted Heresy; nothing for the future being so to be determined, but only such tenets, which have been heretofore so declared. 1. By the words of the canonical scriptures. 2. By the first four General Councils or such others as have only used the words of the Holy Scriptures; or, 3. which shall be hereafter so declared by the parliament, with the assent of the Clergy in Convocation. Thus was Heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular, as a man continued still liable to be burnt for what perhaps he did not understand to be Heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de Hæretico comburendo* remained still in force, and there are instances of its being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James I. But it was totally abolished, and Heresy again subjected only to ecclesiastical correction *pro salute animæ* by virtue of Stat. 29 Car. 2. c. 9; for in one and the same reign our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *Habeas Corpus act*; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law. 4 Comm 46—9.

The following determinations will further explain the history and progress of proceedings in Heresy; and those relative to the temporal courts seem to be yet undisputed law, as far as they are now applicable.

By the Common-law with us, the Convocation of the clergy or Provincial Synod, might and frequently did proceed to the sentencing of Hereticks, and, when convicted left them to the secular power, whereupon the writ of *hæretico comburendo* might issue. Bro. tit. Heresy: 2 Rol. Abr. 226.

It is also agreed, that every Bishop may convict persons of Heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it hath been questioned, whether a conviction before the Ordinary were a sufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the Convocation was. F. N. B. 269: 12 Co. 56, 57: 3 Inst. 40: Gibf. Codex 401: 1 Hawk. P. C. c. 2. § 4: State Trials, Vol. 2. 275.

It seems agreed, that regularly the Temporal Courts have no cognisance of Heresy, either to determine what it is, or to punish the Heretic as such, but only as a disturber of the public peace; that therefore, if a man be proceeded against as an Heretic in the spiritual court, *pro salute animæ*, and think himself aggrieved, his proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition, from a temporal one. 27 H. 8. 14 b. 5 Co. 58: Hob. 236.

Yet a Temporal Judge may incidentally take knowledge whether a tenet be heretical or not; as where one was committed by force of Stat. 2 H. 4. c. 15, for saying, that he was not bound by the law of God to pay tithes to the curate; another for saying, that tho' he was excommunicated before men, yet he was not so before God; the temporal courts on an *habeas corpus* in the first case, and in an action of false imprisonment in the other, adjudged neither of the points to be Heresy within that statute, for the King's courts will examine all things which are ordained by statute. 3 Inst. 42: 1 Rol. Rep. 110: 2 Bufl. 300.

In *quare impedit* if the bishop plead that he refused the clerk for Heresy, it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action is brought. 5 Co. 58: 1 Aud. 191: 3 Leon. 199: 3 Lev. 314. See title *Quare Impedit*.

HERETABLE JURISDICTIONS, in Scotland. The feudal grievance of these jurisdictions is removed by Stat. 20 Geo. 2. c. 43. Vide *Dissimile of Feud*, 292. And see the Stat. 20 Geo. 2. c. 50, which abolished the tenure of *Ward holding* equivalent to the ancient tenure of knight-service in England.

HERETICK, *Hæreticus*. One that adheres to and is convicted of heresy. See title *Heresy*.

HERETICO COMBURENDO. See *Heresy*.

HERETOCHIE, From Sax. *Here*, exercitus, and *togen*, ducere. The general of an army; a leader or commander of military forces. LL. Ed. Conf. c. 35. Ducange lays the *Heretochus* were the barons of the realm.—Leg. H. 1: Du Fresne. See title *Peer*.

HERETOCHIAS, A leader or commander of military forces. See at large the name and office in the laws of Edward the Confessor, cap. 35. *De Heretochus*.

HERETUM,

HERIOTUM, Sax. *heriot*; *heriot*, *heriot*, from *here*, *exercitus*, an army, and *geat*, *geat*, *geat*. Signified originally a tribute given to the lord of a manor for his better preparation for war. By the laws of *Canutus*, at the death of the great men of this realm, so many horses and arms were to be paid as they were in their respective life-times obliged to keep for the King's service. *Spelm.* Sir *Edw. Coke* makes *Heriot*, or *heriot*, (from *herus* lord) the lord's beast: And it is now taken for the best beast, whether it be horse, ox, or cow, that the tenant dies possessed of, due and payable to the lord of the manor: and in some manors, the best goods, piece of plate, &c. *Kitch.* 133.

There is this difference between *Heriot* and *Relief*; *Heriot* has been generally a *personal*, and *Relief* always a *predial* service.

It appears not only from *Spelman's* conjectures, but likewise from the laws themselves of King *Canutus*, that the *Danes* were the first inventors of *Heriots*, and that it was a political institution of theirs, whereby the *Danish* tenants were to hold by military service, and their arms and horses, at their deaths, to revert to the Public; by that means putting the whole strength and defence of the kingdom into their hands; committing only the affairs of agriculture, and the improvement of the nation to the *English*, though they thereby enjoyed greater freedom and immunities in their tenures than the *Danish* tenants. *Spelm.* 287.

As to the several kinds of *Heriots*, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory; those due by custom, are the most frequent, and arose by the contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant; and for which an *Heriot*, as the best beast, best piece of household furniture, &c. became due, and belonged to the lord, either on the death or alienation of the tenant, and which the lord may seize, either within the manor or without, at his election. *Dyer* 199 b: *Bro.* title *Heriot* 2, 3.

Heriots are therefore now to be considered as usually divided into two sorts; *Heriot-service* and *Heriot-custom*. The former, being such as are due upon a special reservation in a grant or lease of lands, therefore amount to little more than a mere rent. 2 *Saund.* 166. The latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom. *Co. Cop.* § 24. The latter, of which we are here principally to speak, are defined to be "a customary tribute of goods and chattels, payable to the Lord of the fee, on the decease of the owner of the land." 2 *Comm.* c. 28.

Upon the plan of the *Danish* establishment, already noticed, did *William the Conqueror* fashion his law of-reliefs, when he ascertained the precise relief to be taken of every tenant in chivalry; and, contrary to the feudal custom and the usage of his own duchy of *Normandy*, required arms and implements of war to be paid instead

of arms and implements of war. But this custom was not universal, and sometimes the relief was paid in money, as in the case of the *Double Rent* payable at the death of the tenant, which now continues among us, and is a custom of the same nature, but of Saxon parentage, and at first to have been merely discretionary. *London, Parambly.* 108.

There are now for the most part assigned to Copyhold Tenures and are due by custom only, which is the life of all estates by copy, and perhaps are the only instance where custom has favoured the Lord. For this payment was originally a voluntary donation or gratuitous legacy of the tenant; perhaps in acknowledgement of his having been raised a degree above villeinage, when all his goods and chattels were quite at the mercy of the Lord: and custom which has on the one hand confirmed the tenant's interest in exclusion of the Lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An *Heriot* may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, where upon the *Heriot* is still due by custom. *Bracton* speaks of *Heriots* as frequently due on the death of both species of tenants, which he observes, *magis sit de gratia quam de jure*; in which *Fleta* and *Britton* agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant, though now the immemorial usage has established it as of right in the Lord. *Bract.* l. 2. c. 36. § 9: *Fleta* l. 3. c. 18: *Britton*, c. 69.

This *Heriot* is, as has been said, sometimes the best live beast, or *aurum*, which the tenant dies possessed of, which is particularly denominated the villein's relief, in the 29th law of King *William the Conqueror*; sometimes the best inanimate 'good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which immediately on the death of the tenant who was the owner of it, being ascertained by the option of the Lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. *Hob.* 60. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no *Heriot* can be taken: for she can have no ownership in things personal. *Kalu.* 4 *Leon.* 239. In some places there is a customary composition in money, as 10s. or 20s. in lieu of a *Heriot*, by which the lord and tenant are both bound, if it be an indisputable antient custom; but a new composition of this sort, will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible. *Co. Cop.* § 31: See 2 *Comm.* 422—4. c. 28.

The following extracts will further elucidate this subject.—*Heriot-service* is payable on the death of Tenant in fee-simple; and *Heriot-custom* upon the death of Tenant for life: *Co. Lit.* 185.

If an *Heriot* is reserved upon a lease, it is *Heriot-service*, and incident to the reversion. *Lutw.* 1366, 7. For a *Heriot* goes with the reversion, as well as rent; and the grantee of the reversion shall have it. 2 *Saund.* 166.

Although an Heriot reserved upon a lease is called an Heriot-service; yet it is not like the case where a man holds land by the service of paying an Heriot, &c. because where a Heriot is reserved on lease, the proper remedy is either a distress, or action of covenant grounded on the contract, for the lessor cannot seize, as the lord of a manor may do, the beast of his tenant who holds of him by Heriot-service. *Kirkw. 82, 84. See Post.*

There may be a covenant in leases for lives, &c. to render the best beast, or so much money for an Heriot, at the election of the lessor; in which case the lessor must give notice which he will accept, before action may be brought for it, or a distress taken. *2 Lill. Abr. 19.*

For Heriot-service, the lord may distress any beast belonging to the tenant on the land: Also it has been held, that the lord may distress any man's beasts which are upon the land, and retain them until an Heriot is satisfied. *Co. Litt. 185; Litt. Rep. 33; Co. Car. 260.* And if the tenant deviseth away all his goods, &c. yet the lord shall have his Heriot on the death of the tenant. *Stat. 13 Eliz. cap. 5.*

When a Heriot is to be paid by a certain life holder of his own goods, an assignee is not liable to pay the Heriot; his goods not being the goods of such life. *Co. Car. 313; 2 Nelf. 532.* If the lord purchase part of the tenancy, Heriot-service is extinguished; but it is not so of Heriot-custum. *8 Rep. 105.*

It hath been solemnly adjudged, that for an Heriot service, or for a Heriot reserved by way of tenure, the lord may either seize or distress; for when the tenant agrees that the lord shall on his death have the best beast, &c. the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves 20 s. or a robe; for there the lessee has his election which he will pay, and being to do the first act the lord cannot seize, but must distress. *Plow. 96. adjudged. Cro. Eliz. 589.*

So it hath been ruled, that for a Heriot-custum or service the lord may seize as well in the manor as out; but if he distress, it must be in the manor. See *1 Salk. 356; 1 Show. 81. S. P. 3 Mod. 231.* But it is now stated as positive law, that for Heriot-custum, which Coke says, *Co. Cap. 6 25*, lies only in *prender*, and not in *render*, the lord may seize the identical thing itself, but cannot distress any other chattel for it. *Cro. Eliz. 590; Cro. Car. 260; 3 Com. 15. c. 1.* And this is confirmed by the following authorities.

For Heriot custum, the lord is to seize, not distress; and he may seize the best beast, &c. though out of the manor, or in the King's highway, because he claims it as his proper goods, by the death of the tenant, which he may seize in any place where he finds it. *Kitch. 267; 2 Inst. 132; 2 Nelf. Abr. 931; Plow. 96. Kirkw. 82, 4; 1 Salk. 356; Bro. tit. Heriot, 2, 3.*

And it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations. See *1 Show. 81; 3 Mod. 231.*—Also see further *14 Vin. Abr.* and *3 New. Abr. tit. Heriot.*

HERISCHILD, Military service, or knight's fee: from the Sax. *Heri*, an army, and *scild*, scutum. *Cowell.*

HERISGINDIUM, A division of household goods; non tollis fieri placet heriscindia *Blount. i. e. I am not pleased to often to divide my goods.*

HERISLIT, Laying down of arms: from the Sax. *here*, exercitus, and *slitan*, sciffura. *Blount. See Spelm.*

HERISTALL, A castle; from the Sax. *here*, an army, and *stall*, *antio*, *Blount; Spelm.*

HERMAPHRODITE, *Hermaphroditus.*] A person that is both man and woman. *Lit. Dist.* And as *Hermaphroditus* partake of both sexes; they may give or grant lands, or inherit as heirs, any, and shall take according to the prevailing sex. *Co. Litt. 2, 7.* See titles *Hen*; *Deficient*; *Grant*, &c.

HERMER, Among the Saxons was a great lord; from the Sax. *hera*, i. e. major, and *maere*, dominus.

HERMINUS, *mus ponticus.*] A mouse, of whose skins we have *Ermine*. See *Furr.*

HERMITAGE, *Hermitagium.*] The habitation of a hermit, a solitary place. *Mon. Angl. 2 par. fol. 339 b.*

HERMITORIUM, The chapel or place of prayer, belonging to an hermitage. *Cowell.*

HERnescus. A heron. *Cowell.*

HERNESSUM, Tackle or furniture of a ship. *Pl. Parl. 22 Ed. 1.* It is also called *hermiffum*, from the Teuton. *harnas*, English *harness*, and signified any sort of furniture of a house, implements of trade, or rigging of a ship. *Cowell.*

HEROUDES, Heralds. *Knighton, p. 2571.*

HERRINGS. It is unlawful to buy or sell *Herring* at sea, before the fishermen come into the haven, and the cable of the ship be drawn to the land. *Stat. 31 Ed. 3. stat. 2.* No *herrings* shall be sold in any vessel, but where the barrel contains 32 gallons, and half barrel and firkin accordingly; and they must be well packed, of one time's packing and salting, and be as good in the middle as at the ends, on pain of forfeiting 3 s. 4 d. a barrel, &c. by *Stat. 22 Ed. 4. cap. 2.* The vessels for *Herrings* are to be marked with the quantity, and place where packed; and packers are to be appointed and sworn in all fishing ports, &c. under the penalty of 100 l. *Stat. 15 Car. 2. cap. 16.*—See titles *Fish*; *Navigation Acts*.

HERRING SILVER, Seems to be a composition in money, for the custom of paying such a number of *herrings*, for the provision of a religious house. *Plac. Trin. T. 18. E. 1.*

HESIA, An easement.—*Chart. Antiq.*

HESIA or HESTHA, A corruption of the Latin *bestia*] A little loaf of bread. *Domesday: Cowell, edit. 1727. See Russia.*

HESTCORN. Perhaps vowed or devoted corn. See *Mon. Ang. tom. 2. p. 367.*

HESTA. A capon or young cockerill. *Domesday.*

HEUVELBORTH, from the Sax. *healf*, i. e. dimidium, & *borgh*, *debitur vel fidejussor.*] A surety for debt, *quia qui fidejuber, debitorem se quodammodo constituit. Du Fresne.*

HEXAM or HEXHAM; AND HEXAMSHIRE, Anciently *Hogestald*; was a county of itself, and likewise a bishoprick, endowed with great privileges: but by the *Stat. 14 Eliz. c. 13*, it is enacted, that the franchise of *Hexham* and *Hexhamshire*, shall be within and accounted part of the county of *Northumberland*, saving to the bailiffs return of writs, &c. *4 Inst. 22.*

HEYBOTE,

HEY

HEYBOTE, See Heybote.

HEYLOED, Seems to signify a customary load or burden laid upon the inferior tenants for mending or repairing the *heys* or hedges. *Cowell*.

HEYMECTUS, A net for catching conies; a *hay-net*.
Placit. temp. Ed. 3. Cowell.

HIBERNAGIUM, See Hibernagium.

HIDAGE, *hidagium*.] An extraordinary tax formerly payable to the King for every *hide* of land. *Bract. lib. 2. cap. 6.* This taxation was levied, not only in money, but provision of armour, &c. And when the Danes landed at Sandwich, in the year 994, King Ethelred taxed all his lands by *hides*, so that every 310 hides found one ship furnished; and every 8 hides found one jack and one saddle, to arm for the defence of the Kingdom, &c. Sometimes the word *hidage* was used for the being quired that tax; which was also called *hidgild*, and interpreted from the Saxon, a price or ransom paid to save one's skin or hide from beating." *Sax. Dict.* See title *Taxes*.

HIDEGILD. Vide *Hidgild*.

HIDES, See *Leather and Skins.*

HIDE AND GAIN, Did anciently signify arable land. *Coke Lit.* 85 b. For of old, to *gain* the land was as much as to till it. See *Gainage*.

HIDELANDS, Sax. *Hydlandes*] *Terræ ad hydām seu*
dælum pertinentes.

HIDE OF LAND, Sax. *hyde-lands*, from *hyden*, *tegere*.] A ploughland (See *Plow-land*.) In an old manuscript it is said to be 120 acres. *Bede* calls it *Familiam*, and says it is as much as will maintain a family, others call it *Mansum*, *Manentem*, *Casatam*, *Carucatam*, *Sullingham*, &c. *Compton*, in his *Jurisdic* fo. 222, says, a *Hide of land* contains one hundred acres, and eight hides make a knight's fee. *Henry Hunting.* *Hist. lib. 6. fol. 206. b.* But *Sir Edward Coke* holds, that a knight's fee, a *Hide* or plough-land, a yard land, or an *oc gang of land*, do not contain any certain number of acres *Co Litt fol. 69.* The distribution of *England* by *Hides of land* is very ancient; for there is mention of them in the laws of *King Ina*, cap 14. *Spelm.* And see *Cand. Brit.*

HIDEL, A place of protection or sanctuary. See *Stat. Hen 7 c. 6.* . Cowel, edit. 1727.

HIDGILD, HIDE GILD, in LL. *Canuti R.* Sometimes written *Hinegild* and *Hudegeld*. From the Sax. *Hide*, i. the skin; and *geld*, *pretium*.] The price by which a villain or servant redeemed his skin from being whipped in such trespasses as anciently incurred that corporal punishment. *Corwell*.—See *Fleta*, lib. 1. c. 47. § 20.

HIERLOOM, See *Heirloome*

HIGH TREASON, See *Treason*.

HIGHWAY:

VIA REGIA.] A publick passage for the King's people; for which reason it is called the *King's Highway*

Under this title are comprehended Bridges repaired by the parish or township. As to County Bridges, See this Dict. title *Bridges*.

The law relating to *Turnpike-roads* as well as that concerning *Highways*, being in a great measure, regulated by statutes, the provisions of which are in some degree implicated with, and frequently refer to each other, the whole is here digested and abridged according to the following divisions.

HIGHWAYS.

1. Of the various Sorts of Highway, &c.

II. Of the Right to the claiming, and changing and
altering of Highway.

III. Of Reports of Confirmed Cases.

IV. Of *Musco*, at Common Law, in Highway.

V. Of proceedings relative to repairing Highways, Nuisances
in them, &c.

* VI. Regulation of { (A) HIGHWAYS
(B) TURNPIKE-ROADS } in Statute.

"I. It seems, that anciently there were but four High ways in England, which were free and common to all the King's subjects, and through which they might pass without any toll, unless there was a particular consideration for it; all others, which we have at this day, are supposed to have been made through the grounds of private persons, on writs of *ad quod damnum*, &c. which being an injury to the owner of the soil, it is said that they may prescribe for toll without any special consideration: 3 *New Abr.* 54: 1 *Mod.* 231: 2 *Mod.* 143:

There are (says Lord Coke) three kinds of ways: 1. A foot-way, called in Latin *iter*. 2. A pack and prime way, which is both a horse and foot-way, called in Latin *actus*. 3. A cart-way, called in Latin *via* or *aditus*, which contains the other two, and also a cart way; and is called *via regia*, if it be common to all men; and *communis fructuaria*, if it belong only to some town or private person. Co. Lit. c6 a.

But, notwithstanding these distinctions, it seems, that any of the said ways which is common to all the King's subjects, whether it lead directly to a market-town or only from town to town, may properly be called a Highway; that any such cart-way may be called the King's Highway; that a river common to all men may also so called a Highway; and that distances in any of the said ways are punishable by indictment: otherwise they would not be punished at all: for they are not actionable unless they cause a *special damage* to some particular persons, because, if such action would lie, a multiplicity of suits would ensue. See 2 *Term Rep.* — But it seems, that a way to a parish church, or to the common fields of a town, or to a village, which terminate there, may be called a private way, because it belongs, not to all the King's subjects, but only to the particular inhabitants of such parish, house or village, each of which, as it seems, may have an action for a nuisance therein. *Palm* 389: *Cra. Elix* 63. 664: 1 *Vent* 189, 208: 3 *Keb.* 28: *Cy. Lit.* 56: 6 *Mod* 255: 1 *Harw. P. C.* c. 76. § 1.

A street built upon a person's own ground is a dedi-
cation of the Highway so far only as the publick has
occasion for it, viz. for a right of passage, not as to the
absolute possession of the soil *Sua 1004.*

If passengers have used time out of mind, when the roads are bad, to go by outlets on the land adjoining to a Highway in an open field, such outlets are parcel of the Highway; and therefore if they are sown with corn, and the tract sounderous, the King's subjects may go upon the corn. 1 *Rep. Abr.* 39b: *Cro. Ca.* 366 S C: 1 *Hawt. P. C. c.* 76 § 2. But it is not a good justification in *trespass* that the defendant has a specific right of way over the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable by being overflowed by a river. *Taylor v Whitehead Doug* 745-9.

HIGHWAYS, II. III.

Though every Highway is said to be the King's, yet this must be understood to be that in every Highway the King and his Subjects may pass and repass at their pleasure. But the freehold, and all the profits, as trees, &c. belong to the lord of the soil, or to the owner of the lands on both sides of the way. Also the lord or owner of the soil shall have an action of trespass for digging the ground. But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within an Highway within this rape, though the manor or soil adjoining belongs to another: for usage to take the trees is a good mark of ownership. 1 *Rel. Abr.* 394: 1 *Burr.* 43: *Kilw.* 141.

II. A Man may have a way either by prescription or grant, by reservation, by implication, or by cowlty of partition, and shall not in a *cuius claudunt* be obliged to shew which way he claims it; but it will be sufficient for him to alledge *debet et silet, &c.* but in a bar or replication, he must shew his title precisely. 1 *Pent.* 274: 2 *Lev.* 148: 3 *Keb.* 548, 531. But he who prescribes for a way, must shew in certain whether it is a foot, horse, or cart way. *Yel.* 163.

But it seems, that if a man has a way for carriages from D, to Blackacre over my close, and after he purchases land adjoining to Blackacre, he cannot use the said way with carriages to the land adjoining, for then it may be very prejudicial to my close; but it seems, if I will help myself, I must shew the special matter, and that he used it for the land adjoining. 1 *Rel. Abr.* 391.

A way must not be claimed as appendant or appurtenant to a house, because it is only an easement, and no interest. *Yelv.* 159. But it may be *quasi* appendant thereto, and as such pass by grant thereof. *Cro. Jac.* 190.

A man may prescribe for a way from his house through a certain close, &c. to church, though he himself has lands next adjoining to his said house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others. *Ralm.* 387, 388: 2 *Rel. Rep.* 397.

An ancient Highway cannot be changed without an injunction found on a writ of *ad quod dampnum*, that such change will be no prejudice to the Public; and it is said, that if one change a Highway without such authority, he may stop the new way whenever he pleases; neither can the King's subjects, in an action brought against them for going over such new way, justify generally as in a common Highway, but *ought to shew specially, by way of excuse, how the old way was obstructed, and a new one set out*; neither are the inhabitants bound to keep watch in such new way, or repair it, or to make amends for a robbery committed in it. *Cro. Car.* 266: *Vaugh.* 341: *Yelv.* 141: 1 *Burr.* 465: 1 *Hawk. P. C.* 2, 76, 53.

But it hath been holden, that if a water, which hath been an ancient Highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the Highway continues in the new channel in the same manner as in the old. 22 *Aff.* 93: 1 *Rel. Abr.* 390.

An owner of land, over which there is an open road may inclose it by his own authority, but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. But if he alter or change the road by the legal course of a

writ of *ad quod dampnum*, he is not obliged to repair the new road, unless the jury impose such a condition on him; for otherwise it stands just as it did before, even though it was at first open and should be directed by the jury to be inclosed. And a private act of parliament for inclosing lands which vests a power in commissioners to set out new roads by their awards, is equally strong as to these consequences as a writ of *ad quod dampnum*. See 1 *Burr.* 456.

As to the regulation by statute, See *post.* VI. (A) 9.

III. Of Common rights, the general charge of repairing Highways lies on the occupiers of lands in the parish wherein they lie; but it is said that the tenants of the lands adjoining are bound to scour their ditches. 1 *Rel. Abr.* 39: *March* 26: 1 *Kent.* 90: 181: 2 *Hen.* 7. 5.

If a parish is partly in one county, and part in another, and the Highways in one county are out of repair, the whole parish shall contribute to the repair; but there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach, the one may have an action upon the case against the other; but in indictment they shall take no advantage of these agreements, for as to the King they are equally liable. 1 *Mod.* 112: 1 *Yelv.* 256: 3 *Keb.* 301.

A Highway lying within a parish, the whole parish is of common right bound to repair it; except it appears that it ought to be repaired by some particular person either *ratiōe tenuræ*, or by prescription. 1 *Vent.* 183. *Style* 163.

If a parish lie in two distinct counties, an indictment may be brought against that part of the parish in which the ruinous road lies. 4 *Burr.* 2511. But it must appear upon the face of the indictment by what right the charge is laid upon the particular division of any parish, which is in one county only. 5 *Burr.* 2700, 2: As that they have repaired time out of mind. *Andr.* 276: *Hardw.* 256; and see 2 *Tenn. Rep.* 513.

But though the parish be obliged of common right to repair the Highways in it, yet it is certain, that particular persons may be bound to repair the Highway, by reason of inclosure or prescription; as where the owner of lands not inclosed, next adjoining to the Highway, incloses his lands on both sides of it; in which case he is bound to make a perfect good way, and shall not be excused by making it good as it was before the inclosure, if it were then any way defective, because by the inclosure he takes from the people the liberty of going over the lands adjoining to the common track. 1 *Rel. Abr.* 390: *Cro. Car.* 366: 1 *Sid.* 464.

Also it is said, that if one inclose land on one side, which hath anciently been inclosed on the other side, he ought to repair all the way; but that if there be no such ancient inclosure on the other side, he ought to repair but half the way. 1 *Sid.* 464.

Therefore, if there be an old hedge time out of mind belonging to A. on the one side of the way, and B. having land lying on the other side, makes a new hedge, there B. shall be charged with the whole repair. 1 *Sid.* 464: 2 *Keb.* 665: 2 *Saund.* 157. But if A. makes a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. 1 *Sid.* 464: 2 *Keb.*

66g. Nor it seems clear, that whosoever a person makes himself liable to repair a Highway, by reason of his own fault by throwing of it upon the road, he thereby binds himself from the burden of any future reparation. 1 *Comm.* 160; See ante II.

In a writ of *ad quod damnum* and *inquisitio* found thereupon, after the person hath once made the road, (and *N. B.* it is not necessary the whole new road should go through his own soil;) the parishioners ought to keep it in repair: because being discharged from repairing the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the parishioners who sued out the writ, and his heirs, ought to keep it in repair, because the inhabitants of the other parish gaining no benefit from the old road being taken away, it would be imposing a new charge upon them for which they enjoyed no compensation. 3 *Aff.* 772.

Particular persons may be bound to repair a Highway, by prescription, or in respect of interest of the land wherein the road lies; and it is said, that a corporation aggregate may be charged by a general prescription; that it ought and hath used to do it, without shewing any consideration in respect whereof they had used to do it, because such a corporation never dies, neither is it any plea, that they have done it out of charity; but it is said, that such a general prescription is not sufficient to charge a private person, because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. but it seems, that an indictment charging a tenant of lands in fee with having used of right to repair such a way *ratione tenore terræ sue*, without adding that his ancestors, or those whose estate he hath, have so done, is sufficient, for it is implied. 27 *Aff.* 51: 27 *Ed.* 4. 38 *Bio. Prescription* 49, 70: *M. v. 52 at Lamb.* 206: 1 *Hawk. P. C. c. 76. § 5—8.*

And it seems certain in all those cases, whether a private person be bound to repair a Highway by inclosure or prescription, that the parish cannot take advantage of it on the general issue, but must plead it specially; that therefore, if to an indictment against the parish, for not repairing a Highway, they plead Not-guilty, this shall be intended only that the ways are in repair, but does not go to the right of reparation. 1 *Mod.* 112: 3 *Keb.* 301: 1 *Vent.* 256.

At Common law it is said, that all the county ought to make good the reparations of a Highway, where no particular persons are bound to do it, by reason the whole county have their ease and passage by the said way. *Co. Rep.* 13. By the ancient Common-law, villages are to repair their Highways, and may be punished for their delay; and if any do injury of straighten the Highway, he is punishable in the King's Bench, or before justices of the peace in the Court-Leet, &c. 27 *Aff.* 63: *Crompt. Jurisd.* 76: See post V.

As to Private ways.—If one grants a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the land be filled with water, yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. *Godb.* 52, 3. But in such case he may bring his

action against the owner of the land for spoiling the way, or he may sue to go out of the way, upon the land of the wrong doer, or alter to the bad way as he can. But where a private way is spoiled by those who have a right to pass through, and through the default of the owner of the land, it seems, that they who have the use and benefit of the way, ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 *Burr.* 482.

In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient to allege, that the defendant as owner of the close is bound to repair. 3 *Term Rep.* 765.

For further matter as to repairs of Highways, See post VI. (A). 2, 3, 6.

It is clearly agreed to be a Nuisance to dig a ditch, or make a hedge across the Highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious. *Kitch.* 34: 1 *Hawk. P. C. c. 76. § 48.* Also it is a Nuisance for any person (and for which he may be indicted,) to continue an incroachment, or other nuisance to a Highway begun by his ancestor, because such continuance thereof amounts, in the judgment of law, to a new nuisance. 1 *Hawk. P. C. c. 76. § 61.* Also it is agreed, that it is no excuse for him who lays logs in the Highway, that he laid them only here and there so that the people might have a passage through them by windings and turnings. 2 *Roll. Abr.* 137: 1 *Hawk. P. C. c. 76. § 49.*

It is a nuisance to suffer the Highway to be incommoded by reason of the foulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c. And it is said, that the owner of land next adjoining to the Highway, ought of common right to clear his ditches; but that the owner of land next adjoining to such land, is not bound by the Common-law to do without a special prescription; also it is said, that the owner of trees hanging over an Highway, to the annoyance of travellers, is bound by the Common-law to lop them; and it is clear that any other person may lop them, so far as to avoid the nuisance, 8 *II.* 7. 5 a: *Kitch.* 34: *Dalt. cap.* 26: 1 *Hawk. P. C. c. 76. § 52.*

But it is no nuisance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time. 2 *Roll. Abr.* 137, 265.

Any one may justify pulling down, or otherwise destroying a common nuisance, as a new gate or house erected in a Highway; and it hath been holden, that there is no need, in pleading such justification to shew that as little damage was done as might be. 2 *Roll. Abr.* 144: *Cro. Car.* 184: 1 *Jam.* 221: 2 *Salk.* 458.

Though all nuisances are punishable by indictment with fine and imprisonment, it is said, that one convicted of a nuisance to the Highway, may be commanded by the judgment to remove it at his own costs, &c. 2 *Roll. Abr.* 84: 1 *Hawk. P. C. c. 75. § 44.* See 2 *Sira.* 686.

A gate erected in a Highway is a common nuisance, because it interrupts the people in that free and open passage, which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the

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the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. 1 Hawk. P. C. c. 75. § 9. If one has a *private way* without a gate, and a gate is hung up, an action on the case lies, for the party hath not his way as he had before. *Litt. R. p.* 267.

See further as to nuisances in Highways post V: and of their punishment by statute, post VI. (A) 4.

V. As to the general doctrine with respect to Indictments, &c. upon this subject, Mr. Serjeant Hawkins has laid down the following rules:

First, That it is safe in every such indictment to shew both the place from which, and also the place to which, the way supposed to be out of repair doth lead; yet exceptions, for want of such certainty, have sometimes been disallowed: (See 4 Burr. 2091: Lucas 383.) However it seems certain, That there is no necessity to shew that a Highway leads to a market town, because every Highway leads from town to town. 1 Hawk. P. C. c. 76. § 86.

An indictment against the parish of B. for not repairing a road leading from A. to B. is exclusive of B. and therefore bad: and it is not aided by a subsequent allegation that a certain part of the same Highway, situate in B. is in decay, &c. 3 Term Rep. 513.—See 1 H. Black. Rep. 351; that in pleading a publick Highway it is not necessary to state any termini. So in an indictment for a nuisance in a Highway, it is not necessary to mention the termini. *Stra.* 44.

2dly, That it is necessary in every such indictment expressly to shew in what place the nuisance complained of was done; for which cause an indictment for stopping a way at D. leading from D. to C. is not good; for it is impossible that a way leading from D. should be in D. and no other place is alledged. 1 Hawk. P. C. c. 76. § 87.

So also in a presentment the Highway must be alledged to lie in the parish, otherwise the parish is not bound to repair. *Cowp.* 111; *Stra.* 181.—But if there be two villis in a parish, it is not necessary, in an indictment for a nuisance, to shew in which vill the nuisance lies. *Say.* 119.

3dly, That every such indictment ought also certainly to shew to what part of the Highway the nuisance did extend, as by shewing how many feet in length, and how many feet in breadth it contained; or otherwise the defendant will neither know of the certainty of the charge, against which he is to make his defence, neither will the court be able from the record to judge of the greatness of the offence, in order to assess a fine answerable therunto; and upon this ground it hath been adjudged, that an indictment for stopping a certain part of the King's Highway at K. is bad, for the uncertainty thereof. Also it hath been resolved, that the place wherein such a nuisance is alledged, is not sufficiently ascertained in such an indictment, by shewing that it contained so many feet in length, and so many in breadth, by estimation. 1 Hawk. P. C. c. 76. § 88.

An indictment for a nuisance in laying soil in a Highway is not bad for want of the length and breadth of the nuisance being set out. *Say* 98.—Nor for a nuisance in digging two grips or ditches in a common footway. *Say.* 197.—Nor for a nuisance, that a certain Highway and bridge are in a ruinous condition. *Say.* 301.

4thly, That every such indictment must shew, that the way wherein a nuisance is alledged, is a common Highway; for which cause it hath been resolved, That an indictment for a nuisance to a highway, without adding that it was a Highway, is bad; and upon the same ground it seemeth also, that an indictment for a nuisance to a common footway to the church of D. for all the parishioners of D. is not good; yet it seems, that if those last words, viz. for all the parishioners of D. had been omitted, such an indictment might be maintained. See 1 Hawk. P. C. c. 76. § 89.

5thly, That it is not safe in an indictment against a common person for not repairing a Highway, which he ought to have done in respect of the tenure of certain lands, barely to say that he was bound to repair it *ratione tenuræ terræ*, without adding *suæ*. Also it is said, that in an indictment against a bishop, &c. for not repairing a Highway, in respect to certain lands, it ought to be shewn in what capacity he ought to repair it, because otherwise it cannot be known in what capacity the process is to be awarded against him. 1 Hawk. P. C. c. 76. § 90.

If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. *Stra.* 184.—And it hath been held upon consideration that *ratione tenuræ* is sufficient without *suæ*. *Stra.* 187. Hawkins positively states that the defendant ought not to plead *quod non debuit reparare* without shewing who ought. 1 Hawk. P. C. c. 76. § 94; cites 1 Sid. 140: *Carth.* 213: 11 Mod. 273: 12 Mod. 13.

6thly, That in every such indictment the fact alledged against the defendant must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, That a presentment for diverting a Highway is not good, because a Highway cannot be diverted, but must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place. See 1 Hawk. P. C. c. 76. § 91.

It hath been resolved, That an indictment against a man for stopping a Highway in his own land, is good, without laying the offence done *vi et armis*. Also it is said, That a presentment that a Highway in such a place is decayed by the default of the inhabitants of such a town, is good, without naming any person in certainty. But it hath been adjudged, that an indictment against particular persons must specially charge them every one; for which cause it hath been resolved, that an indictment against several for not repairing their streets, that they, & *eorum uterque*, did not repair them, is not good. See 1 Hawk. P. C. c. 76. § 92.

Upon an indictment for not repairing a Highway, if the defendant produce a certificate before trial, that the way is repaired, he shall be admitted to a fine: but after verdict, the certificate is too late, for then he must have a *consent* to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, must be answered by a record. *Raym.* 215. And where the defendants, indicted for not repairing a common footway, confessed the indictment, and submitted to a fine; it was held, that the matter was not ended by their being fined; but that writs of *distingas* shall be awarded *in infinitum* till the court of B. R. is certified that the way is repaired, as it was when it was at best; but the defendants are not bound to put it in better repair than it has been time out of

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of mind. 1 *Salk.* 358; 6 *Mod.* 163. If a defendant has made a Highway as good as it is capable of being made, it was said, in an extraordinary case, that he shall not be charged him, on an information against him, though it may be a mitigation of his fine. 1 *Salk.* 358; 1 *Alfo.* 119. It is no excuse for the inhabitants of a parish indicted at Common-law, for not repairing the Highways, that they have done the work required by statute; for the Statutes are made in aid of the Common-law: and when the statute work is not sufficient, rates and assessments are to be made. *Dalt.* c. 26.

It is said, that if the right or title to repair such ways come in question, upon suggestion and affidavit made thereof, a *certiorari* may be had to remove the indictment into B. R.

A person may be indicted for not repairing a house standing upon a Highway which is ruinous, and like to fall down, to the danger of travellers, whatever be his tenure, which in such case is not material. 1 *Salk.* 357.

If there be a common foot-way through a close by prescription, and the owner of the close ploughs up the way, and sows it, and lays thorns at the side of it, passengers may go over another foot-way in the same close, without being trespassers. *Tylor.* 142. And if a Highway is not sufficient, any passenger may break down the inclosure of it, and go over the land, and justify it till a sufficient way is made. 3 *Salk.* 182.

Erecting a gate across a Highway, though not locked, but opening and shutting at pleasure, is esteemed a nuisance; for it is not so free and easy a passage, as if there had been no gate; and the usual way of redressing nuisances of this kind, is by indictment; but every person may remove the nuisance, by cutting or throwing it down, if there be occasion so to do; and it hath been held, that though there are many gates across Highways, they must be anciently set up, and it shall be intended by licence from the King upon the writ of *ad quod damnum*. *Gro. Car.* 184. See ante IV.

VI. (A) Of HIGHWAYS.

1. *The Statute duty.*
2. *Assessment of Rates and other funds for the Repair of Highways.*
3. *Of the Appointment of the Surveyor, and his duty.*
4. *Of Nuisances by Statute.*
5. *The Number of Horses in Carriages.*
6. *Of presenting Highways.*
7. *Of levying Assessments, Penalties and Forfeitures; and other general provisions to enforce the Execution of the Act.*
8. *Of Defendants in Actions on the Statutes, &c.*
9. *Of Changing and Enlarging Highways.*

1. By *stat.* 13 *Geo.* 3. c. 78. § 34, which repeals and consolidates the provisions of all former statutes on this subject, Occupiers of 50 *l.* a year keeping a team of three horses shall send the same and two men to do statute-duty for six days in every year.—And so for another six days in every year for every further 50 *l.* a year.—So also every person who shall occupy 50 *l.* in any other parish than where he resides.—Every person occupying 50 *l.* a year, but not keeping a team, shall send a team; a person not keeping a team, but occupying under 50 *l.* a year either where he does or does not reside, to pay the surveyor

in lieu of duty for every 20 *s.* a year 1 *d.* for every day's duty.—A person keeping a team and not occupying 30 *l.* a year shall send one man with the team.

Labourers, who are not kept, neither occupied or let, are liable to the performance of the duty; to be satisfied by their Owner. *Falm.* 389.

The living of the clergy are liable as other estates, *W. 1st.* 40; 1 *Inq.* 784.

Whoever shall keep a cart and horse, and not a team, shall send the same, and one labourer, or pay the composition at the option of the surveyor.—Persons above 18 and under 60 not occupying 4 *l.* a year, not being apprentices or menial servants, if they have not otherwise performed or commuted shall, by themselves or deputy, perform the six days' duty.—A person keeping a coach or carriage and no team, and not occupying 50 *l.* a year shall pay 1 *s.* a day for each horse or the composition before mentioned at the option of the surveyor.—If the carriages required are not necessary, the owners shall send 3 men or pay 4 *s.* 6 *d.*—The labourers shall furnish themselves with proper instruments for the statute-labour; and shall with the teams, &c. work 8 hours a day.—If persons do not send a sufficient labourer besides the driver, or if the labourers disobey the surveyor, he may discharge them and recover the forfeiture against the master, as he might in case none had been sent at all. § 35.

A stand-cart and one horse to be reckoned half a team; a cart and two horses as two-thirds.—And if the duty require it, the surveyor may order it to be performed with a waggon. § 36.

The surveyor shall give four days' notice to the occupiers, &c. of the statute-duty required, and the days when. (See *Ld. Raym.* 858.) Persons making default in sending the team and men, to forfeit 10 *s.*—in sending cart, horse and man 3 *s.*—in sending cart, horse and two men 5 *s.*—in sending a labourer 1 *s.* 6 *d.*—The forfeitures to be applied to the highways; the surveyor to be impartial. § 37.

The statute duty may be compounded for, as the justices shall direct, at the rate of 4 *s.* 6 *d.* for a team; 2 *s.* for a cart and horse; 3 *s.* for a cart and 2 horses; and 4 *d.* for a day's personal labour, § 38.

Justices of cities, corporations, &c. are to execute this act within their jurisdictions. § 54.

If a necessity should arise in any particular place, the Justices may supersede the liberty of compounding, and order the statute-duty to be performed in kind; and lots shall be drawn which of the inhabitants shall so perform it. § 39.

The Justices may mitigate the composition, where part of the land occupied lies in another parish. § 40.

Section 41, Settles the manner in which the surveyors shall give notice of the time and place for compounding, and how such compositions shall be paid.

Where a draught or plough is kept and no carriage, 1 *s.* shall be paid for every horse or pair of oxen. § 42.

The Inhabitants may appoint 3 separate months in the year for seed-time, hay, and corn-harvest in which no Statute-duty shall be performed. § 43.

The *Stat.* 13 *Geo.* 3. c. 84. § 58, empowers the Justices in special sessions in certain cases to apply the funds of Turnpike roads in aid of the statute-duty on Highways.

By *Stat.* 30 *Geo.* 2. c. 25. § 23, Persons serving in the militia are exempted from statute-duty during their service.

The

The performance of this duty is an inducement to an indictment for not repairing. *Stat. 13 Geo. 3. c. 78. § 2.*

The inhabitants of a parish into which a road is opened by Turnpike-trustees are not bound to do any work thereon. 1 *Black. 603.*

2. The Sessions may order a rate not exceeding 6 *d.* in the pound to defray the expenses of procuring materials, &c. for the repairs. *Stat. 13 Geo. 3. c. 78. § 2.*

If the funds are exhausted, and they and the labour appointed by the act, are insufficient to keep the Highways in sufficient repair, the Sessions may cause an equal assessment for that purpose; provided the said rate of 6 *d.* and this assessment do not exceed 9 *d.* per pound. §§ 45, 46.

Peoffees or trustees of lands granted for the repair of Highways shall let them to the best advantage, and the Sessions may enquire into the management thereof. § 52.

3. Of the Appointment of the Surveyor. By the said *Stat. 13 Geo. 3. c. 78 § 1.* The officers and Parishioners shall assemble yearly on 22d of September at 11 in the morning, when the majority shall make a list of ten parishioners each possessing a real estate of 10 *l.* a year or renting 30 *l.* or worth 100 *l.* personally.—If a sufficient number of this description cannot be found, the deficiency shall be supplied by the most able inhabitants.—Within three days after, the constable shall send a copy of the list to the Justice of the division, and the original list to the special Sessions after Michaelmas session; and give notice to the persons named, to appear at the Session and accept the office of surveyor (if appointed) or shew cause to the contrary.—The Justices, at such special Sessions shall appoint one, two or more surveyors from the said list, preferring such as are qualified; which shall be notified to the persons chosen who shall be surveyors for the next year.—If any named in the list refuse to serve, they shall forfeit 5 *l.*—And the Justices may appoint inhabitants of the county living within three miles of the parish; who on refusal shall forfeit 50 *s.*—A surveyor serving one year shall be exempt for the three following.—If no list is returned, or the person appointed refuses to serve, two Justices at special Session may appoint a surveyor with a salary to be paid from the forfeitures, but not to exceed $\frac{1}{3}$ of the 6 *d.* rate.—The Justices may order the collector to return an account of the said assessment.—Officers neglecting their duty to forfeit 40 *s.*

It seems that the presence of the parish officers is not absolutely essential to the legality of the meeting, provided it is in other respects fair and regular. 4 *Burr. 2454.*—More Surveyors than one are comprehended under, and understood by the word *surveyor* in this act. See *Sect. 5.* of the act.—If the list has been improperly procured, the Justices may reject it. 4 *Burr. 2454.*

Where a surveyor with a salary is appointed, the justices shall also appoint an assistant, who shall forfeit 50 *s.* on refusal to serve, and another be appointed, liable also to 50 *s.* for refusing, and they may then appoint one with a salary.—An assistant serving one year shall not be appointed again for three years, without his own consent. 13 *Geo. 3. c. 78. § 2.*

The Surveyor shall give security by bond, if required. § 3.

By § 5. It is provided that two parts in three of the parishioners assembled may recommend a Surveyor with a salary to the Justices.—And if the Surveyor dies or becomes incapable during the interval of the Sessions,

the Justices may appoint another, and the same shall be done if he dies or becomes incapable.

The Surveyor shall be bound to execute the duties of his office, and to keep the Highways in repair, and to give notice to the Justices of the state of the Highways, and to the persons chargeable with the repairs, and to the persons who may neglect to repair, not more than 14 days after the date of the declaration of the Justices.—The Surveyor is to draw on the assistant for sums of 40 *s.* or upwards.

Surveyors shall view the Highways, and give notice to remove obstructions or encroachments by hedges, &c. and if not remedied within twenty days the Surveyor may do it at the charge of the party offending, who shall also forfeit 1 *d.* per foot. § 12. and See *post. 4.*

The Surveyor shall upon oath inform two Justices of all Highways, bridges, &c. repairable by tenure which are out of repair.—And if they are not repaired on notice to the persons chargeable they shall be presented at the Sessions. § 23. See 1 *Black. 602.* and *post. 6.*

Justices at special Sessions may order which of the Highways shall be first repaired. § 25.

Sect. 26. directs how, where, and in what manner the surveyor shall erect direction posts in cross roads, &c.

Sects. 27 & 28. State where and in what manner the Surveyor may get materials for the repairs; and § 29, how materials shall be obtained where there are not sufficient within the parish.—As to this latter, See 1 *Burr. 382.*—The Surveyor enabled to contract. § 50.

The Surveyor is to fence off all pits and holes made in digging materials, on forfeiture of 10 *s.* and on neglect after notice from 40 *s.* to 10 *l.* § 31.—Materials dug for the use of a different parish than that in which they lie, shall be removed only between the 1st of April and 1st of November or in a hard frost. § 32.

The penalty for damaging bridges, mills, &c. between 20 *s.* and 5 *l.* at the discretion of the Justices. § 33.

Sect. 48. Directs in what manner the Surveyor or his executors, &c. shall keep his accounts; which are to be examined at a vestry, afterwards by a Justice, and further if necessary at a special Sessions.—See 2 *Burr. 746.*

Surveyors neglecting their duty shall forfeit between 10 *s.* and 5 *l.* at the discretion of the Justices. § 51.

If the Surveyor receives money due to the turnpike roads he shall pay it to the treasurer, and how it is to be applied. § 44.

4. By the said *Stat. 13 Geo. 3. c. 78. § 7.* The Surveyor shall give ten days' notice to the landholders next adjoining the road to cut and prune their hedges, and upon default the Justices may order the same to be done, and if such order is not complied with, in ten days, the Surveyor shall cut and prune at the expense of the owner of the land, who shall pay over and above 2 *s.* for every 24 feet of hedge, and 2 *s.* for every tree; and see § 12 of this act mentioned under the last head.

The landholder shall make proper ditches and drains, and keep them properly covered and in repair on pain of 10 *s.* § 8.—And where the old ditches are not sufficient, the Surveyor shall order new ones to be made § 14.

No small tree or bush whereby a man may lurk, shall stand within 200 feet of a Highway.—See *Stat. Winchester (13 Ed 1 A. 2.) c. 5.* which was repealed by 7 *Geo. 3. c. 42.* but revived by 8 *Geo. 3. c. 5. § 3.*

Sect.

HIGHWAYS VR (A), 5-7.

Sect. 13, of the said act, 13 Geo. 3. c. 78. directs the season in which hedges shall be pruned and trees felled.

No tree, bush or shrub shall grow within 15 feet from the centre of any Highway, unless for ornament, &c. § 6.

Whoever shall lay any stone, timber, &c. in a Highway for five days so as to obstruct or injure the same, shall forfeit 10s. § 9.—And if not removed within five days after notice by the surveyor, it shall be sold. § 10.—Obstructions by carriages, unless for a reasonable time to unload, forfeit 10s. § 11.

Penalty for incroaching upon Highways 40s. and the incroachment may be taken down by the surveyor. § 64.

No ale-houses suffered on bridges where tolls are kept, on penalty of 5 l. § 63.

Penalty for damaging banks, causeways, mile-stones, &c. from 10 s. to 5 l. or commitment to the house of correction § 53. [The same provisions are made as to turnpike roads by 13 Geo. 3. c. 84.]

5. The number of horses in the several carts and wagons with wheels of various breadths is settled by § 56, of the said Stat. 13 Geo. 3. c. 78; and the time of prosecution for penalties is so limited by § 57, as to render it necessary for an informer to be pretty diligent.

Justices at sessions may licence an additional number, and stop proceedings for the forfeiture. §§ 58, 59. See 4 Burr. 2260.

The owner's name, &c. to be painted on all carriages on forfeiture of from 20s. to 5 l. § 59.

Penalty for negligent or impertinent behaviour of drivers not more than 20s. if owners of carriages, or 10s. if not, who may be apprehended *with or without warrant* by a person seeing the offence committed: § 60.

This statute does not restrain the Subject, who receives any injury by a driver, &c. of any carriage, from suing the owner thereof at Common law, or from punishing the driver for wilful offence, by indictment, as the nature of the case may require. But then the party prosecuting must waive the benefit of proceeding, under this statute, in the summary way thereby prescribed. *J. M.*

The forms to be observed in proceedings are settled in the schedule annexed to the act—Abstracts of the act are to be given to the surveyor. §§ 70, 71.

6 Under the said Stat. 13 Geo. 3. c. 78. § 24, (and see § 81,) Justices of assize upon view, and justices of peace upon view, or on information on oath by the surveyor, may present at the assizes, great sessions of *Wales*, or quarter sessions, any Highway, causeway or bridge out of repair, within the jurisdiction and county where they lie—And no such presentment nor any indictment shall be removed by *certiorari* [on the part of the defendant (a)] until traverse and judgment—But if the right to repair is in question, the defendant may remove the proceedings—And every such presentment shall have equal force as if it had been found by a jury.—Saving the right of traverse as to the fact of non-repair, as well as to the right of repairing—The justices may order the prosecution to be at the expence of the limit, and on conviction may fine the offender

(a) On the part of the prosecution a presentment may be removed before traverse and judgment; for the restriction was to prevent delay by *defendants*. *Coup.* 78. And if the Quarter Sessions exceed their authority; as to order a surveyor to make out his account before a special sessions, such proceedings may be removed by a *certiorari* and

quashed; for their power in such case is not original but appellate. *Leprie's Harpkins* i. c. 76. § 80, and the authorities there cited: and see 2 *Str.* 1209

Justices are compellable by *mandamus* to receive a general traverse. *Burr.* 1532: 1 *Black* 468.

[Since compiling the above abstract, the Stat. 34 Geo. 3. c. 74, was passed repealing §§ 34, 35 & 39 of the Stat. 13 Geo. 3. c. 78; and re-enacting them in all particulars, except as relates to *poor and indigent persons*; whom two Justices, in special or petty sessions, may as they see fit, on their application, excuse and exempt from performing any personal labour, and from paying any composition in lieu thereof.]

7. Assessments may be levied by distress, and the surveyor shall be a competent witness. Stat. 13 Geo. 3. c. 78. §§ 68, 69.

Forfeitures, &c. to be levied by distress. §§ 73, 74.

Convictions shall be made on confession, the oath of one witness, or view of the justice—Inhabitants competent witnesses. § 77.

The prosecutor may proceed for a forfeiture above 40s. either as directed by the act, or by action of *debt*, in a court of record, and recovering shall have double costs. § 75.

It may not be improper to observe, that there are very good opinions, against the general method of declaring in debt, directed by the act, and that a declaration, thus framed could not be supported, on demurrer; for, the act creating a variety of offences, where the forfeiture is a pecuniary one, the defendant cannot be prepared to defend the charge, not knowing what may be given in evidence on the trial, &c. what kind of offence may then be alleged against him, but such declaration being directed by an act of parliament, it is a very doubtful point. *J. M.*

Ten days notice before action commenced and none to be brought after a month [See *post* § 82,] has expired. § 76.

No distress *unlawful*, or the party to be deemed a trespasser for want of *form*. § 79.

The court may award costs to either party, according to the circumstances. § 65.

A defendant indicted for not repairing *rat one tenus* shall on submission pay costs 1 *Black* 602.

All forfeitures shall be paid into the hands of such persons as the court insisting them shall direct for the benefit of the Highways; on penalty, for the misapplication, of double the sum received—And if any forfeiture is levied upon a particular inhabitant for the default, or on account of the parish, the sessions may cause a rate to be levied within one month by the surveyor for reimbursing him. § 47.

The court will also grant a *mandamus* for a rate to reimburse a particular *district* for a fine paid on the conviction of another district in the same parish, both bound to repair; but such *mandamus* must be special. *Doug.* 422: *Str.* 211.

The parishioners may agree to bear the charges of any prosecution or defence. § 66—But public notice shall be given of every meeting of the parish § 67.

Forfeiture for opposing the execution of the act, and on officers neglecting to execute warrants; from 40s. to 10 l. or imprisonment till paid § 72.

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Justices are empowered to administer oaths for the purposes of the act. § 78.—And on giving fit notice they may hold a special sessions. § 62.

8 Persons aggrieved may appeal to the Quarter sessions, giving notice thereof within 6 days after the cause arose, and entering into a recognisance with one surety within 4 days after notice; and on notice of such appeal all proceedings to be returned to the sessions on pain of 5*l*.—The sessions shall hear the appeal in a summary way, and decide finally, and award costs as the decision shall be. *Stat. 13 Geo. 3. c. 78. § 81.*

Limitation of actions 3 months, and treble costs to defendant. § 82.

9. By the said *Stat. 13 Geo. 3. c. 78. § 15*, Every public cartway shall be 20 feet wide, and every horse-way 8 feet wide.

Two justices, upon view, may order Highways to be widened or diverted; so as not to exceed 30 feet in breadth, and so as not to pull down any building, or incroach on any garden, court, or yard.—The surveyor shall make satisfaction to the owners for the ground which shall be necessary for such purposes.—If the owners refuse to treat, or cannot be found, or will not accept the satisfaction offered by the surveyor, the sessions upon certificate shall impanel a jury who shall assess the value, not exceeding 40 years purchase; and upon tender thereof, or leaving the same with the clerk of the peace, the ground shall be for ever divided and become a public Highway.—But all subterranean property of value which can be acquired without injuring the surface of the Highway is saved to the owners of the land.—And all timber and wood thereon shall be felled within a month, and laid upon the adjoining land for the benefit of the owner; and the sessions may order a rate, not exceeding 6*l*. in the pound yearly, to pay for such purchase. § 16.

The old Highway to be sold, in which a preference is to be given to the occupiers of the adjoining lands; and if it lead to any land, house or place, the sale shall be subject to such right of passage.—And upon tender or payment of the money, the land shall vest in the purchaser, saving the right of all subterranean property to those who would otherwise have been entitled. § 17.

If the jury shall assess a greater sum than what the surveyor offered, the costs shall be paid from the surveyor's fund; if a less sum, by the owners of the land. § 18.

Two justices may divert any Highway, not in the situation before described, if the owners of the land through which the new road is to pass will consent; and may purchase, stop up and sell, as in roads to be widened or diverted.—Persons aggrieved by any such proceedings, or by any writ of *ad quod damnum* for this purpose may appeal to the next sessions [See *Leach's Hawkins. i. c. 76. § 31. in the notes.*]—No old way shall be stopped up before the new way is completed.—New Highways which have been acquired in for 12 months shall become incontrovertible. § 19. See *Doug. 749; 2 Show. 28; Lev. 1234; W. Jon. 296; Lit. Raym. 725; 3 Comm. 36.*

No common land lying between the fences of any old Highway shall be inclosed.—And land between the fences not being common, exceeding 30 and not extending to 50 feet in breadth shall not be stopped till satisfaction is made to the owners for all the land exceeding 30 feet.—And if the old road shall have pass through com-

mon land, or if the space between the fences, the land not being common, shall exceed 50 feet in breadth, the respective owners of such land shall hold and enjoy the old Highway, making satisfaction for the same. § 20.

Where a footway is diverted through a different part of the same lands, no satisfaction shall be made, except the new road shall be longer, or that part of the land of greater value.—If the footway shall not go through the same person's lands, satisfaction shall be made to the owner of the new land by the award of two persons and an umpire. § 21.

Two justices, upon view, may stop up and sell, or may divert all Highways which are useless and burdensome to the parish. § 22.—But this is not a general power; but tied up to a particular case; and is given only where there is a new road to be set out. *Page v. Howard, Cuth. Ca. 228.*

It often happening that a Highway is in two parishes (See ante III,) and even frequently that the boundaries of parishes pass through the middle of Highways, the *Stat. 34 Geo. 3. c. 64*, provides, that on complaint or application by a surveyor, two justices may determine what parts of Highways lying in two parishes shall be repaired by each; for which purpose they may order boundary stones to be erected, and annex a plan of the Highway and the division of it to their order, which plan is to be filed by the Clerk of the peace; the costs of such order to be paid by both parishes.

(B) Of Turnpike roads.—

The Turnpike Roads of England are placed under the management and direction of certain trustees, who are usually appointed by the respective acts of parliament occasionally passed for the making and repairing particular roads. But the powers of these acts being confined to separate and distinct objects, it was thought expedient to pass some general laws which should apply in common to all trustees and turnpike roads in general throughout the kingdom.—*Leach's Hawk. P. C. i. c. 70. A. 6.*

The last general turnpike act, and that now in force, is the *Stat. 15 Geo. 3. c. 54*, and this act by *21 Geo. 3. c. 20* is extended to all acts of parliament made before it, or to be made hereafter for the purpose of regulating particular turnpikes.

In analyzing and abbreviating this act the editor will follow nearly the plan of the last ingenious editor of *Hawkins*, referring to his book for fuller information. Considering

1. The Trustees; their Qualification, Powers and Duty.
2. Weighing Engines.
3. Carriages; and their Tolls.
4. Exemptions from Toll.
5. Statute Duty and Repairs.
6. Nuisances.
7. Subscribers and Mortgagees.
8. Officers, their Duty and Responsibility.
9. Of adopting the Powers of the Highway Act, and enforcing this Act.
10. Of destroying Turnpike-Gates, &c.

1. A Trustee must possess *realty* of 40*l*. a year, or 800*l*. *personalty*, or be heir apparent to *realty* of 80*l*. a year.—And take an oath of such qualification before

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two Justices; on penalty of 50*l.* and in an action it is incumbent on the trustee to prove his qualification, *Stat. 13 Geo. 3. c. 84. § 44.*

No Publican shall be a Trustee, or act under them as Collector of tolls, &c. but he may *farm* the tolls, if he employs a person to collect them. § 46.

Acting as a Trustee is evidence of being one. § 64.

Where the first or any other day of meeting has elapsed, any 5 Trustees may appoint a meeting of the whole body, on giving 20 days notice. § 49. [explained and amended by *Stat. 18 Geo. 3. c. 63 § 1.*]

No meeting shall be adjourned longer than 3 months; and all business is to be done between 10 A.M. & 2 P.M. § 50.

If Trustees exceed their power in erecting gates, the justices may order them to be removed. § 51.

Trustees may administer oaths necessary under the act. § 84.

Seven Trustees may farm out the tolls by auction upon one month's notice, describing the particular tolls to be let, and specifying their produce the preceding year. § 31.—The same section directs the method in which the bidding at such auction shall be conducted, and that farmers of the tolls shall not take more than the regular rates on penalty of 5*l.* on them, or 40*s.* on the gate-keepers. § 31.

Seven Trustees on a month's notice may reduce or advance the tolls as they see convenient; but if the toll is mortgaged, they must have the consent of four fifths of the creditors. § 29.

Five Trustees may erect prosecution for nuisances at the expense of the trust, provided they can prove the fact by one witness. § 47.

Two Trustees may supply the vacancy of toll keeper, till a general meeting. § 54.

The Trustees may agree for proportion of repairs with those who are bound to repair by reason of tenure, inclosure, &c. § 62.

They shall hang up at the toll gates tables of the rates of toll and of the different weights and number of horses allowed to carriages, § 66.

They shall erect mile-stones, direction posts, flood-gates, &c. § 41. [And see *Highways VI. (A) 4*]

2 live trustees may order Weighing-engines to be erected at such gates, within their jurisdiction, as they see proper. *Stat. 13 Geo. 3. c. 84. § 1.* [See *1 Burr. 377.*]

No toll gate to be erected, unless on order of nine trustees (and a majority present) on 21 days notice; and no toll to be paid for passing only 100 yards through the same, unless over some expensive bridge. § 34.

The different burdens which carriages are allowed are settled at large by § 1. and the additional toll to be paid for extra weight, is determined by *Stat. 14 Geo. 3. c. 82 § 2*—And by § 3 of the said act 13 Geo 3. c. 84, carriages employed in husbandry or in carrying manure are exempted from being weighed.

Any trustee, officer or creditor may cause carriages not passed above 300 yards through any gate to return and be weighed on rendering the driver 1*s.* which shall be refunded if the weight is found excessive. § 3.

If the toll-keeper neglects to weigh *suspected* carriages, or to receive the additional toll, he shall forfeit 5*l.* § 2.

The trustees shall make places within 300 yards of every gate, for carriages to turn.—A list of the trustees and officers, shall be hung in the house of every gate

where there is a Weighing-engine.—A driver refusing to return shall forfeit 40*s.* and any peace officer may drive the carriage back to be weighed. § 4.

The quarter sessions upon complaint may order Weighing-engines to be erected, § 7. and where two roads meet the trustees may erect one Weighing engine for both. § 8.

No composition to be made for tolls, unless the carriages have fellies 6 inches broad. § 9.

The penalty for endeavouring to evade the tolls by unloading goods, &c. before the carriage arrives at the Weighing-engine 5*l.*—and the driver may be committed to the house of correction for a month. § 10.—Penalty on endeavouring to avoid the Weighing-engine; on the owner of a carriage from 20*s.* to 5*l.*—the driver from 10*s.* to 50*s.* § 11.

Toll gates ought not to be erected in the middle of great towns, so as to obstruct the necessary intercourse. *1 Burr. 377.*

3 Sect 13, of the *Stat. 13 Geo. 3. c. 84.* explains at large the number of horses allowed to carriages according to the breadth of their fellies, and the penalties on transgression 5*l.* on owners, and 20*s.* on drivers.

Two oxen equal to one horse. § 67.

Carriages to have names and descriptions. § 68. [Vide *Burr. 2258.*]

Carriages going on 16 inch rollers may be drawn with any number of horses. § 14. [and by *Stat. 14 Geo. 3. c. 82 § 5.* shall only pay half-tolls]

On prosecution for penalties, information to be made of the offence within 3 days, and action commenced within one month. § 15.

Penalty for taking off horses and altering the distance of the wheels to avoid the toll. 5*l.* § 17.

Penalty on persons passing through gates without paying tolls, or assaulting collectors, relieving cattle, &c. between 40*s.* and 10*l.* § 75.

Trustees may allow a sufficient number of horses up hills, rising more than 4 inches in a yard. And one justice may stop prosecution for penalties in drawing with a greater number of horses than allowed; if it appear necessary from deep snows, &c. § 18. [See *Highway act § 59*]

No carriages with less than 9 inch fellies, shall be drawn by horses in pairs, except such as having 6 inch fellies, shall be permitted by 7 trustees, and except carriages drawn by 2 horses only. § 20.

Justices in *Wales* may licence an increased number of horses. § 59.

Any person may apprehend the driver of a carriage not marked, or drawn by too many horses, &c. § 21.

Extraordinary high tolls for particular roads may be reduced by 5 trustees. § 22.

4. As to certain exemptions from toll,—See under the head immediately preceding, as to carriages moving on rollers; and under Div 3 as to carriages employed in husbandry; and as to the former see also § 26 of the act.

No exemption from tolls shall be taken by carriages carrying any particular kind of goods, unless they have 6 inch fellies (except by carriages employed in husbandry.) *Stat. 13 Geo 3. c. 84. § 24.*

And no exemption shall be taken by carriages with 6 inch fellies, unless the tire of such fellies lie flat, or do not deviate more than one inch from a flat surface. § 25.

No chaise-marine, coach, landau, berlin, chaise, chair, calash, or hearse, nor any royal artillery or ammunition carriage; nor any cart drawn by one horse or two oxen; nor any carriage of 9 inch fellies, carrying one block of stone and piece of timber, &c.—shall be subject to the tolls of this act. § 27.

No toll shall be taken for carriages working on the repair of highways or turnpike roads. § 60.

No toll shall be taken for any horses of soldiers or officers on their march or on duty, nor for any baggage-waggons; nor shall such carriages be weighed at any engine. 18 Geo. 3. c. 63.

The mail-coaches are exempted from toll by Stat. 25 Geo. 3. c. 57.

Persons taking fraudulent advantage of any exemptions, shall forfeit between 40 s. and 5 l. 13 G. 3. c. 84. § 28.

5. The Surveyors shall see that the duty required by the several particular Turnpike acts is done, and that the compositions arising therefrom are applied to the repair of the respective roads; on penalty of 40 s.—And when two trust-roads lie in the same parish, and the duty shall exceed three days, the justices shall apportion the duty between each road. Stat. 13 Geo. 3. c. 84. § 32.

No Surveyor shall gather stones without the consent of the owners of the land, or licence from a justice, after the owner shall have been summoned and refuse to appear. § 61.

Satisfaction shall be made for materials, § 71, in the same manner as directed by the Highway act, § 29. And by § 36, materials may be contracted for (but no surveyor shall have any share therein, under forfeiture of 10 l. and being incapacitated). See Highway act § 50.

The inhabitants or persons who were liable to repair any old road, shall continue liable to repair any new road which may be made in lieu of the old one—And if the parties cannot agree in what proportion they are liable to repair it, it shall be settled by two justices: for which proportion, a gross or annual sum may be fixed to be paid, with the consent of the parties at a Vestry for that purpose. § 63.

But this does not extend to the repair of walls or fences on the sides of such new roads, only to the surface of the roads. 2 Term Rep. 232.

Where Turnpike roads are indicted, the Court may proportion the fine and costs between the inhabitants and the Trustees; but so as not to endanger the security of the creditors. § 33.

6. If the Overseer of any Turnpike road shall suffer any nuisance, (such as heaps of stones, rubbish, &c.) to remain for 4 days, within 10 feet on either side the middle of such road, he shall forfeit 40 s. Stat. 13 Geo. 3. c. 84. § 37.

As to nuisances by encroachments of other persons within 30 feet of the road, &c. a penalty of 40 s. is imposed, in the same manner as by § 64, of the Highway act. § 38.

7. Subscribers who shall sign any writing to advance money, shall be bound by their subscription, and on 21 days default, the Treasurer may sue for the same. Stat. 13 Geo. 3. c. 84. § 35.

Mortgages of tolls, having possession of them, shall account, on oath, for all the monies which shall so come to their hands, after 14 days notice from 5 Trustees, or forfeit 10 l. § 52.

Penalty for a mortgagee holding over after his money is paid—Double the money received, and treble costs. § 53.

8. If a discharged gate keeper refuses to deliver up the toll-house, &c. within four days after notice of a new appointment, any justice may order him to be removed, and put the new toll-keeper in possession. Stat. 13 Geo. 3. c. 84. § 54.

Gate-keepers and toll-gatherers on notice from 5 Trustees, shall account for money received by them, on penalty of 5 l. § 55.

No person residing in a toll house, shall be removable as a pauper, unless chargeable; nor shall he thereby gain a settlement, or be assessed to any publick or parochial levy. § 56.

Gate-keepers permitting horses or carriages not allowed by the act, to pass the gates shall forfeit 40 s. § 57.

All officers, their executors and administrators, shall within 10 days, after notice by 5 trustees, deliver up all books, &c. on penalty of 20 l. § 45.

Treasurers and Surveyors shall give bond for the discharge of their duty. § 65. [which bond by Stat. 23 Geo. 3. c. 18, § 15, must be on stamps.]

Officers of parishes and of the trust neglecting to put the act into execution, shall forfeit 10 l. § 73.

Justices may act notwithstanding they are creditors. § 74.

9. When the powers for providing materials, enlarging and turning Turnpike roads, &c. and calling forth the statute duty, are ineffectual, and when more ample powers are given by the Highway act; the Surveyor of the Turnpike roads, with the approbation of the Trustees, may execute and enforce these powers, for the benefit of the Turnpike roads, under the restrictions in the Highway act. Stat. 13 Geo. 3. c. 84. § 70.

The Highway and Turnpike acts are similar in the following particulars, viz. § 72 of the Turnpike act answers to § 70 of the Highway act—§ 74 to 77 & 78.—§ 79, to 73—§ 77 to 74.—§ 78 & 79 to § 76 [except the former, giving full, the latter double costs.] § 80 to 79—§ 81 to 80.—§ 82 & 83 to 81.—§ 85 to 82. For all which sections of the Highway act, see before VI. (A).

10. By Stat. 1 Geo. 2. c. 19, To destroy any publick Turnpike gate, or the rails or fences thereto belonging, subjects the offender to hard labour for 3 months, and to be publicly whipped.

By Stat. 5 Geo. 2. c. 33, On conviction at the assizes, the offender may be transported for 7 years—and on a second offence, or on demolishing any Turnpike house, he shall be guilty of felony and transported for 7 years.

In both these cases the prosecution must be within 6 months, and on the convict's returning from transportation he shall suffer death.

By Stat. 8 Geo. 2. c. 20, Persons guilty of the above offences, or destroying any chain, &c. placed to prevent persons from passing without paying toll, or rescuing any offender, shall suffer death without benefit of clergy.

The two last mentioned acts are made perpetual by Stat. 27 Geo. 2. c. 16.

By Stat. 13 Geo. 3. c. 84, if any person shall commit any of the offences aforesaid, or shall destroy any crane or machine for weighing carriages, &c. he shall be transported for seven years, or committed to prison not exceeding three years at the discretion of the Court.

By the last mentioned act it is provided, that unless the offender is convicted within twelve months, the hundred shall make satisfaction for the damages.

HIGHWAYMEN. A reward of 40*l.* is given for the apprehending and taking of a *Highwayman*; to be paid within a month after conviction, by the sheriff of the county, *Stat. 4 & 5 W. & M. c. 8* See titles *Robbery*; *Reward*.

• **HIGHER,** A name frequently mentioned in our statutes, for a person who carries from door to door, and sells by retail, small articles of provisions, &c. they are laid under various restraints by the statute laws. See titles *Game*, *Holidays*, *Hawkers*.

HIS TESTIBUS, Words anciently added in deeds, after *In cuius rei testimonium*; which *witnesses* were first called, then the deed read, and their names entered down but this clause of *his testibus* in the deeds of Subjects has been disused since the reign of King Hen 8. *Co. Lit. 6* See title *Deed*.

HINDENI HOMINES, From the Sax. *Hindri*, i. e. *Societas*] A society of men; and in the time of the Saxons, all men were ranked into three *classes*, and valued, as to satisfaction for injuries, &c. according to the class they were in, the *highest* class were valued at twelve hundred shillings, and were called *Twelfhindmen*: the middle class valued at six hundred shillings, and called *Sexhindmen*: and the *lowest*, at ten pounds, or two hundred shillings, called *Tryhindmen*: their wives were termed *Hindas*. *Brumpt. Leg. Alfred cap. 12, 30, 31.*

HIND, Sax.] Rather perhaps *Hind*. A servant, or one of the family; but is properly a term for a servant in husbandry, and he that oversees the rest is called the *Master hind*. *Stat. 12 R. 2 c. 4.*

HINFARE, Sax.] *hi*, a servant, and *fare*, a going or passage.] Signifies the loss or departure of a servant from his master. *Domesday.*

HINGELD, See Hingell.

HIRCISCUNDA, The division of an inheritance among *hirs*. Sax.

HIRD, Domestica vel intrinseca familia. Inter. Pla. 9, 12 Edw. 2. Eton. 48. MS.

HIREMAN, A Subject, from the Sax. *Hiran*, i. e. *Obdiere*, to obey; or it may be one who serves in the King's hall, to guard him; from *hind*, *aula*, and *man*, *h. m.* *Du Fresne*; *Cowell.*

HIRING. A contract by which a qualified property may be transferred to the *hira*. Hiring is always for a price, stipend, or recompence. By this contract the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods, &c. so hired, as soon as the time is expired or use performed, together with the price or stipend, either expressly agreed on by the parties, or left to be implied by law according to the value of the service. *2 Comm. 454.* See title *Bailment*; *Poor*, (*Settlement of*.)

HIRST or HURST, A little wood. *Domesday.*

HITH, See Hythe.

HLAFORDSOCNA, The Lord's protection; from the Sax. *Hlaford*, *dominus*, and *soen*, *libertas*. *Nec dominus hominum libero hlafordsoenam prohibeat. Leg. Ad-Elstan, cap. 5.*

HLASOCNER, The benefit of the law; from the Sax. *lega*, *lex*, and *soen*, *libertas*.

HLOTH, An unlawful company, from seven to thirty-five. Quia de hloth fuerit accusatus, abneget per centum et unti bidas, vel sit emendat; that is, he who is accused for being at an unlawful rout, let him purge himself

sacramentationibus quot is qui 120 bidas estimatur; or, let him clear himself by a mulct, which is called blotbota. *Cowell.*

HLOTHBOTE, A mulct set on him who is in a riot. From the Sax. *bloth*, *turma*, and *bote*, *compensatio*. See the preceding article.

HOSI-MEN, An ancient gild, or fraternity at *Newcastle-upon-Tyne*, who dealt in sea coal; they are mentioned *Stat. 21 Jac. 1. cap. 3.* See title *Coals*.

HOBILERS or HOBLERS, Hobellarii.] Were light horse-men; or certain tenants bound by their tenure to maintain a little light horse, for giving notice of any invasion made by enemies, or such like peril towards the sea side; of which mention is made in *Stats. 18 Ed. 3. c. 7: 25 Ed. 3. R. 5 c. 8* See *Camd. Britan.* They were to be *Ad omnem motum agiles, &c.* And we read, *Duravit vocabulum usque ad aetatem H. 8. Genizdarnes and Hobelours. Spelm. Prym's Annad. on 4 Inst. f. 307; Hobeletti, Rot. Parl. 21 Ed. 3.* Sometimes the word signifies those who used bows and arrows, See *Thorn Anno 1304. Cowell.*

HOCUS SALTIS, Seems to be a *bote*, hole or lesser pit of salt. See *Domesday, (Ware Pershire)*

HOCKETTOR, or HOCQUE L'EUR, An old French word for a knight of the post, a decayed man, a basket carrier *3 Par. Inst. f. 175. Stat. Ragman — Cowell.*

HOCK TUESDAY MONEY, Was a duty given to the landlord, that his tenants and bond-men might solemnize that day on which the English mastered the Danes, being the second Tuesday after Easter week. *Cowell.* See *Hokday.*

HOG, HOGIUM, HOCH, A mountain or hill, from the Germ. *Hooch*, *altus*, or from the Sax. *Hou—Du Can.*

HOGASTER, Hogastrum.] A little hog; it also signifies a young sheep. *Flata lib 2 c. 79. See Hoggarius.*

HOGENHINE, Sax.] See *Ibnd Night-Awn-hind.*

HOGGACIUS, HOGGASTER, A sheep of the second year. *Regula computi domus de Farendon: MS. Cartular. Abbat. Glasston. MS.* And indeed in many, especially the Northern parts of England, sheep after they lose the name of lambs, are called *hogs*, as in *Kent, tags.* *Cowell.*

HOGSHEAD, A vessel of wine, or oil, &c. containing in measure 63 gallons; i. e. half a pipe, and the fourth part of a ton. See *Stat. 1 R. 3. c. 13.*

HOGGUS, HOGIETUS, A hog or swine, beyond the growth of a pig. *Cbut. Antiq.*

HOGS, The keeping of hogs in any city or market town is indictable as a public nuisance. *Salk. 460.* Indeed it seems the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See title *Nuisance*: *London*, and the *stat 2 W. & M. R. 2. c. 8. § 20*—see as to hogs and hogs flesh, tit *Cattle.*

HOKEDAY, Called otherwise *Hock Tuesday, dies Martis, quam quindenam Paschæ vocant.]* Was a day for remarkable in ancient times, that rents were returned payable thereon: and in the accounts of *Merton College* in *Oxford*, there is a yearly allowance *pro rueribus hockantibus*, in some manors of theirs in *Hamshire*, where the men *hock* the women on *Monday*, & *cent* on *Tuesday*; the meaning of it is, that on that day the women in merriment stop the way with ropes, and pull passing to them, desiring something to be laid out in pious uses. See *Hock Tuesday-Money.*

HOL

HOLDES, Bailiffs of a town or city, from the Sax. *hold*, i. e. *summus præpositus*. Others are of opinion that it signifies a general; for *hold* in Saxon doth also signify *summus imperator*. *Leges Alfred. de Wregildis*.

HOLDING OVER A TERM, &c. Lands were devised to A. till 800 l. raised. Resolved, that if the Heir at law, or he in reversion or remainder, in case of lease or limitation for life, enters upon A. or on him to whom the lands are devised or limited, and expels him, it is in the election of him so expelled, either to bring his action and recover the meane profits which shall be accounted parcel of the sum, or he may re-enter and hold over till he shall levy the entire sum, not accounting the time of his expulsion. But otherwise, if the expulsion was by a stranger. 4 Rep. 82: See titles, *Term: Limitation: Estate*.

The expression hath also another sense, i. e. Where a term is expired, and premises are held by the tenant or person in possession, afterwards, against the will of the landlord, or person claiming the estate and possession. By Stat. 4 Geo. 2. c. 28. In case any tenant for years, &c. or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of such term, and demand made in writing for recovering possession of the premises, he shall pay, for the time he continues, at the rate of double the yearly value. See titles *Ejectment: Distress: Rent*.

HOLM, Sax. *hulmus*, *insula arctica*] An isle or fenny ground, according to Bede; or a river island. And where any place is called by that name, or this syllable is joined with any other in the names of places, it signifies a place surrounded with water; as the *Flatholmes* and *Skepholmes* in the *Severn* near *Bristol*: but if the situation of the place is not near the water; it may then signify a hilly place; *Holm* in *Saxon* being also a hill or cliff, — *Cum duobus Holmis in campis de Wedone*.—*Mou. Angl. Tom. 2. p. 262*.

HOLT, Sax.] A wood: wherefore the names of towns beginning or ending with *holt*, as *Buckholt*, &c. denote that formerly there was great plenty of wood at those places.

HOLY-DAYS AND FASTING DAYS. See Stat. *Westm. 1; 3 Ed. 1. c. 51*, as to holding assizes in Lent, and this Dict. title *Justice of Assize*.—*Stat. 2 & 3 Ed. 6. c. 19; 5 Eliz. c. 5*, as to eating fish on Fast days; now obsolete.—and *Stat. 5 & 6 E. 6. c. 3*, appointing those now called *Red Letter Days*.

Fairs and markets not to be kept on Sundays and principal festivals, except four *Sundays* in Autumn, 27 H. 6. c. 5. Shoe-makers in *London* not to sell or sit on their goods on *Sundays*, &c. 4 Ed. 4. c. 7: 1 Jac. 1. c. 22. § 29. (obsolete).—Penalty for not resorting to church on *Sundays* and holy days, 1 Eliz. c. 2. f. 14. See title *Announcement*. The 5th of November to be kept as a day of thanksgiving, 3 Jac. 1. c. 1.—The 29th of May to be an anniversary thanksgiving, 12 Car. 2. c. 11.—The 30th of Jan. to be kept as an anniversary day of humiliation, 12 Car. 2. c. 30. § 1.—The 2d of September to be annually kept as a fast in *London*, 19 Car. 2. c. 3. f. 28. See this Dict. title *Sunday*.

HOLYHEAD, Rock salt may be used in its salt-works, 6 Ann. c. 12. f. 2. See title *Navigatio &c.*

HOMAGE, (*Homa homi*.) Is a French word derived from *homo*, because, when the tenant does his service to the Lord, he says, *U homo vir man*. Co. Lit. 61.

The Stat. 12 C. 2. c. 24, which was made to free the Subject from the burthen of Knight's service, and the

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oppressive consequences of tenures in capite, amongst other provisions, wholly discharges all tenures from the incident of Homage; not because Homage itself was any grievance, but because, though not wholly, yet it was more properly an incident to Knight's service, which that statute abolished. But, while Homage continued, it was far from being a mere ceremony; for the performance of it, where due, materially concerned both lord and tenant in point of interest and advantage. See 1 Inst. 67 b. in n. at length, as also 65 a: 67 a: 68 a: in the notes, and this Dict. title *Tenures*.

Notwithstanding the law on this subject is thus become obsolete, the curious reader may not be displeased with the following short extracts relative thereto.

In the original grants of lands and tenements by way of fee, the Lord did not only oblige his tenants to certain services; but also took a submission with promise and oath, to be true to him as their lord and benefactor; and this submission, which is the most honourable, being from a freehold tenant, is called *Homage*. Stat. 17 E. 2. f. 2. The Lord of the fee for which *Homage* is due, takes *Homage* of every tenant, as he comes to the land or fee: but women perform not *Homage* but by their husbands, as *Homage* especially relates to service in war; and a corporation cannot do *Homage*, which is personal, and they cannot appear but by attorney: also a bishop or religious man, may not do *Homage*, only fealty; but the archbishop of *Canterbury* does *Homage* on his knees to our Kings at their coronation; and it is said the bishop of the *Isle of Man* did *Homage* to the Earl of *Derby*; though *Fulbee* reconciles this, when he says that a religious man may do *Homage*, but may not say to his Lord, *Ego devenio homo vester*, I become your man, because he has professed himself to be God's man, but he may say, *I do unto you Homage, and to you swear to be faithful and loyal*. *Britton*, cap. 68.

Homage, say the ancient authors, is either, by ligeance; or reason of tenure: or *Homage* ancestral.

Homage by ligeance is inherent and inseparable to every Subject, See titles *Allegiance: Oaths*.—*Homage* by tenure is a service made by tenants to their Lords according to their estate; and *Homage* ancestral, is where a man and his ancestors have time out of mind held their land of the lord by *Homage*; and such service draws to it warranty from the Lord, and acquittal of all other services to other Lords, &c. *Boet. lib. 3: F. N. B. 267: Lit. S. 9. 85*. But, according to Sir *Edw. Coke*, there must be a double prescription for *Homage* ancestral, both in the blood of the Lord and of the tenant; so that the same tenant, and his ancestors, whose heir he is, is to hold the same land of the same Lord and his ancestors, whose heir the Lord is, time out of memory, by *Homage*, &c. and therefore there was but little land holden by *Homage* ancestral. Co. Lit. 100 b. Though in the manor of *Wharby* in *Hertfordshire*, there was one *Wess* who held lands by this tenure. *D. H.*

Homage tenure is incident to a freehold, and none shall do or receive *Homage*, but such as have estates in fee-simple, or fee-tail, in their own right or right of another. *Lit. b. 131*. Seisin of *Homage* is seisin of fealty, and inferior services, &c. And the Lord only shall take *Homage*, and not the steward, whose power extends but to fealty. 4 Rep. 8.

When a tenant made his *Homage* to the Lord, he was to be ungirt, and his head uncovered, and his Lord was to sit, and he should kneel, and hold his hands together

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together between his Lord's hands, and say; *I become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, saving the faith that I owe to our Sovereign Lord the King: And the Lord so sitting should kiss the tenant, &c.* 17 Ed. 3: Lit. § 85 See 2 Comm. 53. c. 4.

When Sovereign Princes did Homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple Homage*, which was only an acknowledgment of tenure (7 Rep. 7;) and *liege homage*, which included fealty, and the services consequent upon it.—Thus when Edward III. in 1329 did Homage to Phillip VI. of France, for his ducal dominions on that Continent, it was warmly disputed of what species the Homage was to be, whether *liege* or *simple* homage. 1 Comm. 367. c. 10.

HOMAGE JURY, A Jury in a *Court-Baron*, consisting of tenants that do Homage to the Lord of the fee; and these by the *Feudists* are called *pares curie*: they enquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the Lord's court, &c. *R. 1. b.* See title *Court Baron*.

HOMAGER, One that does or is bound to do Homage to another.

HOMAGIO REPECTUANDO, Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the King's tenant, notwithstanding his Homage not done *F. N. B.* 269. And the heir at full age was to do Homage to the King, or agree with him for relpiting the time *New Nat. Br.* 563

HOMAGIUM REDDERE, To renounce Homage, when the vassal made a solemn declaration of disowning and defying his lord. For which, there was a set form and method prescribed by the feudal laws. *Bracton, lib. 2. cap. 37. fol. 35.* This is the meaning of a passage in *Richardus Hufholdensis de Bello Standard*, p. 321. And of *Mat. Paris. sub anno 1188. Corvel. edit. 1727.*

HOMISOKEN, HOMOKEN, OR HAMSOKEN, AND HAMSOCA, From the Sax. *ham*, i. e. *domus*, *habitatio*; and *soken, libertas, immunitas*.] The privilege or freedom which every man hath in his house; and he who invades that freedom is properly said *facere homisoken*. This we take to be what we now call *burglary*, a crime of a very heinous nature, because it is not only a breach of the King's peace, but a breach of that liberty which a man hath in his house, which should be his castle, and therefore ought not to be invaded See *Bracton, lib. 3. tract. 2. c. 23: Du Cange: Ll. Canuti. cap. 59. Raft. v.*

It is also taken for an impunity to those who commit this crime. *W. Thorn, p. 2030.*

HOMESTALL. A mansion house. See *Frumstol*.

HOMICIDE;

HOMICIDIUM.] The killing of any Human Creature: This is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all, the second very little; but the third is the highest crime against the law of nature that a man is capable of committing. 4 Comm. c. 14; from whence the plan of this title, and much of the subsequent matter is extracted.

HOMICIDE.

Offences against the life of a man come under the general name of Homicide, which in our law signifies the killing of a man, by a man. 1 Hawk. P. C. c. 26. § 2: *Bracton, lib. 3. c. 4.*

I. Of Justifiable Homicide.

1. By unavoidable Necessity, under command of the Law.
2. By permission of Law; For advancement of Publick Justice.
3. ————— For prevention of Crimes, in themselves Capital.

II. Of Excusable Homicide,

Per infortunium; or *Misadventure Se Defendendo*.

1. Wherein these are distinct.
2. Wherein they agree.

III. Of Felonious Homicide.

1. Self Murder; or *Felo de se*.
 2. Manslaughter
 3. Murder
 4. Petit Treason.
- } Which two should be carefully compared with each other.

I. 1. JUSTIFIABLE HOMICIDE may be owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame; it is either of a publick or private nature.

That of a *publick* nature is such as is occasioned by the due execution or advancement of publick justice. That of a *private* nature is such as happens in the just defence of a man's person, house or goods. 1 Hawk. P. C. c. 28. § 3.—The first of these may happen by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable; but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon, or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder. 1 Hal. P. C. 497: *Bract. fol. 120.*

There must be no malice coloured under pretence of necessity, for wherever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity to execute his revenge, he is guilty of murder. 1 Hawk. P. C. c. 28. § 2: 2 Rol. Rep. 120, 121; *Kilnyne* 28: *Bract. lib. 3. cap. 4.*

Farther, if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder. 1 Hawk. P. C. c. 28: § 4: 1 Hal. P. C. 497. And upon this account Sir Matthew Hale himself, though he accepted the place of a Judge of the Common Pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the Assizes, and try prisoners; having very strong objections to the legality of the Usurper's commission; a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to Society, as maintaining the boundaries of property.

The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise both Judge and officer may be guilty

HOMICIDE I. 2.

guilty of felony. 1 *Hawk. P. C. c. 28: Dalt. cap. 98: 10 Co. 76: 22 Ed. 4. 33 a: H. P. C. 35*—And therefore if the Court of Common Pleas give a judgment on an appeal of death, or Justices of Peace on an indictment for treason, and award execution, which is executed, both the judge who gives, and the officers who execute, the sentence are guilty of felony; because the courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without foundation.—But if the Justices of Peace, on an indictment for trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence: for the Justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void. 1 *Hawk. P. C. c. 28. §§ 5, 6*, and the authorities there cited.—Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it, which requisition it is, that justifies the Homicide. If another person does it of his own head, it is held to be murder: even though it be the judge himself. 1 *Hal. P. C. 501: 1 Hawk. P. C. c. 28: Dalt. Just. c. 150*. It was formerly held that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person condemned in appeal of death, was delivered to the relations of the deceased, in order to be executed by them. 1 *Inst. 128 b: 2 Aff. pl. 3: S. P. C. 13 a: 11 H. 4. 12 a: Plowd. Com. 306 b: 3 Inst. 131*. But at this day, it seems agreed, if the judge, who gives the sentence of death, and *a fortiori* if any private person execute the same, or if the proper officer himself do it without lawful command, they are guilty of felony. 27 *Aff. 41: Bro. Appeal 69: 1 Hawk. P. C. c. 28. § 8, 9*. This judgment must also be executed, *servato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder: for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death to another, he then acts by his own authority, which extends not to the commission of Homicide; and besides, this licence might occasion a very gross abuse of his power. *Finch L. 31: 3 Inst. 52: 1 Hal. P. C. 501*. The King indeed may remit part of a sentence; as in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment, and in the case of felony, where the judgment is *to be hanged*, the King (it hath been said) cannot legally order, even a peer, to be beheaded. 3 *Inst. 52, 212: See Folt 267*; where it is said that if the officer varieth from the judgment, *of his own head*, and without warrant or the colour of authority, he is guilty of felony at least, if not of murder; but not if he is authorised by custom or warrant from the crown. For although the King cannot by his prerogative vary the execution, so as to aggravate the punishment beyond the intention of the law; yet it doth not follow, that he who may remit part of the judgment, or wholly pardon the offender, cannot mitigate his punishment with regard to the pain or infamy of it. But this doctrine is more fully considered in another place. See titles *Pardon: Execution (Criminal): Judgment (Criminal)*.

2. Homicides, committed for the advancement of public justice, are;—Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that *assaults* and resists him. 1 *Hal. P. C. 494: 1 Hawk. P. C.*—If an Officer, or any private person, attempts to take a man charged with felony, and is *resisted*; and in the endeavour to take him, kills him. 1 *Hal. P. C. 494*.—In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at Common-law, and by the Riot act, *Stat. 1 Geo. 1. c. 5: 1 Hal. P. C. 495: 1 Hawk. P. C. 161*. And in case a stranger interposes to part the combatants in an affray, giving notice to them of that intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable Homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. *Fost. 272*.—Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. 1 *Hal. P. C. 496*.—If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain, by virtue of the *Stat. 21 E. 1. §. 2. de malefactoribus in parvis*; and 3 & 4 *W. & M. c. 10*.—If a person having actually committed felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. So if even an innocent person be *intended* of a felony, where no felony was committed, yet if he will not suffer himself to be arrested by an officer who has a warrant, he may be lawfully killed, for there is a charge against him on record, to which he is bound at his peril to answer. 1 *Hawk. P. C. c. 28. §§ 11, 12: 22 Aff. 55: Bro. Cor. 87, 89. S. P. C. 13: 2 Inst. 221: Dalt. cap. 98: H. P. C. 36: Crom. 70*.—Where a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 *Hawk. P. C. c. 28. § 17: 1 Rol. Rep. 189: H. P. C. 37: 3 Inst. 50: Crom. 24 a: Dalt. cap. 98*. And in such case the officer is not bound to give back, but may stand his ground and attack the party, 1 *Hawk. P. C. c. 28. § 18: H. P. C. 31*. But no private person of his own authority can arrest a man for a civil matter, as he may for felony, &c. 1 *Hawk. c. 28. § 19: Crom. 30 b*. Neither can the sheriff himself lawfully kill those who *barrel fly* from the execution of any civil process. 1 *Hawk. c. 28. § 20: H. P. C. 37*.

And in all these cases, there must be an apparent necessity on the officer's side, *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such Homicide were committed; otherwise without such absolute necessity, it is not justifiable.

Lastly, If the champions in a trial by battle, killed either of them the other, such Homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth. 1 *Hawk. P. C. 71*. See title *Battel*.

HOMICIDE I. 3: II. 1.

3. Such Homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of *Bracon*, and as it is since expressly declared by *Stat. 24 Hen. 8. c. 5*. See *Bracon. fol. 155*. If any person attempts a robbery or murder of another, or attempts to break open a house *in the night time*, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged. *1 Hal. P. C. 488*. And not only the matter of a house, but a lodger or a sojourner who kills an assailant intending to commit murder or robbery, is within the protection of the law. *Cro. Car. 544*. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also. *4 Comm. c. 14*.

Justifiable Homicide of a private nature, in the just defence of a man's person, house or goods, may happen either by the killing of a *wrong-doer*, or an *innocent* person. And first, the killing of a wrong-doer in the making of such defence, may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants, or lodgers, &c. kill one who attempts to burn it, or to commit therein murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself; but in other circumstances, he could not have justified the killing of such an one, but ought to have apprehended him, &c. *1 Hawk. P. C. c. 28. § 21: 24 H. 8. cap. 5: Dalt. cap. 98*.

Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, *in defence of an injury done by himself*, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully withhold a house by force, and kill those who attack it from without, and endeavour to burn it. *1 Hawk. P. C. c. 28. § 22: Crom. 27 b: H. P. C. 56*.

Neither can a man justify the killing another in defence of his house or goods, or even of his person, from a *bare private trespass*; and therefore he that kills another, who, claiming a title to his house, attempts to enter it by force and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter; and he, who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of Homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course; yet it seems, that a private person, and, *a fortiori*, an officer of justice, who happens unavoidably to kill another endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of public justice. *1 Hawk. P. C. c. 28. § 23: H. P. C. 40. 57: Cro. Car. 538: Dalt. cap. 98*.

According to the opinion of Mr. Serjeant *Hawkins*, A person who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shews

an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may justify killing such an assailant, as much as if he had attempted to rob him. *1 Hawk. P. C. c. 28. § 24: 57: N. Lendo 47: 1 And. 41: Crom. 27 b. 28 b: Dalt. cap. 98: S. P. C. 15. 3 Inst. 57: Faxon 33*. For other cases, vide *Cro. Car. 338: March 5*.

The Roman Law also justifies Homicide, when committed in defence of the chastity either of one's self or relations: The English Law also justifies a woman killing one who attempts to ravish her: *Bac. Elem. 34: 1 Hawk. P. C. c. 38. § 21*; and so too, the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. *1 Hal. P. C. 485, 6*. And there seems no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, *in itself capital*, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. *4 Comm. c. 14*.

In these instances of *justifiable Homicide*, it may be observed, that the Slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. *1 Hawk. P. C. c. 28. § 3*.

But that is not quite the case in *excusable Homicide*, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment. See the next Division.

II. 1. HOMICIDE *per infelicitatem*; or MISADVENTURE, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander by; or where a person *qualified to keep a gun*, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. *1 Hawk. P. C. c. 29*. So where a person is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, (as by whipping,) and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is *Manslaughter* at least; and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. *1 Hal. P. C. 473, 4*.—Where an officer of the impress service in the navy, fires at a boat in order to bring her to, and kills a man, it is impossible that the offender should be made guilty of more than manslaughter, especially if he fires in the manner usual upon such occasions. *Cowp. 832. per Ld. Mansfield*.

A tilt or a tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword-playing, the succeeding amusements of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such

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Killing is felony of manslaughter. But, if the King command, or permit such diversion, it is said only to be misadventure; for then the act is lawful. *1 Hal. P. C. 473: 1 Hawk. P. C. c. 29. § 8.* Likewise to whip another's horse whereby he runs over a child and kills him, is held to be accidental death in the rider, for he has done nothing unlawful: but it is manslaughter in the person who whipped him; for the act was a trespass, and at best a piece of idleness of inevitably dangerous consequence. *1 Hawk. P. C. c. 29. § 3.*

Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such-like accident, kills another, this is only Homicide by misadventure. *Keilw. 108: Bro. Cor. 148, See Kelynge 41.*—So where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports which are attended with no apparent danger of life, and intended only for the trial, exercise and improvement of the strength, courage and activity of the parties. *Keilw. 108, 136: Crom. 29 a: 11 H. 7. 23 a: 1 Hawk. P. C. c. 29. §§ 6, 7, b.*

In general, if death ensues in consequence of an idle, dangerous, and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts. *1 Hawk. P. C. c. 29. § 9: 1 Hal. P. C. 472: Fost. 261.* Thus, If a man kills another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting of a gun, or throwing stones in a city or highway, or other place where men usually resort, by throwing stones at another wantonly in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at hand-sword without the King's command; or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. *1 Hawk. P. C. c. 29. § 9: H. P. C. 31, 32, 58: H.b. 134.* But see post III.

Where the defendant came to town in a chaise, and before he got out of it, fired his pistols, which by accident killed a woman, King, Ch. J. ruled it to be manslaughter. *Str. 481.*

Homicide, in self-defence, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the *English* law. This species of self-defence must be distinguished from that already mentioned, *ante* I. 3, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*; the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion, both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of Homicide by misadventure; whereas it appears by the *Stat. 24 Hen. 8. c. 5*, and our ancient books (*Stann. P. C. 16*), that it is properly applied to such killing as happens in self-defence, upon a sudden rencounter. *3 Inst. 55, 7: Fost. 275, 6.*

This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice: they cannot therefore legally exercise this right of preventive defence, except in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse Homicide, by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of Homicide (upon *chance-medley*, in self-defence,) from that of man-slaughter, in the proper legal sense of the word. *3 Inst. 55.* But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of man-slaughter: but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is Homicide excusable by self-defence, *Fost. 277.* For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects, the law countenances no such point of honour: because the King and his Courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. *1 Hal. P. C. 481, 3.* The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, he may kill his assailant instantly. *1 Hal. P. C. 483.* And as the *manner* of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defence. Neither under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons *A.* and *B.* agree to fight a duel, and *A.* gives the first onset, and *B.* retreats as far as he safely can, and then kills *A.* this is murder; because of the previous malice and concerted design. *1 Hal. P. C. 479.* But if *A.* upon a sudden quarrel assaults *B.* first, and upon *B.*'s returning the assault, *A.* really and *bonâ fide* flees, and being driven to the wall, turns again upon *B.* and kills him; this may be *se defendendo*, according to some of our writers. *1 Hal. P. C. 482:* Though others have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. *1 Hawk. P. C. c. 29. § 17.*

And it is now agreed, that if a man strike another upon *malice prepense*, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. *1 Hawk. P. C. c. 29. § 17: S. P. C. 15 a: Crom. 28 a: Dak. cap. 98: Kelynge 58: H. P. C. 42.* See post. III. 3.

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Under this excuse, of self-defence, the principal civil and natural Relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the Relation assisting being construed the same as the act of the party himself. 1 Hal. P. C. 484.

Homicide, *se defendendo*, or by self-defence, says *Hawkins*, seems to be, where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempts be made upon him in his own house) kills the person by whom he is reduced to such an inevitable necessity. 1 *Hawk. P. C. c. 22. § 13*, &c. *H. P. C. 40: S. P. C. 15*.

And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Hawk. P. C. c. 29. § 14: Bro. Coro. 125: 43 Aff. 31: 3 Inst. 56: H. P. C. 41*.

And notwithstanding a person, who retreats from an assault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of Homicide *se defendendo* only. 1 *Hawk. P. C. c. 29. § 15: H. P. C. 41: Crom. 28: S. P. C. 15 a*.

And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all. 1 *Hawk. P. C. c. 29. § 16: H. P. C. 41: 3 Inst. 56: Crom. 28 a*.

There is one species of Homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this Homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expence of another man's, is excusable, through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and endangering of each other's life. See *Bac. Elem. c. 5: 4 Comm. c. 14*.

2. The circumstances wherein these two species of Homicide, by misadventure and self-defence, agree, are in the blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who is therefore not altogether faultless. And as to the necessity which excuses a man who kills another *se defendendo*, Lord Bacon entitles it *necessitas culpabilis*, and thereby distinguishes it

from the former necessity of killing a thief or a malefactor. *Bac. Elem. c. 5*. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since, in quarrels, both parties may be, and usually are, in some fault, and it scarcely can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original fault can never be upon my side. The law besides may have a farther view, to make the crime of Homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

The Penalty inflicted by our laws in these cases is said, by Sir Edward Coke to have been antiently no less than death; 2 *Inst. 248, 315*; which however is with reason denied by later and more accurate writers. 1 *Hal. P. C. 425: 1 Hawk. P. C. c. 29. § 20: Fost. 282. &c*. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*: which was probably disposed of, *in pios usus*, according to the humane superstition of the times, for the benefit of his soul, who was thus suddenly sent to his account, 'with all his imperfections on his head.' *Fost. 287*. But that reason having long ceased, and the penalty (especially of a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach, a pardon, and a writ of restitution of his goods as a matter of course and right, only paying for suing out the same. *Fost. 283: 2 Hawk. P. C. c. 37. § 2*. And indeed to prevent this expence, in cases where the death has notoriously happened by misadventure or in self-defence, the Judges will usually permit, (if not direct) a general verdict of acquittal. *Fost. 283*.

It seems clear that neither of these Homicides, by misadventure or *se defendendo*, are felonious, because they are not accompanied with a felonious intent, which is necessary in every felony. 1 *Hawk. P. C. c. 29. § 19: 3 Inst. 56: 2 Inst. 149*.

And from hence it seems plainly to follow, that they were never punishable with loss of life: And the same also farther appears from the writ *De odio & atia*, by virtue whereof, if any person committed for killing another, were found guilty of either of these Homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death, for what is owing rather to his misfortune than his fault. 1 *Hawk. P. C. c. 29. § 20*.

It is true indeed, that some of our best authors have argued from the statute of *Mansbridge, cb. 26*, which enacts, that *murdrum de cetero non adjudicetur, ubi injur-tunium tantummodo adjudicatum est, &c.* that, before this statute, homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death. 1 *Hawk. P. C. c. 29. § 21: 2 Inst. 56: S. P. C. 16*.

But to this it may be answered, that murder in those days signified only the private killing of a man, by one who was neither seen nor heard by any witness; for which the offender, if found, was to be tried by ordeal,

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and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an *Englismen*: otherwise it was presumed he was a *Dane* or *Norman*, who in those days were often privately made away with by the *Englsh*. And it being a doubt whether Homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question. 1 *Hawk. P. C. c.* 29. § 22: *Bract.* 134 *b*; 135 *a*: *Kilnyng* 121.

However it is certain, that notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by *Justices of peace*, but must be committed till the next coming of the Justices of eyre or gaol-delivery. 1 *Hawk. P. C. c.* 29. § 23. *H. P. C.* 98, 99: 2 *Inft.* 315: *Dalt. cap.* 98. But such offender may be brought up by *habeas corpus*, before any of the twelve judges, and bailed.

Indeed, anciently a person committed for the death of a man, might sue out the writ *de odio et atia*, which by *Magna Charta c.* 16, is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprised by twelve men, upon the writ *deponendo in ballium*. But such writs and enquiries were taken away by the statute of *Gloucester, c. 9.* and *St. 28 Ed. 3. c. 9.* and though perhaps they were again revived by *St. 42 Ed. 3. c. 1.* which makes all statutes contrary to *Magna Charta* void, yet at this day they seem to be obsolete, and, indeed, useless; inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the Justices of gaol-delivery. 1 *Hawk. P. C. c.* 29. § 24: *S. P. C.* 77 *g*: 2 *Inft.* 43, 315: 9 *Co.* 56: *Co. Bail and Mainprize, c.* 10.

It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead 'Not guilty', and give the special matter in evidence. And that whenever a person is found guilty of such Homicide, either by a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or Homicide, he shall be discharged out of prison upon bail, and forfeit his goods: But, that upon removing the record by *certiorari* into Chancery, he shall have his pardon of course, without staying for any warrant from the King to that purpose. 1 *Hawk. P. C. c.* 29. § 25: 4 *H. 7. 2 a*: *Keilw.* 53 *a*; 108 *l*: 2 *Inft.* 310: *S. P. C.* 15 *b*; 16 *b*: *Dalt. cap.* 96, 98. *F. N. B.* 246. *C. H.*

III. FELONIOUS HOMICIDE, is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another person.

I. SELF-MURDER, is ranked among the highest crimes, being a peculiar species of felony; a felony committed on one's self. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not be strained to that length, to which our Coroners' Juries are too apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal

non compos, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac it does not deprive a man of the capacity of discerning right from wrong, and therefore if a real lunatic kills himself in a lucid interval, he is *felo de se* as much as another man. 1 *Hal. P. C.* 412.

As to the punishment which human laws inflict on this crime; they can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by the forfeiture of all his goods and chattels to the King.

In this, as well as all other felonies, the offender must be of the age of discretion, and *compos mentis*; and therefore, an infant killing himself under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se*. 1 *Hawk. P. C. c.* 27. § 1: *Crom.* 30 *a, b*; 31 *a*: *H. P. C.* 28: *Dalt. cap.* 92: 3 *Inft.* 54.

Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such an attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer; 1 *Hawk. P. C. c.* 27. § 4: *Dalt. cap.* 92, 144: 44 *E. 3. 44*: 44 *aff.* 55: *Bro. Cor.* 12, 14: *S. P. C.* 16: *H. P. C.* 28, 29: *Dalt.* 119 *b*: *Crom.* 28.

He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head; and the person killed is not looked upon as a *felo de se*, inasmuch as his act was merely void, being against the law of God and man. 1 *Hawk. P. C. c.* 27. § 6: *Keilw.* 136: *Moor* 54.

Further as to what a *Felo de se* shall forfeit, it seems clear, that he shall forfeit all chattels real or personal which he hath in his own right; and also all chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession to which he was intitled jointly with another, on any account, except that of merchandize. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. 1 *Hawk. P. C. c.* 27. § 7. However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower. 1 *Hawk. P. C. c.* 27. § 8: *Plowd. Com.* 261 *b*: 262 *a*: 1 *Hal. P. C.* 413.

Not any part of the personal estate is vested in the King, before the self-murder is found by some inquisition; and consequently the forfeiture thereof, is saved by a pardon of the offence before such finding. 5 *Co.* 110 *b*: 3 *Inft.* 54: 1 *Saund.* 362: 1 *Sid.* 150, 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided. *Plowd. Com.* 260: *H. P. C.* 29: 5 *Co.* 110. And such inquisitions ought to be by the Coroner *super visum corporis*, if the body can be found; and an inquisition so taken, as some say, cannot be traversed. *H. P. C.* 29: 3 *Inft.* 55. See 1 *Hawk. P. C. c.* 27. § 9, 10, 11.

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But if the body cannot be found, so that the coroners who has authority only *super visum corporis*, cannot proceed, the inquiry may be by Justices of peace; (who by their commission have a general power to inquire of all felonies;) or in the King's Bench, if the felony were committed in the county where that court sits; and such inquisitions are traversable by the executor, *See* 1 *Hawk. P. C. c. 27. § 12: 3 Inst. 55: H. P. C. 29: 2 Lev. 141.*

Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact; and in the conclusion add, that the party in such manner murdered himself. 1 *Hawk. P. C. c. 27. § 13: 3 Lev. 140: 3 Mod. 100: 2 Lev. 152.* Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form. 1 *Stil. 225, 259: 3 Mod. 101: 1 Keb. 907: 1 Hawk. P. C. c. 27. § 15.*

By the rubrick in the Common Prayer, before the burial office, (confirmed by stat. 13 & 14 *Car. 2. c. 4.*) persons who have laid violent hands upon themselves, shall not have that office used at their interment.—See further on this subject this Dict. tit. *Felo de se.*

The other species of criminal Homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *Manslaughter*, and *Murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles; and principally consists in this, that *Manslaughter* (when voluntary) arises from the sudden heat of the passions; *Murder* from the wickedness of the heart.

2. **MANSLAUGHTER** is therefore thus defined; *The unlawful killing of another, without malice, either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act.* 1 *Hal. P. C. 466.* And hence it follows, that in Manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is Manslaughter: and so it is, if they, upon such an occasion go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. 1 *Hawk. P. C. c. 31. §§ 29, 30.* So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it, to preserve himself; yet neither is it murder, for there is no previous malice; but it is Manslaughter. *Hyde. 135.* But in this, and in every other case of *Manslaughter*, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpolate, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *East. 256.* So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; this is not absolutely ranked in the class of justifiable Homicide, as in case of a forcible rape, but it is Manslaughter. 1 *Hal. P. C. 486.* It is however the lowest degree of it, and therefore in such a case, the court directed the burning in the hand

to be gently inflicted, because there could not be a greater provocation. *Ramm. 212.* Manslaughter therefore on sudden provocation differs from Excusable Homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge. 4 *Comm. c. 14.*

The second branch, or *involuntary* Manslaughter differs also from Homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the King's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. 3 *Inst. 56.* So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstance under which the original act was done; if it were in a country village where few passers are, and he calls out to all people to have a care, it is misadventure only; but if it were in *London*, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. *Ad. 43: 3 Inst.* And, in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in it's consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. 4 *Comm. c. 14. See post. 3. more at large.*

Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by Stat. 10 *Geo. 2. c. 31.* if any Waterman between *Graveland* and *Windsor* receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony; and shall be transported as a felon.

Next as to the *Punishment* of this degree of Homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally slaying another, though done upon sudden provocation. For by stat. 1 *Jac. 1. c. 8.* when one thrusts or stabs another, who has not then a weapon drawn, or who hath not then first stricken the party slaying, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels, and slaying with short daggers, between the *Scotch* and the *English*, at the accession of *James* the First; and, being therefore of a temporary nature, ought perhaps to have expired with the manner which

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which it meant to remedy. 1 *Lord Raym.* 140. It was however continued indefinitely by *St. 3 Car. 1. c. 4.*: and by *stat. 16 (or 17) C. 1. c. 4.*, till some other act shall be made touching the continuance or discontinuance thereof.—It seems that in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the Subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the Common-law. *Foff. 299, 300.* Thus, (not to repeat the cases before mentioned, of stabbing an adulteress, &c. which are barely manslaughter, as at Common-law) in the construction of the statute it hath been doubted, whether if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute. *Foff. 301*: 1 *Hawk. P. C. c. 30. § 6.* Altho it hath been resolved, that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. 1 *Hal. P. C.* 470. And if the party slain had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute. 1 *Hawk. P. C. c. 30. § 8.*

It is generally holden, that this statute is but declarative of the Common law, and in the construction thereof, the following points have been also resolved. 1 *Bulst.* 87: *Kelynge* 55.

That he who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present, and aiding and abetting the fact, are within the statute; from whence it follows, That it cannot be proved by whom the stroke was given, none can be found guilty within the statute. 1 *Hawk. P. C. c. 30. § 7*: *H. P. C.* 58: *Aleyn* 44.

That there is no need to lay the conclusion of the indictment *contra formam statuti*, because the statute makes no new offence, but only takes away the privilege of clergy from an old one, and leaves it to the judgment of the Common-law; from whence it follows, that a person indicted on the statute, may be found guilty of manslaughter generally. Altho from the same ground it hath been resolved, That if an indictment lay, and a verdict also find, a fact to be *contra formam statuti*, which cannot possibly be so, as that *A.* and *B.* aided and abetted *C.* *contra formam statuti*, yet neither such indictment nor verdict are void; but *A.* and *B.* shall be dealt with in the same manner as they should have been, if these words *contra formam statuti* had been wholly omitted, because the substance of the indictment being found, they may be rejected as senseless and superfluous: And, *a fortiori*, therefore it is certain, that they shall do no hurt to an indictment or verdict containing a fact which may be within the statute. 1 *Hawk. P. C. c. 30. § 9*: *H. P. C.* 58, 266: *Allen* 47: *Cro. Jac.* 283.

That, as these words, *contra formam statuti*, do not vitiate an indictment which would be good without them;

so also, they will not supply a defect in a vitious one, which does not specially pursue the statute. 1 *Hawk. P. C. c. 30. § 10*: *H. P. C.* 58.

A prisoner whose case may be brought within this statute, is commonly arraigned upon two indictments, one at Common-law for murder, and the other upon the statute. *Foff. 299.*—But the same circumstances which at Common-law will serve to justify, excuse or alleviate a charge of murder, have always had their due weight in prosecutions, grounded on this statute. *Foff. 298.*—As where a husband stabs an adulterer whom he seizes in the act. 1 *Vent.* 158: *Raym.* 212.—Or where a man is assaulted by thieves in his house, the thieves having no weapon drawn, nor having struck him; and he stabs one of them. *Stra.* 469. Or where an officer entering violently into the chamber of a gentleman to arrest him, but without announcing the purpose for which he came, is rabbed by the gentleman with his sword. *Kel.* 136: 1 *Hale* 470: *Sy.* 467.—Or where upon an outcry of thieves a person who had innocently hidden himself in a closet, was mistaken for the thief and stabbed in the dark. See 1 *Hale* 42, 474: *Cro. Car.* 538: *W. Jon.* 429: *Kely.* 136; and many other instances of this kind which were held not to be within the statute. 1 *Hawk. P. C. c. 30. in n.*

3. The term of MURDER (as a crime) was antiently applied only to the secret killing of another; *Dial. de Scacc. l. 1. c. 10*; which the word *merda* signifies in the Teutonic language; and it was defined, "*homicidium quod, nullo vidente, nullo sciente, clam perpetratur*." *Glarv. lib. 14. c. 3*: for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. *Bract. l. 3. tr. 2. c. 15. § 7*: *Stat. Marl. c. 26*: *Foff. 281.* The word *murdrum* in our old statutes also signified any kind of concealment or stifling: So in the stat. of *Exeter*, 14 E. 1. "*je riens ne celerai ne suffirai ne celé ne murdré.*" which is thus translated in *Flota*, l. 1. c. 18. § 4. "*Nullum veritatem celabo, nec celari permittam, nec murdari.*" And the words "*pur mur he le doit*" in the articles of that statute, are rendered in *Flota*, *ibid.* § 8 "*pro jure alicujus murdandi.*" The word *murdrum*, (by some derived from the Sax. *morþ*, whence, (as it is said) comes the barbarous Latin *Mordrum*, & *Murdum*, in French *Murme*; though the word *Murdrum*, evidently comes from the Latin *Mortidum*), was a word in use long before the reign of King Canutus, which some would have to signify a violent death; and sometimes the Saxons expressed it by *morþedil* & *morþ secere*, a deadly work. But the Sax. *morþ* relates generally to *mois*.

The usage of fining the vill or the hundred was common among the antient *Goths*, in *Sweden* and *Denmark*, who supposed the neighbourhood, unless they produced the murderer to have perpetrated, or at least connived at, the murder: and, according to *Bracton*, it was introduced into this kingdom by King Canute to prevent his countrymen the *Danes* from being privily murdered by the *English*; and was afterwards continued by William the Conqueror, for the like security of his own *Normans*. *Bract. l. 3. tr. 2. c. 15*: 1 *Hal. P. C.* 447. And therefore if, upon inquisition had, it appeared that the person slain was an *Englishman*, (the presentment whereof was denominated *Englesberic*) the county seems to have been excused from this burthen. *Bract. ubi supra.* See this Dict. tit. *Englucery*.

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Engleccery. But, this difference being totally abolished by Stat. 14 E. 3. c. 4, we must define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of *English* or foreign extraction. See *Staunf. P. C. l. 1. c. 10*, as also *Hawk. P. C. c. 31*; where it is said that in the ancient times above alluded to, the open killing of a man through anger or malice was not called *murder*; but *voluntary Homicide*. *Bract. 121 a; 134 b; 135 a; Kel. 121*.

The law concerning *Engleccerie* having been abolished by Stat. 14 Ed. 3. c. 4, the killing of an *Englishman* or foreigner through malice prepense, whether committed openly or secretly, was by degrees called *murder*; and Stat. 13 Rich. 2. c. 1, which restrains the King's pardon in certain cases, does in the preamble, under the general name of *murder*, include all such *Homicide* as shall not be pardoned without special words; and, in the body of the act, expresses the same by *murder*, or killing by *await*, *assault*, or *malice prepense*. And doubtless the makers of Stat. 23 H. 8. cap. 1, which excluded all wilful murder of malice prepense from the benefit of clergy, intended to include open, as well as private *Homicide*, within the word *murder*. 1 *Hawk. P. C. c. 31. § 2*; *S. P. C. 18 b; 19 a*.

By *Murder*, therefore, says *Hawkins* at this day we understand, the wilful killing of any Subject whomsoever, through malice *forethought*, whether the person slain be an *Englishman* or foreigner. 1 *Hawk. P. C. c. 31. § 3*.

Murder is thus defined, or rather described, by Sir *Edward Coke*; "When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 3 *Inst. 47*. The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, murder must be committed by a *person of sound memory and discretion*: for lunaticks or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

One under the age of discretion, or *non compos mentis*, cannot be guilty of *murder*; though if it appears by circumstances, that the infant did hide the body, &c. it is *felony*. *H. P. C. 43*; 3 *Inst. 46. 54*.

If an infant under twelve years old, hath an extraordinary wit, that it may be presumed he knows what he does, and he kill another, it may be felony and murder; otherwise it shall not. 3 *H. 7. 13*; *Plowd. 191*.

See the case of *William York*, at *Bury*, Summer assizes in 1748. *Foster's Rep. 70*. and this Dict. tit. *Infant I*.

Next, murder happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. See 1 *Hal. P. C. 425*.

A person indicted for intending to murder the Master of the Rolls, *Term Mich. 16 Car. 2*; and for offering a sum of money to another person to do it, saying at the same time, that "if he would not perpetrate the crime, he would do it himself;" upon his conviction, the court declared that this was a heinous offence, and not only indictable, but fineable; and the offender was fined one thousand

marks, committed to prison for three months, and ordered to find sureties for his good behaviour during life. 1 *Lev. 146*.

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol, or starving. But where they only differ in circumstances, as if a wound be alleged to be given by a sword, and it proves to have arisen from a staff, an ax, or a hatchet, this difference is immaterial. 3 *Inst. 319*; 2 *Hal. P. C. 185*. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 *Inst. 48*. And therefore by the Stat. 22 Hen. 8. c. 9, it was made treason, and a more grievous and lingering kind of death was insisted on it than the Common law allowed; namely, boiling to death: but this act did not live long, being repealed by Stat. 1 El. 6. c. 12; which declares that all wilful killing by poisoning of any person shall be adjudged wilful murder, of malice prepensed.

There was also, by the ancient Common-law, one species of killing held to be murder which may be dubious at this day, as there hath not been an instance wherein it has been held to be murder, for many ages past; namely by bearing false witness against another, with an express, premeditated design to take away his life, so as the innocent person be condemned and executed. *Murder c. 1. § 9, 19*; *Brit. c. 52*; *Bracton l. 3. c. 4*. There is no doubt but this is equally murder *in foro conscientie* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the perils of their own lives,) has not yet punished it as such. See 3 *Inst. 48*; *Fost. 131*. and this Dict. tit. *Perjury*.

A gaoler knowing a prisoner to be infected with an epidemic distemper, confines another prisoner against his will, in the same room with him, by which he catches the infection, of which the gaoler had notice, and the prisoner dies; this is a felonious killing. *Str. 856*; 9 *St. Tr. 146*. So to confine a prisoner in a low, damp, unwholesome room, not allowing him the common conveniences, which the decencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies; this is also a felonious Homicide. *Str. 884*; *Ld. Raym. 1578*.—For although the law invests gaolers with all necessary powers, for the interest of the common-wealth, they are not to behave with the least degree of wanton cruelty to their prisoners, *O. B. 1784, p. 1177*.—And those were deliberate acts of cruelty, and enormous violations of the trust the law reposed in it's ministers of justice. *Fost. 322*.

In some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by dures of imprisonment compels a man to accuse an innocent person, who, on his evidence, is condemned and executed; or where one incites a madman to kill himself or another: or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another who dies thereof. 1 *Hawk. P. C. c. 31. § 7*; *S. P. C. 36*; 3 *Inst. 91*; *Dalt. cap. 93*; *Plowd. Com. 474*.

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If a man however does such an act, of which the probable consequence may be, and eventually is death, such killing may be murder although no stroke be struck by himself, and tho' no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died. 1 Hawk. P. C. c. 31. § 5; of the harlot, who hid her child under leaves in an orchard, where a kite struck it and killed it. 1 Hal. P. C. 432; and of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance. Palm. 545. So also, in general any one who, assuming to take care of another, relieves them necessary subsistence, or by any other severity, though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, it death actually and clearly ensues in consequence of it, it is murder.—And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation and reflection. O. B. 1784 p. 455: R. v. S. S. J. O. B. 1781. 4th S. J. 1776.

If a man hath a beast that is used to do mischief; and he, knowing it, suffers it to go abroad, and it kills a man, even this is manslaughter in the owner: but if he had purposely *tuned it loose*, though barely to frighten people and make what is called sport, it is as much murder, as if he had incited a bear or dog to worry them. See 1 Hal. P. C. 431.

Pocock says, that he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, *a se, bene fact*, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself killed him; and this is agreeable to the Mosaic law. However, it is agreed by all, such a person is guilty of a very gross misdemeanor. 1 Hawk. P. C. c. 31. § 1: F. 12. Coven 311: S. P. C. 17 a: *Crom.* 24 b: *Dalb. cap.* 93: F. 1. 122 b: H. P. C. 53: *Exodus*, c. 2. v. 29.

If a physician or surgeon gives his patient a potion or plaster to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action, for neglect or ignorance. *Marr* c. 4. § 10. But it hath been holden, that if he is not a *regular* physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter at the least. *Brow.* c. 5: 4 b. 251. Yet Sir *Matthew Hale* very justly questions the law of this determination. 1 Hal. P. C. 430.

In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. 1 Hawk. P. C. c. 31. § 9.

But if a person hurt by another, die thereof within a year and a day, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself. 1 Hawk. P. C. c. 31. § 10: 3 Inst. 53: *Kerog* 26: 1 K. b. 17.

If one dies within a year and a day, through disorderly living, it shall be no excuse, *the wound will be judged the principal cause of his death*; but if one wounded die after that time, the law will presume he died a natural death. 3 Inst. 53: H. P. C. 55: K. b. 26. If a man receive a wound that is not mortal; but either for want of help, or by neglect, it turns to a fever, &c. which causes the party's death, it is murder: so it is, where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, &c. But if, by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not murder: by *Hale*; Hist. P. C. 428.

As to the place where such killing is within the consequence of the law; it seems that the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at Common law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, that the death of one who is both wounded and dies beyond sea, and it is said by some, that the death of him who dies here of a wound given there, may be heard and determined before the Constable and Marshal, according to the Civil law, if the King please to appoint a Constable. And it seemeth also to be clear, that such a fact being examined by the privy council, may by force of St. 33 H. 8. cap. 23, be tried (in relation to the principal offenders, but not as to the accessaries) before commissioners appointed by the King, in any county of England. 1 Hawk. P. C. c. 31. § 11: 3 Inst. 48: 2 Inst. 51: Co. Lit. 75: S. P. C. 65 a: Bro. Appeal 153: Co. Car. 247: 1 And. 195. A commission was issued, against Captain *Roche* for killing Mr. *Ferguson*, at the cape of Good Hope.

A murder at sea was anciently cognisable only by the Civil law; but now by force of Stat. 27 H. 8. c. 4: 28 H. 8. c. 15, it may be tried and determined before the King's Commissioners in any county of England, according to the course of the Common-law; yet the death of one who is at land, of a wound received at sea, is neither determinable at Common-law, nor by force of either of these statutes: but it seems, that it may be tried by the Constable and Marshal, or before the commissioners appointed in pursuance of the aforesaid statute of 33 H. 8. c. 23: 1 Hawk. P. C. c. 31. § 12: 3 Inst. 48, 49: 1 Leon. 270: H. P. C. 54: 3 Inst. 48.

The Commissioners to be appointed under Stat. 27 & 28 H. 8, are the Admiral, or his deputy, and three or four more (among whom two Common law judges are constantly appointed, who in effect try all prisoners); the indictment being first found by a Grand Jury of 12 men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the Court of Admiralty. The Judge of the Admiralty still presiding therein, just as the Lord Mayor presides at the Sessions in London. 4 Comm. 269. See this Dict. tit. Admiralty.

And it is said by some, that the death of one who died in one county, of a wound given in another, is not indictable at all at Common-law, because the offence was not complete in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corpse were carried into the county where the stroke was given, the whole might be enquired of by a jury of the same county. And it is agreed, that an appeal might be brought in either county, and

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and the fact tried by a jury returned jointly from each. And at this day, by force of *St. 2 & 3 Ed. 6. c. 24*, the whole is triable by a jury of the county wherein the death shall happen, on an indictment found, or appeal brought, in the same county. 1 *Hawk. P. C. c. 31. § 13*; 3 *Inst.* 48, 49; *Bro. Coro.* 140, 141, 143; *Indictm.* 3; *S. P. C.* 90. c: 6 *H. 7. 10 a*: *Finch Law* 411; *S. P. C.* 182; *Bro. Appeal* 3. 80. 83. 85. 149.

Also by force of *St. 26 H. 8. cap. 6*, a murder in *Wales* may be enquired of in an adjoining *English* county, but appeals must still be brought in the proper county. 1 *Hawk. P. C. Cro. Car.* 247; 1 *Jon.* 255; 1 *Lev.* 118; *Latch* 12. 118; *Wilf.* 320.

By *Stat. 2 Geo. 2. cap. 21*, it is enacted that where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of *England*, and shall die of the same in *England*; or where any person shall be feloniously stricken or poisoned within *England*, and shall die of such stroke or poisoning upon the sea, or out of *England*, an indictment thereof found by jurors of the county in *England*, in which such death, stroke or poisoning shall happen, whether it be found before any coroner upon view of such dead body, or before justices of peace, or other justices who shall have authority to inquire of murders, shall be as effectual, as well against the principals as the accessories, as if such stroke or poisoning and death, and the offence of such accessories, had happened in the same county; and every such offender shall have the like defences (except challenges for the hundred) as if such stroke or poisoning and death, and the like offence of such accessories, had happened in the same county where such indictment shall be found. See title *Indictment* II.

Further; the person killed must be "a reasonable creature in being, and under the King's peace," at the time of the killing; therefore to kill an alien, a Jew, or an outlaw, who, are all under the King's peace and protection, is as much murder as to kill the most regular born *Englishman*, except he be an alien enemy in time of war. 3 *Inst.* 50; 1 *Hal. P. C.* 433. To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion to be murder in such as administered or gave them. 3 *Inst.* 50; 1 *Hawk. P. C. c. 31. § 16*. But see 1 *Hal. P. C.* 433.

It seems also agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards kills it in pursuance of such advice, he is an accessory to the murder. 1 *Hawk. P. C. c. 31. § 17*; *Dyer* 186; 3 *Inst.* 51.

But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by *stat. 21 Jac. 1. c. 27*, "that if a woman be delivered of a child, which if born alive, should by law be a bastard; and endeavours privately to conceal it's death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead." See title *Bastard* II. 2.

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing, and this malice presense, *malicia præ-*

cogitata, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved and malignant heart. *Forst.* 256: *un dessein à faire un male chose* 2 *Rel. Rep.* 461. and it may be either *express*, or *implied* in law. *Express* is, when one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention; as lying in wait, antecedent menace, former grudges, and concerted schemes to do him some bodily harm. 1 *Hal. P. C.* 451. This takes in the case of deliberate duelling, where both parties meet avowedly, with an intent to murder; thinking it their duty, as gentlemen, and claiming it as their right, to warrant with their own lives and those of their fellow creatures; without any warrant or authority from any power, either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also. 1 *Hawk. P. C. c. 31. § 21. & seq.*

As to the first instance of this kind, it seems agreed, that wherever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary: For since he deliberately engaged in an act in defiance of the laws, he must at his peril abide the consequences thereof. 1 *Hawk. P. C. c. 31. § 21*; 1 *Bullst.* 86, 7; 2 *Bullst.* 147; *Crom.* 22 b; 1 *Rel. Rep.* 360; 3 *Bullst.* 171; *H. P. C.* 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 *Hawk. P. C. c. 31. § 22*; 3 *Inst.* 51; *H. P. C.* 48; *Kelynge* 56; 1 *Lev.* 180.

And wherever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder: as if after the quarrel he fall into other discourse, and talk calmly thereon: or perhaps if he has so much consideration as to say, that the place wherein the quarrel happens, is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c. 1 *Hawk. P. C. c. 31. § 23*; *Kelynge* 56; 1 *Sid.* 177; 1 *Lev.* 180.

If *A.* on a quarrel with *B.* tells him that he will not strike him, but that he will give *B.* a pot of ale to strike him, and thereupon *B.* strike, and *A.* kills him, he is guilty of murder; for he shall not elude the justice of the law by such pretence to cover his malice. 1 *Hawk. P. C. c. 31. § 24*; *H. P. C.* 48.

In like manner, if *B.* challenge *A.* and *A.* refuse to meet him; but in order to evade the law, tells *B.* that he shall go the next day to such a town about his business, and accordingly *B.* meet him the next day in the road to the same town, and assault him, whereupon they

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fight, and *A.* kills *B.* he is, in the opinion of *Hawkins*, guilty of murder, unless it appear by the whole circumstances that he gave *B.* such information accidentally, and not with a design to give him an opportunity of fighting. 1 *Hawk. P. C. c. 31. § 25*; *Crom. 22 b*; *H. P. C. 48*.

And at this day it seems to be settled, That if a man assaults another with *malice prepense*, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent. *Hawk. P. C. c. 31. § 26*; *Crom. 22 b*; *Dalt. cap. 93*; *H. P. C. 47*; *Kelynge 58*. *Margridge's case*.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make a pull at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all. 1 *Hawk. P. C. c. 31. § 27*; *Crom. 23 a. b*; *Dalt. cap. 93*; *Kelynge 61*. *Margridge's case*.

But it is said, that if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himself, with like hazard to both, he shewed that his intent was not so much to kill, as to contend with the other; in compliance with those common notions of honour, which prevailing over reason, during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of *malice prepense*. 1 *Hawk. P. C. c. 31. § 28*; *Kelynge 55, 61, 131*; 2 *Roll. Rep. 491*.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kills the other, he is guilty of manslaughter only, because he did it in the heat of blood, 1 *Hawk. P. C. c. 31. § 29*; *H. P. C. 48*; 3 *Id. 51*.

And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact. 1 *Hawk. P. C. c. 31. § 30*; *Crom. 23 a*; *Dalt. cap. 93*; *H. P. C. 49*; 1 *Roll. Rep. 360*.

But the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the persons killed are also equally guilty, in respect of that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them: but perhaps the contrary opinion is the

more plausible; for it seems too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 *Hawk. P. C. c. 31. § 32*; *H. P. C. 51*; *Dalt. cap. 93*.

Any formed design of doing mischief may be called malice; and therefore not only such killing as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice *prepense* or *aforethought*, and consequently murder. 1 *Hawk. P. C. c. 31. § 18*; *Kelynge 127*; *Stran. 766*.

If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; he shall be adjudged guilty of murder. 1 *Hawk. P. C. c. 29. § 10*; *H. P. C. 52, 57*; *Kelynge 117*.

A fortiori, He shall come under the same construction, who, in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at game fowl with an intent to steal them, &c. for such persons are by no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Hawk. P. C. c. 29. § 11*; 3 *Inst. 56*; *Kelynge 117*; *H. P. C. 52*.

If any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is misadventure; for it was not unlawful to shoot at the wild fowl: But if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poultry (which must be collected from circumstances) it will be murder by reason of that felonious intent: but if it was done wantonly, and without that intention, it will be barely manslaughter. *Fest. 253, 9*.

The rule before laid down supposeth, that the act from which death ensued, was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose, the case of a person offending, will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties, will not, in a question of this kind, enhance the accident beyond its intrinsic moment. *Fest. 259*.

If upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express *act doli*, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such

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as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 1 *Hal. P. C.* 454, 473, 474. Neither shall He be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. *Ld. Raym.* 143: 1 *Hawk. P. C. c.* 29. § 12.

And it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. *H. P. C.* 32, 44: 3 *Inst.* 57: *Dalt. cap.* 93, 97: 11 *H. 7.* 23 a: *Bro. Cons.* 229.

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the King's peace, of which the probable consequence might be bloodshed, as to beat a man; to commit a riot, or to rob a park: and one of them kill a man, it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand. 1 *Hawk. P. C. c.* 31. § 46.

Murder occasioned through an express purpose to do some personal injury to him who is slain, is properly said to be of express malice: Such as happens in the execution of an unlawful action, principally intended for some other purpose, and *not expressed in its nature to do a personal injury* to him in particular that is killed, is most properly malice implied. *Kel.* 129, 130.

In many cases where no malice is expressed, the law will imply it: as, where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hal. P. C.* 455. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gesture only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. 1 *Hawk. P. C. c.* 31. § 33: 1 *Hal. P. C.* 455, 6. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour as to judge it only manslaughter, and not murder. *Foss.* 291.

In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray; or apprehends a felon, knowing his authority, or the intention with which he interposes; the law will imply malice; and the killer shall be guilty of murder. 1 *Hal. P. C.* 457: *Foss.* 308, &c. And if one intends to do another felony, and undesignedly kill a man, this is also murder. 1 *Hal. P. C.* 465. Thus if one shoots at A. and misses him, but kills B. this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. 1 *Hal. P. C.* 466. So also if one gives a woman with child a medicine to procure abortion, and

it operates so violently as to kill the woman, this is murder in the person who gave it. 1 *Hal. P. C.* 429.

As to such murder as happens in killing another *without any provocation*, or but upon a slight one: it is to be observed, that wherever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, &c. 1 *Hawk. P. C. c.* 31. § 32: *Kelynge* 27.

Also it seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not: for so base and cruel a revenge cannot have too severe a construction. 1 *Hawk. P. C. c.* 31. § 33: *Kelynge* 131, 135: 2 *Rob. Rep.* 460, 461: *Dalt. cap.* 93: *Cro. Eliz.* 779: *Noy* 171: 1 *Sid.* 277: 1 *Levinz* 180: *Hob.* 121. con: 1 *Jos.* 432 a.

But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then in fighting with him had killed him, he had been guilty of manslaughter only. 1 *Hawk. P. C. c.* 31. § 34: *Kelynge* 55, 61, 131.

And of the like offence shall he be adjudged guilty, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. 1 *Hawk. P. C. c.* 31. § 35: *Kelynge* 61, 136: *Cro. Jac.* 295: 12 *Co.* 87.

If two having *malice* fight, and the servant of one of them, not knowing of the malice, killeth the other, this is murder in the master, and manslaughter in the servant: Though if there be a conspiracy to kill a man, but *no malice* against his servant; if the servant be slain, the malice against the master shall be construed to extend to his servant: and the killing the servant is murder. *Dyer* 128.

He cannot be thought guilty of a greater crime, than manslaughter, who finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or slipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his person from an unlawful arrest; or in the defence of his house from those who, claiming a title to it, attempt forcibly to enter it, and *so that purpose shoot at it*, &c. or in the defence of his possession of a room in a public house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable; but it is certain, that it can amount to no more than manslaughter. 1 *Hawk. P. C. c.* 31. § 36: *H. P. C.* 57: 3 *Inst.* 57: *Kelynge* 51, 137: *Crom.* 27 a.

Nor was he judged criminal in a higher degree, who seeing his son's nose bloody, and being told by him, that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel,

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cudgel, whereof he afterwards died. 1 *Hawk. P. C. c. 31. § 48: Cro. Jac. 296: 12 Co. 87.*

Nor was he thought more criminal, who duped and encouraged by a concourse of people, threw a pick-pocket into a pond adjoining to the road, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pick-pocket was drowned; for although this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given: O. B. 85, N^o. 751.—So also where three *Scotch* soldiers were drinking together in a public house, one of them struck some strangers that were drinking in another box, with a small rattan; they having used several opprobrious epithets, reviling the character of the *Scotch* nation: an altercation ensued, and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle.—The altercation increased, and when the soldiers had paid the reckoning the strangers again shoved him from the room into the passage; upon this, the soldier exclaimed, that “he did not mind killing an *English* man, nor eating a mess of crowdy;” the stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged *Manslaughter*. 5 *Burr. 2799.*—But in every case of Homicide, upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such Homicide will be murder. *Fost. 273, 296: 1 Hal. 486: 1 Vent. 158: Kaym. 212: Leach's Hawk. P. C. i. c. 31. § 37. in n.*

When one executes his revenge, upon a sudden provocation, in such a cruel manner, *with a dangerous weapon*, as shews a malicious intention to do mischief; and death ensues, it is express malice and murder from the nature of the fact. *Kel. 55, 61, 65, 130.* A man chided his servant, and upon some cross answer given, he having a hot iron in his hand ran it into the servant's belly, of which he died, this was adjudged murder. *Kel. 64.*

If a person is trespassing upon another, by breaking his hedges, &c. and the owner upon sight thereof take up a hedge-stake, and give him a stroke on the head, whereof he dies, this is murder, because *it is a violent act beyond the proportion of the provocation.* *H. P. C.* And where a boy was upon a tree in a park cutting of wood, and the keeper bids him come down, which he did; and then the keeper struck him several blows with a cudgel, and afterwards *with a rope tied him to his horse's tail*, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. *Cro. Car. 139: H. P. C.*

As to such murder as happens in killing one whom the person killing intended to hurt in a less degree; it is to be observed, that wherever a person in cool blood by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Hawk. P. C. c. 31. § 38: Kelyne 119. Mawgrudge's case: H. P. C. 49, 50, 51, 52.*

Also it seems, that he who upon a sudden provocation executeth his revenge in such a cruel manner, as shews a cool and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park

finding a boy stealing wood, tied him to a horse's tail and beat him, whereupon the horse ran away with him and killed him. 1 *Hawk. P. C. c. 31. § 39: Cro. Car. 131: 1 Jon. 198: Palm. 545: H. P. C. 49.*

As to the cases where such killing shall be adjudged murder, which happen in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain, they are as follow. And first, Such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony; it seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with one man with a design to murder him, misses him, and kills another. 1 *Hawk. P. C. c. 31. § 40, 41: Kelyne 117: H. P. C. 46, 50: Dalt. cap. 93: Moore 87.*

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband, who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child who died thereof; such also was the case of the wife who mixed *raisbane* in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as such a murderous intention, which of itself perhaps in strictness might justly be made punishable with death, proves now in the event the cause of the King's losing a Subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power. 1 *Hawk. P. C. c. 31. § 42: Plow. Com. 474: 9 Co. 91.*

But if one happened to be poisoned by *raisbane* laid in order to destroy vermine, the person by whom he is so killed, is guilty of Homicide *per infortunium* only, because his intentions were wholly innocent. 1 *Hawk. P. C. c. 31. § 43.*

Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only; but it hath been adjudged, that if a justice of peace, constable or watchman, or even a private person be killed in the endeavouring to part those whom he sees fighting, the person by whom he is killed, is guilty of murder; and that he cannot excuse himself by alledging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shews such an obstinate contempt

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contempt of the law, that he is no more to be favoured than if he had acted in cool blood. 1 *Hawk. P. C. c. 31. § 44*; *H. P. C. 45, 50*; 3 *Inst. 52*; *Dalt. cap. 93*; *Savil 67*; *Kelynge 66*; 22 *Aff. 71*; 4 *Co. 40 b*; 9 *Co. 68*; *Crom. 25 a. b.*

Yet it hath been resolved, that if the third person slain in such a sudden affray, do not give notice for what purpose he comes, by commanding the parties in the King's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. 1 *Hawk. P. C. c. 31. § 45*; *Kelynge 66*. If the officer be within his proper district, and known, or but generally acknowledged to have the office he assumeth, the law will presume that the party killed had due notice of his intent, especially if it be in the day time. *Fost. 135, 311*.

As to such killing as happens in the execution of an unlawful action, where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain; it seems clear that where divers persons resolve generally to resist all opposers in the commission of any such breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, &c. and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. 1 *Hawk. P. C. c. 31. § 46*; *Savil 67*; *Moore 86*; *Palm. 35*; *Crom. 24 b. 25 a*; *H. P. C. 47*; 5 *Mod. 285*; *Dyer 128. pl. 60*; *S. P. C. 17 b*.

The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled. *Prin. P. L. 234*:—Therefore if divers persons be engaged in an unlawful act, and one of them with malice prepened against one of his companions, finding an opportunity, kills him, the rest are not concerned in the guilt of that act. *Kely. 112*: because it hath no connection with the crime in contemplation. *Prin. P. L. 235*.—So where two men were beating another man in the street, a stranger made some observations upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principals in the murder, yet although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act, and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that he could not be guilty either as principal or accessory: and upon the case of *R. v. Thompson, Kely. 66, 7*, he was acquitted. 8 *Mod. 164*; 12 *Mod. 629*; Yet see 12 *Mod. 256*:—*Leach's Hawk. P. C. i. c. 31. § 46, in n.*

Where divers rioters, having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, because the person slain was so much in fault himself. 1 *Hawk. P. C. c. 31. § 47*; *Crom. 28 b*; *H. P. C. 56*.

But if in such, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony. 1 *Hawk. P. C. c. 31. § 48*; *H. P. C. 45*; *Dalt. cap. 93*; 3 *Inst. 52*; *Kelynge 66*; 22 *Aff. 71*; 4 *Co. 40 b*; 9 *Co. 68*; *Crom. 25*. See *supra*.

If one attack another to rob him, and by the resistance of the party kills him, this is murder. 3 *Inst. 52*; *Dalt. 344*. A person stands by and encourages or commands another to murder a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact: It will be murder in them all. *Plowd. 98*; 11 *Rep. 5*. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, &c. and one of them kills a person, this is murder in all present, aiding or assisting, or that were ready to aid and assist: All will be said to intend the murder. 3 *Inst. 56*; *Dalt. 347*; *H. P. C. 31*. And such persons will be judged to be present who are in the same house, though in another room, or in the same park, although half a mile off, &c. *H. P. C. 47*; *Kel. 87, 116, 127*. See tit. *Necessary*.

Several persons having conspired to enter the King's park, and to hunt and carry away deer, with design of killing any one that should oppose them; though the keeper's servant began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be murder; as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but to have surrendered themselves. *Roll. Rep. 20*.

As to such killing, as happens in the execution of an unlawful action, the principal motive whereof was to assist a third person; it seems clear, that if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. *Pl. Com. 100, 101 a*; *Crom. 23*; *Dalt. cap. 93*; *H. P. C. 51, 52*; 1 *Hawk. P. C. c. 31. § 49*.—Though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with the master, if they kill another, it is murder both in master and servant. *Dy. 26*; 9 *Rep. 66*; *Plowd. 100*.

And therefore it follows *a fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his sword broken lend him another, wherewith he kills the other, he is guilty of manslaughter only. 1 *Hawk. P. C. c. 31. § 50*; *Crom. 26 b*; *H. P. C. 57*; *Dalt. cap. 94*; 1 *Roll. Rep. 407, 408*; 3 *Bulst. 206*; *H. P. C. 52*.

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Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c. in due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew the person slain were an officer or not. *Keynge* 67, 86, 87. But perhaps it may be objected, that in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person. To this it may be answered, that all fighting is highly unlawful, and that he who on a sudden seeing persons engaged in it, is so far from endeavouring to part them, as every good Subject ought, that he takes part with one side, and fights in the quarrel, without knowing the cause of it, shews a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does; and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which does not always signify a particular ill-will against the person killed, as appears by many of the above mentioned cases; and tho' such persons be favoured in respect of the suddenness of the occasion where both the quarrel and the persons are private, yet he must not expect such indulgence, where the fight, in which he so rashly engages, was begun in opposition to the justice of the nation, and a person happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and it may be justly challenged, that his opposers be made examples to deter others from joining in such unwarrantable quarrels. 1 *Sid.* 160: *Noy* 50. *Plow. Com.* 100.—See 1 *Hawk. P. C. c.* 31. § 51-53.

But if a man seeing another arrested, and restrained from his liberty, under colour of a 'prels-warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers' in resisting the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself; and the person who rescued him, did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence with a shew of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril. *Keynge* 66, 137: *Com.* 27 a, *Dent's* case: 1 *Hawk. P. C. c.* 31. § 54.—But the principles upon which this case was determined, are very elegantly and warmly controverted by Mr. Justice *Fryer*, p. 315—318.

There were two men in an inner chamber, quarrelling, and together by the ears; a brother of one of them standing at the door, that could not get in, cried to his brother to make him sure, and presently after he gave the other a mortal wound; this was held manslaughter in him that stood at the door. *Ship. Abr.* 493.

As to such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest, it seems to be agreed that whoever kills a sheriff, or any of his officers, in the lawful execution of civil process, as on arresting a person upon a *capias*, is guilty of murder. 1 *Hawk. P. C. c.* 31. § 55: *Dalt.* 427. 93: *H. P. C.* 25: *Com.* 24 a.

Nor is it any excuse to such a person, that the process was erroneous, (for it is not void by *bill* 2 (1),

or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance): or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. 9 *Co.* 66, 68: *Co. Jac.* 280, 486: 6 *Co.* 68 b: 60 a: 1 *Hawk. P. C. c.* 31. § 56.

Yet the killing of an officer in some cases will be manslaughter only; as, where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests *J. S.* a baronet, who never was knighted; by force of a warrant to arrest *J. S.* knight. 1 *Hawk. P. C. c.* 31. § 57: *Co. Car.* 372: 1 *Jon.* 346: 12 *Co.* 49. So where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a Sunday since *stat.* 29 *Car.* 2. *cap.* 7, by which all such arrests are made unlawful. *H. P. C.* 46: 1 *Hawk. P. C. c.* 31. § 58.

If a bailiff is killed in executing a lawful warrant, &c. it is murder: Nor is it any excuse to the person, that the process was erroneous; or that the arrest was in the night; that the officer did not tell him for what cause he arrested him; or that he did not shew his warrant, &c. being a bailiff commonly known. 9 *Rep.* 68, 69: *Co. Jac.* 280, 486. But if a bailiff who is not executing his office is killed, it is not murder; for he ought to be duly executing his office, by serving the process of the law, wherein he is assisted *cum potestate Regis & Legis*. *Co. Car.* 537: 2 *Lill. Abr.* 212. Therefore where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests a wrong person, or *J. S.* a baronet, by force of a warrant to arrest *J. S.* knight; or if a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door, or window, to arrest a man; or perhaps if he arrest one on a Sunday; since the *stat.* 29 *Car.* 2. *c.* 7, by which all such arrests are made unlawful, and he is slain; malice shall not be implied to make it murder, but it shall be manslaughter only. *H. P. C.* 46: *Co. Car.* 372: 12 *Rep.* 49: 1 *Hawk. c.* 31. § 58. If bailiffs come to a house to arrest a person, and the house being locked they attempt to break in, whereupon the son of the person intended to be arrested, shoots and kills one of them, it is not murder. *Jones* 429: See *Foster's Rep.* 135, 138, 270, 308, 312, 318, 321.

A person was arrested, and another not knowing the cause of the struggle, but seeing swords drawn, and to prevent mischief, came and defended the party arrested, and in the scuffle the bailiff was killed; it was resolved to be no murder in the person doing it, but that all that were present and assisting, knowing of the arrest, were principal murderers. *Kel.* 86. Though it has been held in such a case, that the person offending is guilty of murder, whether he knew that the person slain were an officer or not; for all fighting is unlawful, and he who, seeing persons engaged in it, takes part with one side, and fights in the quarrel without knowing the cause of it, especially where the fight is begun in opposition to the justice of the nation, shews a readiness to break through the laws on a small occasion, and must at his peril take heed what he doth. 1 *Sid.* 160: *Noy* 50. See ante.

As to such killing as happens in the execution of an unlawful action, whereof the principal purpose was to usurp an illegit.

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illegal authority; it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder. 1 Hawk. P. C. c. 31. § 59: H. P. C. 49.

But where persons act by virtue of a commission, which if it were strictly regular, would undoubtedly give them full authority, but which happens to be defective only in some point of form, it seems that they are no way criminal. 1 Hawk. P. C. c. 31. § 60.

As to such killing as happens in the execution of an unlawful action, where no mischief was intended at all, it is said, that if a person happen to occasion the death of another, in doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them in a fright, he is guilty of murder. 1 Hawk. 87.

It has been already mentioned to have been anciently holden, that if a person not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony; but in as much as the books wherein this opinion is holden were written before the statute of 23 H. 8. c. 1, which first excluded such felonious killing, as may be called *wilful murder or malice prepense*, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice prepense, within the intent of that statute; however, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature; and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them: but surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. 1 Hawk. P. C. c. 31. § 62: S. P. C. 16 b: Pult. 32 b: Crom. 27: 43 Ed. 3. 33 b: Fitz. Coron. 163: See Dalt. cap. 93.

It were endless to go through all the cases of Homicide which have been adjudged either expressly or impliedly, malicious: the above therefore may suffice as a pretty ample specimen: and we may take it for a general rule that all Homicide is malicious, and of course amounts to murder, unless where, 1. *justified* by the command or permission of the law; 2. *excused* on the account of accident or self-preservation; or 3. *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the

guilt. For all Homicide is presumed to be malicious, until the contrary appeareth upon evidence. *Foet. 275.*

The punishment of murder, and that of manslaughter were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. 1 Hal. P. C. 450. But by several statutes the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. See *Stats. 23 Hen. 8. c. 12: 1 Ed. 6. c. 12: 4 & 5 P. & M. c. 4.* And tit. *Clergy, Benefit of.*

The Principal in murder is therefore now ousted of clergy in all cases, and the Accessary *before* is also ousted of clergy in all cases, but the Accessary *after* is in no case ousted of clergy. 2 *Hob. H. 314.*

In atrocious cases, it was frequently usual for the court to direct the murderer, after execution to be hung upon a gibbet in chains near the place where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. But now in *England*, it is enacted by *Stat. 25 Geo. 2. c. 37.* that the Judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be *Sunday*, and then on the *Monday* following) and that his body be delivered to the surgeons to be dissected and anatomized; and that the Judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. See *Foet. 107.* And during the short but awful interval between sentence and execution the prisoner shall be kept alone, and sustained only with bread and water. But a power is allowed to the Judge upon good and sufficient cause to respite the execution and relax the other restraints of the act. See tit. *Execution of Criminals.*

At a meeting of the Judges to consider of this act there was some doubt whether *hanging in chains* might ever be made part of the sentence; but on debate it was agreed by nine judges, that in all cases within the act, the judgment for *dissecting and anatomizing* only should be part of the sentence, and if it should be thought advisable, the judge might afterwards direct the *hanging in chains* by special order to the sheriff, pursuant to the power given by the act. *Foet. 107.*

4. By the Roman law *Parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of Homicide. But the *English* laws treat it no otherwise than as simple murder, unless the child was also the servant of his parent; probably under the idea of the impossibility of committing to enormous a crime.

But though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder denominates it a new offence, no less than a species of treason, called *parricidium*, or *Parricide*: which is however nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient *Gothic* constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the State and Sovereign.

PETIT TREASON, according to the *stat.* 25 E. 3. c. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular,) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left upon a grudge conceived against him during his service, is guilty of petit treason, for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention. 1 Hawk. P. C. 89: 1 Hal. P. C. 380. So if a wife be divorced *à mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress. 1 Hal. P. C. 381.

A wife divorced *causâ adulterii vel fornicationis*, is still within this law, because the bond of matrimony is not thereby dissolved, and she may again lawfully cohabit with her husband. But a divorce *causâ consanguinitatis vel pre-con-sensu*, entirely dissolves the nuptial tie, and annihilates the very character of wife.—Therefore a wife *de facto* only, and not *de jure* cannot commit this crime, for she has no lawful lord to whom she owes subjection and obedience.—Neither can a husband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and subjection.—*Leach's Hawk. P. C.* i. c. 32. § 7.

A clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop; and therefore to kill any of these is petit treason. 1 Hal. P. C. 381. As to the rest, whatever has been said, or remains to be observed, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in it's most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of *William 3.* *Foß.* 337. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder. *Foß.* 106: 1 Hal. P. C. 378: 2 Hal. P. C. 184; and in such case it should seem that two witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in it's punishment. 4 Comm. c. 14.

An appeal of death will lie, and *ante factum acquit* or *attaint* in murder is a good bar, in petit treason; and *à converso*. 2 Hal. 246, 253: 3 Inst. 213. It is included in a pardon under the name of murder. 1 Hal. 378. And the offender may be indicted either for petit treason, murder or manslaughter, and tried and found guilty on such indictment, of either of those crimes respectively, according as the case may appear upon the evidence. 1 Hal. 378: *Foß.* 326.—But if the prosecutor be apprised of the real case, he ought to adapt the bill to the truth of the fact. *Foß.* 104, 326. For though the offences are to most purposes considered as substantially the same, yet there is, as we have seen, some difference with regard to the judgment; and also a very material one with regard to the trial. *Foß.* 327.—On the trial the prisoner is entitled to a peremptory challenge of thirty five. *Foß.* 327.—Two witnesses, it is also positively stated, by *Foß.*, are required both on the indictment and at the trial. *Foß.* 337: See *stat.* 1 Ed. 6. c. 12: And the *stat.* 5 & 6 Ed. 6. c. 11, by general words extending to all treasons, requireth that

the witnesses, if living, shall be examined in person upon the trial in open court. Depositions therefore taken before the coroner, or informations taken by a justice of the peace, are not evidence whereon to ground a conviction of petty treason, if the party be living, though unable to travel, or kept out of the way by the prisoner, or his procurement. *Foß.* 337. cites *stat.* 1 & 2 P. & M. c. 13: 1 Hale 305: 2 Hale 284.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman as formerly to be drawn and burned, but which latter sentence is now changed to hanging by *stat.* 30 Geo. 3. c. 48. See title *Judgment in criminal cases*. Persons guilty of petit treason were first debarred the benefit of clergy by *stat.* 12 H. 7. c. 7, which has been since extended to their aiders, abettors, and counsellors, by *stat.* 23 Hen. 8. c. 1: 4 & 5 P. & M. c. 4. See title *Clergy Benefit of*.

HOMINATIO. *Domesday*, tit. *Northampton Sockmanni de Risdan*.—The mustering of men; also the doing of homage. *Cravell* edit. 1727.

HOMINE CAPTO IN WITHERNAMUM. A writ to take him that hath taken any bondman or woman, and led him or her out of the country, so that he or she cannot be replevied according to law. *Reg. Orig.* fol. 79. See this Dist. tit. *Withernam*.

HOMINE ELIGENDO AD CUSTODIENDAM PECIAM SIGILLI PRO MERCATORIBUS EDITI. A writ directed to a corporation, for the choice of a new person to keep one part of the seal appointed for *Statutes merchant*, when a former is dead, according to the statute of *Edm-Bur-nel*. *Reg. Orig.* 178.

HOMINE REPLEGIANDO. A writ to bail a man out of prison: *F. N. B.* fol. 6: *Reg. Orig.* fol. 77.

This writ lies where a person is in prison, (not by special commandment of the King, or his Judges, or for any crime or cause irrepleviable,) directed to the sheriff to cause him to be replevied: in the same manner that charters taken in distress may be replevied; and if the person be conveyed out of the sheriff's jurisdiction, he may return, that the defendant hath *efforced* the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a *capias in withernam* to take the defendant's body, and keep him without bail or mainprize till he produces the party. 3 Comm. 129. c. 8. And if the sheriff return *non est inventus* in that writ against the body, the plaintiff shall have a *capias* against the defendant's goods, &c. *F. N. B.* 66: *New Nat. Br.* 151, 152.

Where one takes away secretly, or keeps in his custody another man against his will, upon oath made thereof, and a petition to the Lord Chancellor, he will grant a writ of *replegiari facias*, with an *alias* and *pluries*, upon which the sheriff returns *an elongatus*, and the coupon issues out a *capias in withernam*: and when the party is taken, the sheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a *habeas corpus* to the sheriff to bring him into court and bail him. 2 Lill. 23.

In a *Homine replegiando* it hath been adjudged, that it doth not differ from a common *replevin*, on which the sheriff must return a *deliberari feci*, or an excuse why he doth not: that where he cannot make deliverance, if he return an *elongatus*, the defendant is not concluded by that return

return to plead *non cepit*: and after the return of an *elungatus*, and a *capias in withernam*, if the defendant pleads this plea, he shall be bailed, for the *withernam* is no execution: and after a defendant is bailed upon the *capias in withernam*, there may be a new *withernam* against him. And it was held, that in a *homine replegiando* after an *elungatus* returned, if the defendant comes in *gratis*, and calls for a declaration, and pleads *non cepit*, he shall not be obliged to give bail, but if he come in upon the return of the *capias*, he must give bail, and shall not be admitted to it till he call for a declaration, and plead *non cepit*. 2 Salk. 381.

The sheriff returned an *elungavit* in a *homine replegiando*, and then a *capias in withernam* went forth; afterwards the defendant, having entered an appearance, moved for a *superfedeas* to the *withernam*, and offered to plead *non cepit*; which was opposed, unless he would give bail to deliver the person, in case the issue was found against him: though it was ruled, that if any property had been pleaded in the party then the defendant ought to give bail to deliver him; but he says he hath not the person, and therefore *non cepit* is a proper plea, and he shall put in bail to appear *de die in diem*. In this case the defendant shall not be compelled to *gage deliverance*; and a *superfedeas* was granted to the *withernam*. See 4 Mod. 183.

A *homine replegiando* cannot be brought either by the wife herself, or by her *prochein amy* against her husband; and the nature and proceedings in the writ shew it to be so. Ch. Prec. 492.

This writ is now seldom used to deliver a person out of custody, being superseded by the more beneficial effects of the writ of *Habeas Corpus*. See that title.

HOMINES; A term applied to a sort of *feudatory tenants*, who claimed a privilege of having their causes and persons tried only in the court of their lord: and when Gerard de Camvil, Anno 5 R. 1, was charged with treason and other misdemeanors, he pleaded that he was *Homo comitis Johannis*, &c. and would stand to the law and justice of his court. Paroch. Antiq. 152.

HOMIPLAGIUM; Is used in the laws of Hen. 1. cap. 80, for the maiming a man. *Si quis in domo vel curia Regis fecerit homicidium vel homi plagium*.

HOMO. This Latin word includes both man and woman, in a large or general understanding. 2 Inst. 45.

HOMSTALE. A home-stall, or mansion-house. As in a charter granted about the 5 Ed. I. Corvill.

HOND-HABEND, See *Hand habend*. It also signifies the right which the lord hath of determining the offence in his court.

HONEY. All vessels of honey are to be marked with the name of the owner, and be of a certain content, under penalties; and if any honey sold, be corrupted with any deceitful mixture, the seller shall forfeit the honey, &c. Stat. 23 Eliz. c. 8.

HONOUR, Is, besides the general signification, used especially for the more noble sort of *Seigniories*, on which other inferior Lordships or Manors depend, by performance of some customs or services to those who are lords of them; (though anciently *honore* and *baronia* signified the same thing.) See *Skelman*, in *v. Honor*. The manner of creating these Honours by act of parliament, may in part be collected out of the statute of 33 Hen. 8. cc. 37, 38.

In the early times of our legal constitution, the King's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors

to inferior persons to be holden of themselves; which do now therefore continue to be holden under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an Honour, not a manor; especially if it hath belonged to an ancient feudal baron, or hath at any time been in the hands of the crown. 2 Comm. 91. c. 6. See title *Tenure*.

An Honour ought to consist of lands, liberties, and franchises. 1 Bulst. 197: 2 Rel. 72. l. 48. And it is the most noble seignory. Co. Lit. 108 a. One or more manors may be parcel of an Honour. 2 Rel. 72. l. 45. So a forest may be appendant to it. 2 Rel. 73. l. 3.

An Honour originally shall be created by the King. Co. Lit. 108 a. Every Honour must be holden of the King. R. 1 Bul. 195. And if it be assigned, or granted over to another, it shall not be holden of a Subject. For it may be granted by the King to a Subject. A man may claim an Honour by grant, or by prescription. But the King at this day cannot make an Honour by grant, without an act of parliament. R. 1 Bul. 195, 196: Co. Lit. 108 a. See Corvill title Honour.

The following is a list of Honours within the realm, *viz.* Amptill, (by Stat. 33 H. 8. c. 37.) Aquila, (formerly Pevensy) Arundel, (See post) Abergavenny, Boloine, Berkehamstead, Beaulieu, Barnard's Castle, Bullingbroke, Earsfable, Bononia, Brecknock, Bromber, Bulford, Clare, Crevecur, Clun, Christchurch, Cockenmouth, Cormyl, Candicut, Carisbrook, Clifford Castle, Chester, Carmarthen, and Cardigan, Donnington Castle, (by stat. 37 H. 8. c. 18.)—Dudley, and Dover Castle, Eys, and Egremond.

The Honour of East and West Greenwich, Glamorgan, Gloucester, Greatmeash, Gorwer, Grafton, (by stat. 33 H. 8. c. 38.)—Haganet, Hampton Court, (by stat. 31 H. 8. c. 5.)—Huntingdon, (in Herefordshire) Hovingham, Harwenden Castle, Hertford, and Hatton, Lancaster, Lincoln, Leicester, Lovetot, Hinckley, Kingston upon Hull, (by stat. 37 H. 8. c. 18.)—Kington, and Falkingham.

The Honour of Montgomery, Morvray, Middleham, and Maidstone, Nottingham, Newelton or Newelme, Oakhampton, St. Osib, (by stat. 37 H. 8. c. 18.)—Oxford.

The Honour of Plimpton, Peverel, Pickering, Raleigh, Richard's Castle, Skipton, Stafford, Snigul, Tickhill, Tienanton, Totmisi, Theenay, Tamworth.

The Honour of Wigmore, Wallingford, Westminster (by stat. 37 H. 8. c. 18.)—Wimbor, Wormgay, Whirwellton, (in Yorkshire) Werk, Wichechurch, and Warwick, Wibly, and Tutbury.

The King granted to a Subject a great manor, called an Honour, and passed it by the name of an Honour, and well. Jenk. 277. pl. 99.

It is illegal to purchase honour (as a dukedom) for money. Vern. 5. See title *Pens*.

At this day the Earl of Arundel only hath his Earldom by prescription, the beginning of which is not within the memory of any one; so that his Earldom is the most ancient in the realm. 1 Bulst. 196—See title *Pens*.

HONOUR-COURTS, Are courts held within the honours, or manors last noticed, mentioned in the stat. 33 Hen. 8. cap. 37. There is also a Court of Honour of the Earl Marshal of England, &c. which determines disputes concerning precedency and points of Honour. 2 Hawk. P. C. This court of Honour, which is also exercised to do justice to *Heralds*, is a court by prescription, and has a prison belonging to it, called the *White Lion* in *Sustbawark*. 2 Nelf. 935. See title Court of Chivalry.

HON

HONOURARY (or HONORARY) FEUDS, Are titles of nobility, descendible to the eldest son in exclusion of all the rest. See title *Tenures*.

HONOURARY SERVICES, Are those that are incident to the tenure of *Grand Sergeanty*, and commonly annexed to some *honour*. *Stat. 12 Car. 2. 29.*

HONTFONGENETHEF. *Cum omnibus aliis libertatibus tantummodo hontfongenethef mihi retento.*—*Charta Wil. Comitis Matfeldensis. In Mon. Angl. 1 par. fo. 724.*

This should have been written *hontfangenethef*, and signifies a *thief*, taken with *bondhabend*, i. e. having the thing stolen in his hand. *Cowell.*—See *Backberind*.

HOPCON, Signifies a valley, in *Domesday Book*; so do *hope*, *hawgh* and *bough*. *Cowell. edit. 1727.*

HOPS AND HOP-BINDS. Penalty on importing or using corrupt hops, *stat. 1 Jac. 1. c. 18.*—No bitter to be used in brewing but hops, *Stat. 9 Ann. c. 12. § 24.*—No hops to be imported into Ireland from other parts but Great Britain, *Stat. 5 G. 2. c. 9.*—Landing foreign hops before duty paid, hops to be burnt, and ship forfeited, *Stat. 7 Geo. 2. c. 19.*—Penalty on sophisticating hops, *7 Geo. 2. c. 19. sect. 2.*—Cutting hop-bines, *10 Geo. 2. c. 32. sect. 4.*—By *Stat. 6 Geo. 2. c. 37. sect. 6.* Unlawfully and maliciously cutting hop-binds is made felony without benefit of clergy.—The duty upon hops is a branch of the Excise and regulated by many *stats.* made for the purpose.

HORA AURORÆ, The morning bell, or what we now call the *four o'clock bell*, was anciently called *Hora Auroræ*; as our eight o'clock bell, or the bell in the evening, was called *Ignitegium* or *Corcorfeu*. *Cowell.*

HORDERA, from the Sax. *Horil, Thesaurus.*] A treasurer: and hence we have the word *Hord* or *Hoard*, as used for treasuring or laying up a thing. *Leg. Adelfran. cap. 2.*

HORDERIUM, A hoard; a treasury, or repository. *L. Canuti, c. 104.*

HORDEUM PALMALE. Beer-barley, which in *Norfolk* is called sprat-barley, and battledore-barley; and in the marches of *Wales* *cymridge*, it being broader in the ear, and more like a *band* than the common barley, which in old deeds is called *Hordeum quadragesmale*. *Cowell.*

HORNE-BEAME POLIENGERS. Trees so called, that have been usually lopped, and are about twenty years growth, and therefore not tithable. *Plowden, fol. 407: Schy's case.*

HORNEGELD, from the Saxon word *born, cornu*, and *geld, solutio*] A tax within a forest, to be paid for horned beasts. *Crompt. Jurist. 197.* And to be free thereof is a privilege granted by the King unto such as he thinketh good. *Cowell. edit. 1727.*

HORN WITH HORN, or HORN UNDER HORN. The promiscuous feeding of bulls and cows, or all *horned* beasts, that are allowed to run together upon the same common. *Spelman.* To which may be added, that the commoning of cattle *horn with horn*, was properly when the inhabitants of several parishes let their common herds run upon the same open spacious common, that lay within the bounds of several parishes, and therefore, that there might be no dispute upon the right of tithes, the bishop ordains, that the cows should pay all profit to the minister of the parish where the owner lived, &c. *Cowell.*

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HORNAGIUM. *Horngeld*; See that title.

HORNERS. No stranger was to buy any *English* horns gathered or growing in *London*, or within twenty-four miles thereof, by the *Stat. 4 Ed. 4. c. 8.* And none may sell *English* horns unwrought to any stranger, or send them beyond sea, on pain of forfeiting double value: the wardens of *Horners* in *London* may search all wares, &c. *Stat. 7 Jac. 1. cap. 14.* See title *London*.

HORS DE SON FEE, *Fr. i. e.* out of his fee.] An exception to avoid an action brought for rent or services, &c. issuing out of land, by him that pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls. *Brooke.* In an *avowry*, a stranger may plead generally *hors de son fee*; and so may tenant for years: and such stranger to the *avowry*, being made a party, is at liberty to plead any matter in abatement of it. *9 Rep. 30: 2 Mod. 104.* A tenant in fee-simple ought either to disclaim, or plead *Hors de son fee.* *1 Davy. Abr. 655: Vide 9 Rep; Bucknall's case, 22 Hen. 6. 2, 3: Keilw. 73, 14: Aff. pl. 13: Co. Lit. 1 b: 2 Mod. 103, 104: & 14 Vin. Abr. tit. Hors de son fee.* See title *Pleading*.

HORSE-BREAD, Inn-keepers shall not make horse-bread. *Stats. 13 Ric. 2. stat. 1. c. 8: 4 Hen. 4. c. 25.* Permitted to bake horse-bread, *Stat. 32 Hen. 8. c. 41.*

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Were not to be conveyed out of the realm, without the King's licence, &c. on pain of forfeiture, by an ancient statute, *11 H. 7. c. 13.* Persons having lands of inheritance in parks, &c. were ordered to keep two mares apt to bear foals thirteen hands high, for the increase of the breed of *horses*, on pain of 40 s. for every month they are wanting; and not suffer them to be leaped by stoned *horses* under fourteen hands, on a certain penalty by *stat. 27 Hen. 8. c. 6.* And for the preservation of a strong breed of *Horses*, stone-horses above two years old are directed to be fifteen hands high, or they shall not be put into forests or commons, where mares are kept, upon pain of forfeiture; and scabbed or infected *Horses* shall not be put into common fields, under the penalty of 10 s. leviable by the Lord of the leet. *Stat. 32 H. 8. c. 13;* still in force.

Stealing of any horse, gelding, or mare, is felony without benefit of clergy; but accessories to this offence are not excluded clergy. *Stat. 1 Ed. 6. c. 12: 2 & 3 Ed. 6. c. 33.* The first made stealing horses geldings or mares felony; a doubt was entertained whether this extended to the stealing one horse, &c. on which the latter act was passed. And if any *Horse* that is stolen be not sold according to the statute *2 & 3 P. & M. c. 7;* the owner may take the *Horse* again wherever he finds him, or have action of *detinue*, &c. To prevent *Horses* being stolen and sold in private places, this *stat. 2 & 3 P. & M. c. 7,* provides, that owners of fairs and markets shall appoint toll-takers or book-keepers, who are to enter the names of buyers and sellers of *Horses*, &c. And to alter the property, the *Horses* must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the *Horse*.—And by *stat. 31 Eliz. cap. 12,* sellers of *Horses* are to procure vouchers of the sale to them; and the names of the buyer, seller and voucher, and price of the *Horse* are to be entered in the toll taker's book, and a note thereof delivered to the buyer; and if any person shall

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shall sell a *Horse* without being known to the book-keeper, or bringing a voucher; or if any one shall vouch without knowing the seller: or the book-keeper shall make an entry without knowing either, in either of these cases the sale is void, and a forfeiture is incurred of 5 *l.* and the said statute provides that a *Horse* stolen, though sold according to the direction of the act, may be redeemed and taken by the owner within six months, repaying the buyer what he shall swear he gave for the same.

By *stat. 22 & 23 Car. 2. c. 7.* Any person maliciously killing or destroying any horses in the night shall be guilty of felony, punishable by transportation for seven years.—Maliciously hurting or wounding horses in the night, to forfeit treble damages to the owner.

Duties are imposed by *stats. 24 Geo. 3. ft. 2. c. 31: 25 Geo. 3. c. 47: 29 Geo. 3. c. 49.* or persons keeping Horses to ride or draw in a carriage.—These are now 10 *s.* for one horse;—5 *s.* additional (*i. e.* in the whole 15 *s.*) for a second horse;—7 *s.* 6 *d.* additional (*i. e.* 17 *s.* 6 *d.*) each for a third, fourth and fifth horse; and where six or more are kept 20 *s.* for each except the first.—The *stat. 26 Geo. 3. c. 79.* excepts Horses *bona fide* used in husbandry, trade, and on particular occasions only; such as going to church, or market, or election for a member of parliament, &c. The said *stat. 24 Geo. 3. c. 31.* allows horse dealers to be exempted from the tax on taking out an annual licence paying 10 *l.* in *London*, &c. and 5 *l.* elsewhere.—As to *post boxes* and the duty on them, See title *Post*.—As to Horses in Hackney Coaches. See title *Coach*.

Horse-stealing having got to a great pitch, and many of those useful animals having been stolen, merely for the purpose of selling them as dogs meat, and for their hides, the following statute was made to put a stop to this iniquitous traffick.

By *Stat. 26 Geo. 3. c. 71.* No person shall keep any place for slaughtering any horse or other cattle, not killed, for butcher's meat, without taking out a licence at the general quarter sessions, to be granted upon a certificate of the minister and churchwardens that the person applying is proper to be trusted with the carrying on such business. § 1.

Such licence to be signed by the Justices at sessions, and a copy entered in a book to be kept for that purpose by the clerk of the peace, and all persons so licensed shall cause to be painted over their gates, their name and the words "licensed for slaughtering Horses pursuant to an act passed in the 26th year of his Majesty King George III." § 2.

Every occupier of such licensed slaughter-house shall, six hours previous to the slaughtering any live horse, or to the slaying any horse brought dead to the slaughtering house, give notice in writing to the after-mentioned inspector, who is to take an exact account of the height, age, colour and particular marks of every horse, &c. and keep the same in a book. [see *act. 5.*] And no such Horse shall be slaughtered or slay'd but between 8 in the morning and 4 in the evening, from *October* to *March*, both inclusive, and between 6 in the morning and 8 in the evening from *April* to *September* both inclusive. § 3.

Every person so licensed shall at the time any horse, &c. shall be brought, make an entry in a book of the name and abode, and profession of the owner, and also of the person who shall bring the same to be slaughtered or slayed and the reason why the same is so brought; which

book shall, at all times be open for the examination of the inspector, and produced before any justice, when required. § 4.

The parishioners in vestry shall annually or oftner appoint one or more persons to be inspectors of such slaughtering house: And in case such inspector shall upon examination of any Horse, &c. intended to be slaughtered believe that such Horse, &c. is free from disease, and in a sound and serviceable state, or that the same has been stolen, he shall prohibit the slaughtering such Horse, &c. for not exceeding 8 days; and in the mean time shall cause an advertisement to be inserted in some public newspaper twice or oftner (unless the owner of such Horse shall sooner claim the same) at the expence of the occupier of such slaughtering house; who on refusal to pay the same, shall forfeit double the amount, to be raised by distress. § 5.

Every inspector may at all times in the day or night, but if in the night, then in the presence of a constable, enter into and inspect any place kept for slaughtering horses by licensed persons, and take an account of the Horses, &c. there. § 6.

In case any person offering to sale or bringing any Horse, &c. to be slaughtered or slayed shall refuse to give an account of himself, or of the means the same came into his possession, or if there be reason to suspect that such Horse, &c. is stolen; such person shall be carried before a justice of peace, who shall commit him for not more than 6 days to be further examined, and if such justice shall be satisfied that such Horse, &c. is stolen, the person bringing the same is to be committed to gaol to be dealt with according to law. § 7.

Any person keeping such slaughtering house transgressing the rules before laid down by the act, shall be guilty of *felony* and punished by fine and imprisonment, and such corporal punishment by whipping, or shall be transported for not more than 7 years, as the court shall direct. § 8.

Any such person destroying or defacing with lime, or burying the hide or skin of any horse, &c. or being guilty of any offence against this act for which no punishment or penalty is provided shall be adjudged guilty of a misdemeanor, and punished by fine and imprisonment and such corporal punishment by whipping, as the court shall direct. § 9.

Making false entries subjects the party to a forfeiture not exceeding 20 *l.* nor less than 10 *l.* to be levied by distress; half to the informer and half to the poor; and in case the offender shall not have effects to the amount of the penalty, he may be committed to hard labour in the house of correction for not more than 3 months, nor less than one. § 10.

The book of the inspector shall be produced at every general quarter sessions. § 12.

If any person shall occasionally lend any barn or place for slaughtering any horse, &c. without taking out such licence he shall forfeit not more than 20 *l.* nor less than 10 *l.* half to the informer and half to the poor; or be committed to gaol for not more than 3 months nor less than 1, unless the penalty is sooner paid. § 13.

This act does not extend to carriers, &c. nor to farriers, nor persons killing Horses, &c. to feed their own dogs. § 14.

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If any currier, tanner, &c. shall under colour of their trades, knowingly kill any sound horse, or boil the flesh thereof to sell, such tradesman becomes an offender under the act, and shall forfeit not more than 20*l.* nor less than 10*l.* § 15.

[The forms of the several convictions are specified in the act.]

HORSES HIRED, Action of trespass on the case lies for abusing a horse hired, by immoderate riding, &c. And a difference has been made in our law between *hiring* a horse, and *borrowing* one to go a journey: for in the first case the party may set his servant, &c. upon the horse, but not in the second. 1 *Mol.* 210. See title *Bailment*.

HORSES FOR THE KING'S SERVICE. None shall take the Horse of any person to serve the King without the owner's consent, or sufficient warrant, on pain of imprisonment, &c. *Stat.* 20 *R.* 2. c. 5.

HORSE-RACES, For small sums, having encouraged idleness, and impoverished the meaner sort of people; it is enacted, that no person shall run any horse at a race, unless it be his own, nor enter more than one horse for the same plate, upon pain of forfeiting the *baks*; and no plate is to be run for under 50*l.* on the penalty of 500*l.* Also every horse race must be begun and ended in the same day, &c. *Stat.* 13 *Geo.* 2. cap. 13.

Horses at races to be entered by the owners, 13 *Geo.* 2. c. 19. Horse racing with horses carrying small weights, prohibited. 1*b.* Horses may run for the value of 50*l.* with any weight and at any place, 18 *Geo.* 2. c. 34 *sect.* 11.

A plaintiff shall not be allowed to recover a wager on such an horse race, as is illegal within the statute. 4 *Term Rep.* 1. A match for 25*l.* a side is a match for 50*l.* See this *Dict.* tit. *Gaming*.

The *stat.* 24 *Geo.* 3. c. 31, imposes an annual duty of 2 guineas on Race-Horses.

HORSTILERS, Fr. *Hofstellers*.] Is used for Inn-keepers: and in some old books the word *hostlers* is taken in the same sense. *stat.* 31 *Ed.* 3. c. 2. The executors of *Hostlers* are not chargeable, for their faults. 1 *Kib.* 682.

HOSPES GENERALIS, A great chamberlain.—*Vocamus, quantum ad hospitium pertinet, omnes indifferenter nostro hospitali generali obediant, &c.* *Du Cange*.

HOSPITALLERS, *Hospitalarii*.] Were the knights of a religious order, so called because they built an hospital at Jerusalem, wherein pilgrims were received. To these Pope Clement transferred the Templars, which order, by a council held at Vienne in France, he suppressed for their many and great offences. The institution of their order was first allowed by Pope Gelasius the Second anno 1118; and confirmed in this kingdom by Parliament, and had many privileges granted them, as immunities from payment of tithes, &c. Their privileges were reserved to them by *Magna Charta* cap. 37; and the right of the King's Subjects vindicated from the usurpation of their jurisdiction, by the statute of *Westm.* 2. cap. 43. Their chief abode is now in Malta, an island given them by the Emperor Charles V. after they were driven from Rhodes by Soliman the Magnificent, Emperor of the Turks; and for that they are now called *Knights of Malta*. All the lands and goods of these knights here in England were given to the King, by 32 *Hen.* 8. c. 34: See *Men. Angl.* 2 par. fol. 489: *The Walsingham*, in *Hist. E.* II: *Stowe's Ann.* 16. See title *Knights Templars*.

HOS

HOSPITALS

Are either *Aggregate*, in which the master or warden and his brethren have the estate of inheritance; or *Sole*, in which the master, &c. only has the estate in him, and the brethren, or sisters, having college, and common seal in them, must consent, or the master alone has the estate not having college, or common seal. So Hospitals are eligible, donative, or presentative. 1 *Inst.* 342. a.

The Master of the Hospital, who has college, and common seal, may have a writ of right; for the right, and inheritance is in him. If he has no college, or common seal, he may have a *juris utrum*. *Co. Lit.* 341 b: 342 a.

Any person seized of an estate in fee-simple may by deed inrolled in Chancery erect and found an Hospital for the sustenance and relief of the poor, to continue for ever; and place such heads, &c. therein as he shall think fit: and such Hospital shall be incorporated, and subject to such visitors, &c. as the Founder shall nominate; also such corporations have power to take and purchase lands not exceeding 200*l.* per annum, so as the same be not holden of the King, &c. and to make leases for twenty one years, reserving the accustomed yearly rent: but no Hospital is to be erected unless upon the foundation it be endowed with lands or hereditaments of the clear yearly value of 10*l.* per annum. *Stat.* 39 *Eliz.* cap. 5; made perpetual by *Stat.* 21 *Jac.* 1. § 1.

It has been adjudged upon this statute, that if lands given to an Hospital be at the time of the foundation or endowment of the yearly value of 200*l.* or under, and afterwards they become of greater value by good husbandry, accidents, &c. they shall continue good to be enjoyed by the Hospital, although they be above the yearly value of 200*l.* And goods and chattels (real or personal) may be taken of what value soever. 2 *Inst.* 722. And if one give his land then worth 10*l.* a year to maintain poor, &c. and the land after comes to be worth 100*l.* a year, it must all of it be employed to increase their maintenance, and none of it may be converted to private use. 8 *Rep.* 130.

If a devise be to the poor people maintained in the Hospital of St. Lawrence in Reading, &c. (where the mayor and burgesses capable to take in mortmain, do govern the Hospital) albeit the poor, not being a corporation, are not capable by that name to take; yet the devise is good; and commissioners appointed to enquire into lands given to Hospitals, &c. may order him that hath the land to assure it to the mayor and burgesses for the maintenance of the Hospital. *Stat.* 43 *Eliz.* c. 4. See titles *Charitable Uses*, *Mortmain*.

A gift must be to the poor, and not to the aged or impotent of such a parish, without expressing their poverty; for poverty is the principal circumstance to bring the gift within the *stat.* 43 *Eliz.* c. 4. Although at Common-law a corporation may be of an Hospital, that is in possession of certain persons to be governors of the Hospital and not of the persons placed therein: the safest way upon the *stat.* 39 *Eliz.* c. 5, is first to prepare the Hospital, and to place the poor therein, and to incorporate the persons therein placed; and after the incorporation, to convey the lands, tenements, &c. to the said corporation, by bargain and sale, or otherwise, between the Founder of the one part, and the master and brethren, &c. of the other part, in consideration of 5*s.* in hand paid by the master of the said Hospital, &c. 2 *Inst.* 724, 725. And the Founder

Founder cannot erect an *Hospital* for years, lives, or any other limited time, but it must be for ever, according to the *Stat. 39 Eliz. c. 5*. See *10 Rep. 17, 31*.

The *Stat. 43 Eliz. c. 4*, under which *Commissions* may be awarded to certain persons to enquire of lands or goods given to *Hospitals*; and the *Lord Chancellor* is empowered to issue commissions to commissioners for enquiring by a jury, of all grants, abuses, breaches of trust, &c. of lands given to charitable uses, does not extend to lands given to any college or hall in the Universities, &c. nor to any *hospital* over which special governors are appointed by the founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of *Hospitals*, by virtue of the *Stat. 2 Hen. 5. R. 1. c. 1*. &c. See this Dict. tit. *Charitable Uses*.

These commissioners may order houses to be repaired, by those who receive the rents; see that the lands be let at the utmost rent; and on any tenant's committing waste, by cutting down and sale of timber, they may accede satisfaction, and that the lease shall be void. *Ibid. 11 Car.* Where money is kept back, and not paid, or paid where it should not, they have power to order the payment of it to the right use: and if money is detained in the hands of executors, &c. any great length of time, they may decree the money to be paid, with damage, for detaining it. *Duke Read. 123*. See *4 Rep. 104*.

The *Hospital of St. Cross* near *Winchester*, and several other large *hospitals*, were anciently founded by particular statutes, or acts of parliament. And King *Charles 1.* granted to the Mayor and commonalty of *London* the keeping of *Bethlem Hospital*, and the manors and lands belonging to it. Also there is now an *Hospital* in *London* for *Foundling Children*, under the care of governors and guardians, who may purchase lands or tenements to the value of 4000*l.* a year: and they are to receive as many such children, as they think fit, which may be brought to the *Hospital* and shall there be bred up and employed, or placed apprentice to any trade, or the sea service, the males till the age of twenty-four, and the females till twenty-one. They may likewise be let out or hired, &c. See *Stats. 13 Geo. 2. cap. 29*; *29 Geo. 2. c. 29. § 13*; *30 Geo. 2. c. 26. § 14*.—See also *Stat. 13 Geo. 3. c. 82*, regulating *Lying-in Hospitals*, and ordering them to be licensed. and further in general this Dict. titles *Mortmain*; *Corporation* &c.

HOSPITALARIA. See *Hospitalaria*.

HOSPITIUM, *hospitium*. Procuration, or visitation-money. *New. 1. offis. lib. 4. c. 14*: *Brompton, fol. 1193*.

HOSTELGIUM, a right to have lodging and entertainment; reserved by lords in the houses of their tenants. *Coastin. R. Radages, M. S. 157*.

HOSTELLER. *Hostellarius*. From the Fr. *hosteler*, i. e. *hostes*.] An Inn-keeper. See *Stat. 31 E. 3. R. 2. c. 2*: and this Dict. title *Innkeepers*.

HOSTLER. Inn-keepers. See *Stat. 9 Ed. 3. R. 2. c. 2*.
HOSTERIUM, A hoe, an instrument well known: *Chart. Ant. q.*

HOSTIÆ, host bread, or consecrated wafers in the *Holy Eucharist*: and from this word *hostia*, *Somner* derives the Sax. *byst*, used for the Lord's supper, and *bystan* to administer the sacrament; which were kept long in our old *Englsh*, under *boufel*, and to *boufal*. *Paroch. Antiq. 270*.

Shakespeare uses the term *unhosted*, &c. in *Hamlet*; meaning that his father gave up the ghost, without having the holy bread, or sacrament, administered to him. See *Fabian's Chron. edit. 1516. 10. 14*.

HOSTILARIUS, An *hospitaller*.

HOSTILARIA, HOSPITALARIA, A place or room in religious houses, allotted to the use of receiving guests, and strangers; for the care of which there was a peculiar officer appointed, called *Hostillarius*, and *Hospitalarius*. *Cart. Feod. Ely MSS.*

HOSTRICUS, *Austricus*, from the Lat. *astr.*] a goshawk. *Paroch. Antiquities, p. 569*.

HOTCHPOT, *In partem positio*.] A word brought from the Fr. *hotchpot*, used as a confused mingling of divers things together, and among the *Dutch* it signifies flesh cut into pieces, and sodden with herbs or roots; but by a metaphor it is *Allowing or mixing of lands given in marriage, with other lands in fee falling by descent*: as if a man seised of thirty acres of land in fee, hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her; and dies seised of the other twenty acres: now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage, into *Hotchpot*, i. e. she must refuse to take the sole profits thereof, and cause her land to be mingled with the other; so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise her sister will have the twenty acres of which her father died seised. *E. 1. 55: Co. Lit. lib. 3. cap. 12*.

This seems to be a right of waiving a provision, made for a child in a man's life-time, at his death, though as it depends upon *frank marriage*, and gifts of lands therein, it now seldom happens. See this Dict. tit. *Parceners*.

But there a bringing of money into *Hotchpot*, upon the clauses and within the intent of the statute for distribution of intestates' estates, *Stat. 22 & 23 Car. 2. c. 10*. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this has been decreed to be an advancement by the father in his life-time, within the meaning of the statute, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this money into *Hotchpot*; and shall not have both the one and the other. *1 Eq. Ab. 253*; See *2 Vern. 638*. and this Dict. tit. *Executor*, V. S.

By the custom of *London*, there is likewise a term of *Hotchpot*, where the children of a *freeman* are to have an equal share of one third part of his personal estate, after his death. *Preced. Canc. 3*. See title *London*: & title *Executor*, V. 9.

There is also in the Civil law *collatio bonorum* answerable to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest he must cast in all that he had formerly received, and then take out an equal share with the others. *Cowell. See farther Britton, c. 72: Lit. f. 267, 268: 2 Comm. 190. 517*.

HOVEL, *Mandia*.] A place wherein husbandmen set their ploughs and carts out of the rain or sun. *Law Lat. Dict.*

HOUNSLOW

HOUNSLOW HEATH, A large *heath* containing 4293 acres of ground and extending into several parishes; so much thereof as is in the King's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of *copyhold lands*; or the steward of the manor may let it for twenty-one years, &c. and the lessees may improve the same. *Stat. 37 H. 8. c. 2.*

HOUR, Hora. Is a certain space of time of sixty-minutes, twenty-four of which make the natural day. It is not material at what *hour* of the day one is born. *Co. Lit. 135.* See titles *Age*; *Fraction*; *Time*.

HOUSAGE, A fee paid for *housing* goods by a carrier, or at a wharf or key, &c. *Shep. Epit. 1725.*

HOUSE, Domus. A place of dwelling or habitation; also a family or household. Every man has a right to air and light, in his own *house*; and therefore if any thing of infectious smell be laid near the house of another, or his lights be stopped up and darkened by buildings, &c. they are nuisances punishable by our laws. 3 *Inft. 231*: 1 *Danv. Abr. 173*. But for a prospect, which is only matter of delight, no action will lie for its being stopped. 9 *Rep. 58*. See title *Nuisance*.

The dwelling *house* of every man, is as his castle; therefore if thieves come to a man's *house* to rob or kill him, and the owner or his servant kill the thieves in defending him and his *house*, that is not felony, nor shall he forfeit any thing. 2 *Lit. 316*. See title *Homicide*. A man ought to use his own *house*, so as not to damnify his neighbour: and one may compel another to repair his *house*, in several cases, by the writ *de domo reparanda*. 1 *Salk. Rep. 360*. Doors of a *house* may not be broke open on arrests, unless it be for treason, or felony, &c. *H. P. C. 137*: *Plowd. 5*: 5 *Rep. 91*. See tit. *Arrest*.

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries as for his repose. 2. Upon recovery in any real action or ejectment, the sheriff may break the house and deliver seisin, &c. to the plaintiff, the writ being *habere facias seisinam* or *possessionem*; and after judgment it is not the house of the defendant in right and judgment of law. 3. In all cases, where the King is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the King, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the *Stat. Wilm. 1. c. 17*, which is only in affirmance of the Common-law; and without default in the owner, the law will not suffer a house to be broken. 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any Subject, either of body or goods; but otherwise where the door is shut, there he cannot break it to execute process at the suit of a Subject. 5. Though a house is a castle for the owner himself and his family and his own goods, &c. yet it is no protection for a stranger flying thither, or the goods of such an one, to prevent lawful execution; and therefore in such case, after request to enter, and denial, the sheriff may break the house. 5 *Rep. 91* a to 93 a.

From the particular and tender regard which the law of England has to a man's house arises in part the animadversion of the law upon *eaves-droppers*, *nuisancers* and *incendiaries*: and to this principle it must be assigned that a man may assemble people together lawfully (at

least if they do not exceed *eleven*) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 4 *Comm. c. 19. p. 223* cites 1 *Hal. P. C. 547*.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the house of the bankrupt. 2 *Show. 247*. See title *Bankrupt*.

Hundred liable to damages by the burning of houses, 9 *G. 1. c. 22. sect. 7*. See further titles *Arrest*; *Execution*; *Constable*; *Homicide*, &c. as to the cases in which officers may break open a house to execute legal process. As to the *House-tax*,—See this Dict. tit. *Taxes*.—As to felonies in or relative to Houses, See titles *Arson*; *Burglary*; *Felony*; *Larceny*; *Riot*; *Robbery*, &c.

HOUSEBOLD AND HAYBOLD, Seem to signify *housebote* and *hedgebote*, in *M. n. Ang. 2. par. fol. 633*: *Corwell, edit. 1727*.

HOUSEBOTE, A compound of *house* and *bote*, i. e. *compensatio*; signifies *estovers*, or an allowance of necessary timber out of the lord's wood, for the repairing and support of a *house* or tenement. And this belongs of common right to any lessee for years or for life: but if he take more than is needful, he may be punished by an action of waste. *Housebote*, says *Co. on Lit. fo. 41*, is twofold, viz. *Estoveriam edificandi & ardendi*. *Corwell*. See titles *Bote*; *Estovers*; *Common of Estovers*.

HOUSE-BREAKING, OR HOUSE ROBBING, See *Arson*; *Burglary*; *Larceny*; *Robbery*.

HOUSE-BURNING, See *Arson*; *Burning*.

HOUSE OF CORRECTION. In every county of England there shall be a *House of correction* built at the charge of the county, with conveniences for the setting of people to work, or every justice of peace shall forfeit 5 *l.* and the justices in sessions are to appoint governors or masters of such *Houses of correction*, and their salaries, &c. which are to be paid quarterly by the treasurer out of the county stock: These governors are to set the persons sent on work, and moderately correct them, by whipping, &c. and to yield a true account every quarter-sessions of persons committed to their custody; and if they suffer any to escape or neglect their duty, the justices may fine them. See *Stats. 7 Jac. 1. c. 4*: 14 *Geo. 2. c. 33*.

The *House of correction* is chiefly for the punishing of idle and disorderly persons; parents of bastard children, beggars, servants running away; trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour: and any person who lives extravagantly, having no visible estate to support him, may be sent to the *House of correction*, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living; but not be whipped. A person ought to be convicted of vagrancy, &c. before he is ordered to be whipped. 2 *Bulst. 351*: *Sid. 281*. *Br. dewell* is a prison for correction in London, and one may be sent thither. *Style 57*.

By *Stats. 14 Geo. 2. c. 33*: 17 *Geo. 2. c. 5*, upon presentment of the Grand Jury, or under *Stat. 22 Geo. 3. c. 64*, on presentment of any one justice, on view, the justices at Sessions may build, or purchase land for building, or enlarge, buy or hire fit *Houses of correction*. And the justices are to take care that the *House of correction* be provided with proper materials for relieving, employing and correcting persons sent to the same: And two justices shall visit the same twice or oftener in a year, and examine

examine into the estate and management thereof, and report the same at the Sessions. The governor or master of a *House of correction* misbehaving himself, may be fined or turned out, at the discretion of the justices. Offenders liable to be sent to the *House of correction*, where the time and manner of their punishment is not expressly limited by law, may be committed until the next Sessions, or until discharged by due course of law.

By the said *Stat. 22 Geo. 3. c. 64. § 1*, and the *Stat. 24 Geo. 3. § 1*, the Quarter Sessions may appoint certain justices to be visitors and inspectors of such houses.—The *Stat. 31 Geo. 3. c. 46*, regulates the appointment and conduct of the governor and other officers of such houses; as also the appointment of the visiting justices.—The above statutes contain also many other regulations as to such *Houses of correction*, a schedule of *Rules and Orders* for their government, as to employing and feeding the persons therein; and which rules and orders are to be fixed up in every House of Correction. See further titles *Poor*; *Transportation*; *Vagrants*.

HOUSE, See *Hofia*.

HOUSEHOLDER, *Pater-familias*.] Is the occupier of a house, a house keeper or master of a family.

HREDIGE, Readily, or quickly. *Leg. Adelftan. c. 16*. From the Sax. *herdige, i. e. brevi*, in a short time. *Cowell*.

HUDEGELD, See *Hidgild*.

HUDSON'S BAY COMPANY.—An exclusive trade to a part of *America*, was granted in 1670, by *Charles II*, to the *Governor and Company of Adventurers of England trading to Hudfon's Bay*: They were to have the sole trade and commerce of and to all the seas, bays, straits, creeks, lakes, rivers and sounds in whatsoever latitude, that lie within the entrance of the Streight commonly called *Hudfon's Streights*; together with all the lands, countries and territories upon the coasts of such seas, bays and streights, which were then possessed by any *English Subject*, or the Subjects of any other Christian State; together with the fishing of all sorts of fish, of whales, sturgeon and all other royal fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction. *Reeves's Law of Shipping*. See this Dict. title *Navigation Acts*.

HUE - AND - CRY,

HUTESIUM BY CLAMOR; from two *French* words *Huer* and *Crier*, both signifying to shout or cry aloud.] *Manwood in his Forest Law, cap. 19. num. 11*, saith, that *Hue* in Latin, *est vox dolentis*, as signifying the complaint of the party, and *Cry* is the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the constable of the next town, and desire him to raise the *Hue* and *Cry*, that is, make the complaint known, and follow the pursuit after the offender, describing the party, and shewing as near as he can which way he went; the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he be not found there, then to give the next constable notice, and the next, until the offender be apprehended, or at least until he be thus pursued unto the sea side. Of this See *Bracton, lib. 3. tract. 2. cap. 5*: *Smith de Rep. Anglor. lib. 2. cap. 20*, and the *Stat. of Winchester, 13 Edw. 1*: *Stats. 28 Ed. 3. 11*: *27 Eliz. 13*.

The Normans had such pursuit with a *Cry* after offenders, which they called *Clamor de baro*; See *Grand Cus-*

HUE - AND - CRY.

tumary, cap. 54. And it may probably be derived from *barrior, flagitare*. *Hue* is used alone in *Stat. 4 Ed. 1. § 2*. In the ancient records this is called *Hutesium & clamor*. See *2 Inst. fol. 172*.

But the *clamor de baro* was not a pursuit after offenders, but a challenge of any thing to be his own after this manner, *viz.* He who demanded the thing did with a loud voice, before many witnesses, affirm it to be his proper goods, and demanded restitution. This the *Scots* call *hutesium*; and *Skene* saith, it is reduced from the French *oyer, i. e. audire*, (or rather *oyez*,) being a *Cry* used before a proclamation; the manner of their *Hue and Cry* he thus describeth; If a robbery be done, a horn is blown, and an *out-cry* made, after which, if the party flee away, and doth not yield himself to the King's bailiff, he may lawfully be slain, and hanged upon the next gallows. See *Skene in v. Hutesium*.

In *Rot. Claus. 30 H. 3. m. 5*, we find a command to the King's treasurer, to take the city of *London* into the King's hands, because the citizens did not, *secundum legem & consuetudinem Regni*, raise the *Hue and Cry* for the death of *Guido de Arette* and others who were slain. *Cowell*.

Hue and Cry, is also defined the pursuit of an offender from town to town till he be taken; which all that are present when a felony is committed, or a dangerous wound given, are by the Common-law, as well as by the statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. *3 Inst. 116, 117*: *2 Inst. 172*: *Dalt. Justice, cap. 28, 109*: *Fitz. Coron. 395*: *Cro. Eliz. 654*.

The raising of *Hue and Cry* is enjoined by the Common law, which may be called a raising of it at the suit of the King; as well as by several acts of parliament, which may be called a raising of it at the suit of a private person. *3 New Abr. 61*.

HUE AND CRY, says *Blackstone*, is the old Common-law process, of pursuing with horn and with voice, all felons, and such as have dangerously wounded another. *Bract. l. 3. tr. 2. c. 1. § 1*: *Mirr. c. 2. § 6*. It is also mentioned in *Stat. Westm. 1. 3 E. 1. c. 9*, and *4 E. 1. de officio coronatoris*. But the principal statute relative to this matter, is that of *Winchester 13 E. 1. cc. 1, 4*, which directs, that from henceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that *Hue and Cry* shall be raised upon the felons, and they that keep the town shall follow with *Hue and Cry*, with all the town and the towns near; and so *Hue and Cry* shall be made from town to town, until they be taken and delivered to the sheriff. And, that such *Hue and Cry* may more effectually be made, the Hundred is bound by the same statute *c. 3*, to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the Hundred in case of any loss by robbery. By *Stat. 27 Eliz. c. 13*, no *Hue and Cry* is sufficient, unless made with both horsemen and footmen. And by *Stat. 8 Geo. 2. c. 16*, the constable or like officer refusing or neglecting to make *Hue and Cry*, forfeits *5 l.* half to the King and half to the prosecutor, with full costs; and the whole vill or district is still in strictness liable to be amerced, according to the law of *Alfred*, if any felony be committed therein, and the felon escapes. *Hue and Cry* may be raised either by precept of a Justice of the peace, or by a peace officer, or by any private man that knows

HUE - AND - CRY.

of a felony. 2 *Hal. P. C.* 100, 104. The party raising it must acquaint the Constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the Constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such Hue and Cry the Constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a Justice of peace. But if a man wantonly or maliciously raises an Hue and Cry, without cause, he shall be severely punished as a disturber of the public peace. 1 *Hawk. P. C. c.* 12. § 5.

As to Hue and Cry at Common-law, it seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy Hue and Cry, but is also bound to do it under pain of fine and imprisonment. 2 *Inft.* 172: 3 *Inst.* 116: 1 *Hal. Hist. P. C.* 404.

From hence it follows, that although it is a good course, as Lord Hale says, to have a precept or warrant from a justice of peace for raising Hue and Cry, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found; also Hue and Cry was part of the law before the Stat. 1 Ed. 3. cap. 16, which first instituted justices of the peace. 2 *Hal. H. P. C.* 99.

It is incumbent upon constables to pursue Hue and Cry when called upon, and they are severely punishable if they neglect it: and it prevents many inconveniencies if they be there; for it gives a greater authority to their pursuit, and enables the pursuant, in his assistance, to plead the general issue upon the statutes 7 Jac. 1. cap. 5. 21 Jac. 1. cap. 12; without being driven to special pleading: therefore, to prevent inconveniencies which may happen by unruliness, it is most advisable that the constable be called: yet upon a robbery, or other felony committed, Hue and Cry may be raised by the country in the absence of the constable; and in this there is no inconveniency, for if Hue and Cry be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Hal. Hist. P. C.* 99, 100.

The regular method of levying Hue and Cry is for the party to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and then to the next, till the offender be found. 3 *Inft.* 116: *Delt. p. r. c. c.* 28: *Comp. de Pace* 178: 2 *Hawk. P. C.* 75.

The constable is not only to make search in his own vill, but also to raise all the neighbouring vills, who are all to pursue the Hue and Cry with horsemen, as well as footmen until the offender be taken. 2 *Hal. Hist. P. C.* 101. In case of Hue and Cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet these who pursue Hue and Cry may arrest, and proceed as if a felony had been really committed. 2 *Hal. Hist. P. C.* 101: 5 *H. 5. a.* 21 *H. 7.* 28 *a.* 10 *R. de.* 2 *Ed.* 4. 8 & 9: 29 *Ed.* 3. 39: 2 *Inft.* 173: 2 *Lanc. Hist. P. C.* 102.

If Hue and Cry be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those that follow the Hue and Cry, may arrest and imprison him in the common gaol, or carry him to a justice of the peace. 2 *Hal. Hist. P. C.* 102.

If the person pursued by Hue and Cry be in a house and the doors are shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, tho' it be only on suspicion of felony, for it is for the King and Commonwealth, and therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and a Hue and Cry levied upon the offender. 7 *Ed.* 3. 16 *b.*: 2 *Hal. Hist. P. C.* 102. See title *Constable*.

It seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 1 *Hal. Hist. P. C.* 102. See title *Homicide*.

Upon Hue and Cry levied against any person, or where any Hue and Cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. *Delt. cap.* 28: 2 *Ed.* 4. 8 *b.*: *Comp. de Pace* 178: 2 *Hal. Hist. P. C.* 103. See title *Constable*.

But though he may search suspected places or houses, yet his entry must be by open doors, for he cannot break open doors barely to search, unless the person against whom the Hue and Cry is levied be there, and then it is true he may; therefore, in case of such a search, the breaking open the door is at his peril, viz. justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within, of his business, and a demand of entrance, and a refusal, before doors can be broken. 2 *Hal. Hist. P. C.* 103. See title *Constable*.

If the Hue and Cry be not against a person certain, but by the description of his stature, person, clothes, horse, &c. the Hue and Cry doth justify the constable, or other person, following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases) viz. to arrest a person by description. 2 *Hal. Hist. P. C.* 103.

But if the Hue and Cry be upon a robbery, burglary, manslaughter or other felony committed, but the person that did the fact is neither known nor described by person, clothes or the like; yet such a Hue and Cry is good as hath been said, and must be pursued, though no person certain be named or described. 2 *Hal. Hist. P. C.* 103.

And therefore in this case, all that can be done is, for those who pursue the Hue and Cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. 2 *Ed.* 4. 8 *b.*: 2 *Hal. Hist. P. C.* 103.

There can be no doubt but that both by the Common-law, as also by the several statutes which injoin the levying of Hue and Cry, they who neglect to levy one, (whether officers of justice or others) or who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect, 2 *Hal. Hist. P. C.* 104.

HUE AND CRY. 1.

We shall proceed to enquire more particularly, 1. On what robbery Hue and Cry may be raised, and how it ought to be pursued: 2. Of bringing the Action; at what Time; and the Evidence necessary; and what shall excuse the Hundred: 3. Of levying the Money.

1. The levying of Hue and Cry is enjoined by several acts of parliament, and to this purpose it is enacted by *Stat. Westm. 1. 3 Ed. 1. cap. 9*, "That all be ready and appalled at the summons of the sheriff, to pursue and arrest felons."

Though some imagined that Hue and Cry was grounded on this statute; yet Lord Coke says, That it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. *2 Inst. 171.*

By the statute of *4 Ed. 1. De officio coronatoris*, Hue and Cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as elsewhere is used in England; and all shall follow the Hue and steps as near as they can.

Next came the *Stat. of Winchester*, the effect of which has been already stated.

By *Stat. 27 Eliz. c. 13. § 2*, it is enacted, "That the inhabitants and residents of every hundred (with the franchises within the precinct thereof) wherein negligence, fault or defect of pursuit and fresh suit after Hue and Cry made shall happen to be, shall answer and satisfy the one moiety of all such money and damages as shall be recovered against the hundred, with the franchises therein, in which any robbery or felony shall be committed, to be recovered by action of debt, &c. by and in the name of the clerk of the peace for the time being, or of in every such county, and recovery by the party or parties robbed shall be, without naming the christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the use of the inhabitants of the hundred where any such robbery, &c. shall be committed."

It seems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the private stealing, or taking any thing from the party, does not come within the statutes which make the hundred liable, because the hundred is not liable for not preventing the robbery, but because they did not apprehend the robbers, which in private felonies, and of which they had no notice, it would be difficult, if not impossible, for them to do. *7 Co. 6, 7: 2 Salk. 614.*

Also it hath been adjudged, and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable: The reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; also being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders. *7 Co. 6 a. Sendil's case.*

But if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise the provision made by the statute would be eluded. *1 Sid. 263. and see 1 Salk. 614:*

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7 Mod. 159. Also it does not seem necessary, that the robbery should be committed in the highway, nor alleged to have been so by the plaintiff in his declaration.

7 Mod. 159. It may be in a private way, or be in a coppice; and in both cases the hundred shall be chargeable. *2 Salk. 614. and vide Carib. 71: 1 Mod. 221: 3 Mod. 258: 1 Show. 60: Comb. 150. S. C.*

It is clearly agreed that for a robbery committed in the night the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers. *7 Co. 6 b: 2 Inst. 569: 3 Leon. 350.*

But yet it is not necessary that the robbery should be committed after sun-rise, and before sun-set, for if there be as much day-light at the time, that a man's countenance may be discerned thereby, though it be before sun-rise or after sun-set, the hundred shall be liable. *7 Co. 6 a: Cro. Jac. 106: 1 And. 158: 1 Leon. 57: Savil 53: vide Carib. 71: Comb. 150: 3 Mod. 258: 1 Show. 60. S. P.*

It hath been held, that if robbers drive or oblige the waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time so as to charge the hundred. *1 Sid. 263: 7 Mod. 159: Hutton 125.*

If he that is robbed, after Hue and Cry, make no further pursuit after the robbers, action lies against the hundred. *4 Leon. 180.* The party robbed is not bound to pursue the robbers himself, or to lend his horse for that purpose; but still has his remedy against the hundred, if they are not taken: tho' if any of them are taken, either within forty days after the robbery, or before the plaintiff recovers, the hundred is discharged. *Sid. 11.* When a man is robbed on a Sunday, on which day persons are supposed to be at church, and none ought to travel, the hundred is not liable. See *stat. 27 El. c. 13.* But where a robbery is done on a Sunday, tho' the hundred is not chargeable, Hue and Cry shall be made by *Stat. 29 Car. 2. c. 7:* And if a person be robbed going to church in a country town or village, on a Sunday, which is a religious duty required by law, it has been held an action lies against the hundred; but not if one be robbed on that day in other travelling for pleasure, &c. which is prohibited by statute.—*6 Geo. 1. C. B. per King, chief justice.*

And it was formerly ruled by three judges on the *Stat. of Winton*, where a man was robbed on a Sunday, in time of divine service, and made Hue and Cry, that the hundred should be charged; for many persons are necessitated to travel on that day; as physicians, &c. *2 Cro. 496: 2 Rol. 59: Godb. 280: See 2 Nels. Abr. 937, 938.* A robbery must be an open robbery, that the country may take notice of it, to make the hundred answerable. *7 Rep. 6.*

A man is set upon and assaulted by robbers in one hundred, and carried into a wood, &c. in another hundred, near the highway, and there robbed; the action shall be brought against the hundred where the robbery was done as particularly expressed in the statute, and not the hundred where the man was taken or assaulted; because the assault is not the efficient cause of the robbery, as a stroke is the cause of murder. *2 Salk. 614: 7 Mod. 157.*

But where goods are taken from a man in one hundred, and opened in another; where they are first taken or

4 T

seized,

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seized, they are stolen; and the robbery is committed. 2 *Lill. Abr.* 27.

By the *Stat. 8 Geo. 2. c. 16*, no process for appearance is to be served against the hundred, &c. for a robbery committed, but on the high constable, who shall give notice of it in one of the principal market-towns, &c. and then enter an appearance, and defend the action. By *Stat. 22 Geo. 2. c. 24*, No person shall recover on any of the statutes of *Hue and Cry*, above 200*l.* unless the person or persons so robbed shall at the time of such robbery be together in company, and be in number two at the least, to attest the truth of his or their being so robbed.

And by *Stat. 30 Geo. 2. c. 3. § 116*, and 4 *Geo. 3. c. 2. § 118*, no receiver general of the land-tax, or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company.

2. The general doctrine as to actions is as follows. Where a robbery is done on the highway, in the day-time, of any day except *Sunday*, the hundred where committed is answerable for it: but notice is to be given of it, with convenient speed, to some of the inhabitants of the next village, to the intent that they may make *Hue and Cry* for the apprehending of the robbers, or no action will lie against the hundred: and if any of the robbers are taken within forty days, and convicted, the hundred shall be excused.

In 3 *Lev.* 320, it is said, that upon search of the parliament roll it appears, that the statute of *Winton* gives only forty days to the county, and that the statute 28 *Ed. 3. c. 11*, is but a confirmation thereof; and accordingly it was adjudged good, where the plaintiff brought an action on the statute of *Winton*, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute, and with this the modern precedents agree, as *Rast. Ent.* 406: *Co. Ent.* 351: *Hern.* 215: *Tbif. Brev.* 141: 2 *Salk.* 376.

If a servant be robbed in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred, but then the servant must make oath that he knew not any of the robbers. *Cro. Car.* 37. Also the servant being robbed in his master's absence, may himself maintain an action against the hundred, and may declare that he was possessed *ut de bonis suis propriis*, &c. And though the jury find that he was robbed of his master's money, yet shall he recover; for the servant is possessed *ut de bonis suis propriis*, against all, and in respect of all, but him that hath the very right. 2 *Salk.* 613-4: 4 *Mod.* 303: *Comb.* 263: 1 *Sid.* 45.

If a servant be robbed in the presence of the master, the master must sue; and the oath of the master is sufficient. 2 *Salk.* 613: *Carth.* 147.

There must be an oath, *vide Carth.* 145: 2 *Salk.* 613: 1 *Shrow.* 94: 3 *Mod.* 287.

Where a servant is robbed, he must be examined and sworn; but if the master be present, it is a robbery of him. *Shrow* 241: 1 *Leon.* 323. If a quaker be robbed, or a man's servant being a quaker, and either refuse to take an oath of the robbery, and that he did not know any of the robbers, the hundred is not answerable; for the *Stat. of 27 Eliz. c. 13*, was made to prevent combination between persons robbed and the robbers. 2 *Salk.* 613.

But the master's oath where the servant is a quaker, or otherwise, and being robbed in his presence, will maintain the action in his own name. *Carth.* 146. And a plaintiff had judgment on his oath, though his servant that was robbed with him knew one of the robbers. When a carrier is robbed of another man's goods, he or the owner may sue the hundred; but the carrier is to give notice, and make oath, &c. though the owner of the goods brings the action. 2 *Saund.* 380.

If *A.* and *B.* travelling together are robbed of a sum of money, to which they are both jointly intitled, they may both join in an action against the hundred; but otherwise if they had separate and distinct interests. *Dyer* 370 *a.* pl. 59.

By *Stat. 27 Eliz. c. 13. § 11*, it is enacted, That no person that shall happen to be robbed shall maintain any action, or take any benefit of the statutes which make the hundred liable, except the person so robbed shall, with as much convenient speed as may be, give notice of the robbery so committed unto some of the inhabitants of some town, village or hamlet, near unto the place where any such robbery shall be committed.

In the construction of this clause of the statute it hath been holden, That if a person be robbed in a highway *in divisi hundredorum*, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient. *Cro. Jac.* 675, See *Cro. Car.* 41, 379: 1 *Shrow.* 94.

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, that it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conuizance of the nearest place or town. *March.* 11: and see 2 *Leon.* 82.

Also if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in not pursuing the robbers, or refuses to lend his horse for that purpose, yet he shall not lose his action for this, nor the hundred be excused. *March.* 11: 2 *Leon.* 82.

Now by *Stat. 8 Geo. 2. cap. 16. § 1*, it is further enacted, "That no person shall maintain any action against the hundred, unless he shall, (besides the notice already required by the *Stat. 27 Eliz. c. 13.*) with as much convenient speed as may be, after any robbery committed, give notice thereof to one of the constables of the hundred, or to some constable, borougher, headborough or tithingman of some town, parish, village, hamlet or tithing near unto the place where such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling house of such constable, &c. describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of such robbery, together with the goods and effect whereof he was robbed."

By *Stat. 27 Eliz. c. 13. § 11*, it is enacted, "That the party robbed shall not have any action, except he shall first, within twenty days next before such action to be brought, be examined upon his corporal oath, before some justice of the peace of the county where the robbery was committed, whether he knows the parties that committed

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mitted the robbery, or any of them; and if, upon examination, it be confessed, that he knows the parties, or any of them, that then he shall, before the action be commenced, enter into sufficient bond by recognizance before the said justice, effectually to prosecute the same person and persons."

In the construction of this clause of the statute, the following points have been holden;

That if the party does not know the robbers at the time of the robbery committed, tho' he happens to know them afterward, it is not material. *March 11.*

It hath been adjudged, that the oath may be taken before a justice of the county, though not in the county at the time of administering it. *1 Jones 239.*

As to giving bond for payment of costs, by *Stat. 8 Geo. 2. cap. 16.* it is enacted, "That, before any action commenced, the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable, or high constables of the hundred in which the robbery shall be committed, in the penal sum of one hundred pounds with two sufficient sureties to be approved of by such chief clerk, &c. with condition for securing to such high constable or high constables, the due payment of his or their costs, after the same shall be taxed by the proper officer, in case the plaintiff in such action shall happen to be nonsuited, or shall discontinue the action, or in case judgment shall be given on demurrer, or a verdict against him."

Costs are always given in actions on the statutes of Hue and Cry, where damages are recovered. *1 Term Rep. 72.*

By *Stat. 27 Eliz. c. 13. § 9.* The action is to be brought within one year after the robbery committed.

In the construction of this statute it hath been holden; That if a person be robbed the 9th of October 13 Jac. and so laid that the teste of the writ be the 9th October 14 Jac. that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the enrolment of deeds, which have always received a benign interpretation. *Hob. 139. 140: Moor 878. pl. 1233: 1 Brownl. 156. S. C. Vide 1 Sid. 139: 1 Keb. 495.*

An action was brought by the master, on the statute of *Winton*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then 50 miles from the place), also that he made oath that he did not know any of the persons; the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff observing his mistake moved to amend, by declaring of a robbery on his servant, &c. and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost if not allowed, the court, after long debate and consideration of former precedents, admitted him to amend. *3 Lev. 347.*

It seems that, from the necessity of the case, the party himself that was robbed is to be admitted as a witness, but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury

to believe that a robbery was actually committed, and that the party lost what he declared for. *2 Leon. 12.*

By *Stat. 8 Geo. 2. c. 16.* it is enacted, "That in any action against any hundred, any person inhabiting within the hundred, or any franchise thereof, shall be admitted as witness for or on behalf of the hundred."

If an action against the hundred be discontinued, on a new action brought, there must be a new oath taken within forty days before the last action brought. *Sid. 139.* In action upon the statute of *Hue and Cry*, the declaration is good, though the plaintiff doth not say, that the justice of peace who took the oath lived *prope locum* where the robbery was committed. And oath was made before a justice of peace of the county where the robbery was done, in a place of another neighbouring county; and it was held good. *Cro. Car. 211.*

If a justice of peace refuse to examine a person robbed, and to take his oath, action on the statute lies against the justice. *1 Leon. 323.* It is safe to say the plaintiff gave notice at such a place, near the place where the robbery was done; and though that place where notice is given be in another hundred or county, yet it is good enough; for a stranger may not know the confines of the hundred or county. *Cro. Car. 41, 379: 3 Salk. 184.*

If there be a mistake of the parish in the declaration where the robbery was, if it be laid in the right hundred it is well enough. *2 Leon. 212.* And though the party puts more in his declaration than he can prove, for so much as he can prove it shall be good. *Cro. Jac. 348.*

Upon a trial in these cases, the party must file his original, and be sure to have a true copy thereof, and witnesses to prove it; and he must also have the affidavit or oath, and a witness to prove the taking it. *2 Lill. Abr. 25.*

By *Stat. 27 Eliz. c. 13. § 8.* it is enacted, "That where any robbery is committed by two, or a greater number of malefactors, and that it happen any one of the said offenders to be apprehended by pursuit, to be made according to the statutes, that then, no hundred or franchise shall in any wise incur the penalty loss or forfeiture mentioned in the statutes, although the residue of the malefactors shall happen to escape." See *1 Vent. 118, 325: Raym. 221: 2 Lev. 4.*

If Hue and Cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the statute. *1 Vent. 118, 119.*

By the *Stat. 8 Geo. 2. cap. 16.* it is enacted, "That no hundred, or franchise therein, shall be chargeable by virtue of any of the statutes, if any one or more of the felons, by whom such robbery shall be committed, be apprehended within the space of forty days next after public notice given in the *London Gazette*, as by the statute is provided."

3. By *Stat. 27 Eliz. c. 13. § 14.* it is enacted, "That after execution of damages by the party or parties so robbed had, it shall be lawful (upon complaint made by the party charged) to and for two justices of the peace (whereof one to be of the *quorum*) of the same county, inhabiting within the hundred, or near unto the same where any such execution shall be had, to assess and tax rateably and proportionably, according to their discretions, all and every the towns, parishes, villages and hamlets, as well of the said hundred where any such robbery shall be committed,

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committed, as of the liberties within the said hundred, and toward an equal contribution, to be had and made for the relief of the inhabitants, against whom the party or parties robbed before that time had execution."

The constables, &c. are to levy the money and pay it over to the justices, and they are to deliver it over to the inhabitants, for whose use it was collected.

The same taxation is to be in cases where there is default or negligence of pursuit and fresh suit, for the benefit of inhabitants having damages or money levied on them, (See ante 1.)

By the Stat. 8 Geo. 2. c. 16, already referred to, after judgment against the hundred, no process shall be served on the high constable or any inhabitant: but the sheriff on receipt of the writ of execution shall shew it *gratis* to two justices of the peace in or near the hundred, who shall speedily cause an assessment to be levied pursuant to the Stat. 27 El. c. 13 and also for the necessary expences of the high constable above the costs and damages recovered, of which, on notice from the two justices, he shall give an account and proof on oath to their satisfaction, having first caused his attorney's bill to be taxed. § 4.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not be called upon for a return till sixty days after. And See Stat. 22 Geo. 2. c. 46. § 34.

And the like assessment shall be in case the plaintiff be nonsuit, discontinue, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties, he cannot be reimbursed on the bond of 100*l.* penalty; and the money levied shall be paid to the justices for the high constable in ten days after it is levied. § 7 8. of said Stat. 8 Geo. 2. c. 16.

And the justices may limit a time not exceeding thirty days for levying such assessment; and the officer appointed refusing or neglecting to levy and pay the money, &c. in such time, forfeits double the sum. § 9, 10.

If there be judgment against the hundred, it may be levied against the inhabitants of the same hundred by *fiat facias*. So it may be levied upon any one, who has lands in his possession within the hundred, though he has no house nor lodging there; for he is an inhabitant. R. 2 Sav. 423.—Upon a lessee, or purchaser after the robbery committed R. Noy 155.—So it may be levied upon one or two of the inhabitants. But if a man come to inhabit in an hundred after a robbery done, he shall not be charged, R. Hutt. 125; Cont. per Buckley, *Mar. pl.* 28.

HUISSERIUM, A ship used to transport horses; derived, as some will have it, from the Fr. *buis*, i. e. a door; because, when the horses are put on shipboard, the doors or hatches are shut upon them, to keep out the water. *Brompton Anno* 1190.—These ships have been termed *Ufers*.

HUISSIER, An usher of a court, or in the King's palace, &c. See *Usher*.

HULKA, A hulk or small vessel. *Walsing.* 394.

HULKS, for felons; See title *Transportation*.

HULL, A restraint of exactions taken there, Stat. 27 Hen. 8. c. 3. Their duties on salt fish and herrings restored. Stat. 33 Hen. 8. c. 33; 5 Elz. c. 5. *sec.* 3. The Custom of Hull to have a deputy resident at York, Stat. 1 Eliz. c. 11. *f. 8.* For erecting workhouses and maintaining the poor at Hull, See Stat. 15 Geo. 1. c. 10: 28 Geo. 2. c. 27. See this Dict. tit. *Fish: Navigation Acts*.

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HULLUS, A hill.—In *hullis* & *bolmis*, i. e. in hills and dales. *Mon. Angl. tom. 2. p.* 292.

HUMAGIUM, A moist place, *Mon. Angl. 1 par. f.* 628*a.*

HUMBER, (river) in *Yorkshire*, fish-garths and piles, &c. to be removed. Stat. 23 Hen. 8. c. 18. See title *Fish*.

HUNDRED.

HUNDREDUM, *Centuria*.] A part or division of a Shire; so called, either because of old each hundred found 100 fidejussors of the King's peace, or a hundred able men for his wars. But more probably it is so called, because it was composed of an hundred families. It is true, *Brompton* tells us, that an hundred contains *centum villas*; and *Giraldus Cambrensis* writes, that the *Isle of Man* hath 343 *villas*. But in these places the word *villa* must be taken for a country family; for it cannot mean a village, because there are not above 40 villages in that island. So where *Lambard* says, that an hundred is so called, à *numero centum hominum*, it must be understood of an hundred men, who are heads or chiefs of so many families.

These were first ordained by King *Alfred*, the 29th King of the *West Saxons*: *Lambard verbo Centuria*. This dividing counties into hundreds, for better government, King *Alfred* brought from *Germany*: For there *centa*, or *centena*, is a jurisdiction over an hundred towns. See 1 *Comm.* 115: *Introd.* § 4.

In ancient times, it was ordained for the more sure keeping of the Peace, that all free-born men should cast themselves into several companies by 10 in each company. and that every of these ten men should be surety and pledge for the forth-coming of his fellows. For which cause these companies in some places were called *tithings* and as ten times ten makes an 100, so because it was also appointed that ten of these tithings should at certain times meet together for matters of greater weight, therefore that general assembly was called an hundred.—*Lamb. Conf.*

The hundred is governed by an high constable or bailiff; and formerly there was regularly held in it the hundred-court for the trial of causes though now fallen into disuse. In some of the more Northern counties these hundreds are called wapentakes. 1 *Comm. Introd.* § 4. *p.* 115: and See 4 *Comm.* c. 33.

This is the original of hundreds, which still retain the name, but the jurisdiction is devolved to the county-court, some few excepted, which have been by privilege annexed to the crown, or granted to some great Subject, and so remain still in the nature of a franchise. This has been ever since the Stat. 14 Ed. 3. *f. 1. cap.* 9, whereby these hundred-courts, formerly farmed out by the Sheriff to other men, were all, or the most part reduced to the County court, and so remain at present.

But now, by hundred-courts we understand several franchises, wherein the sheriff has nothing to do by his ordinary authority, except they of the hundred refuse to do their office. See *West part 1: Symbol, lib. 2. sec.* 228. *Ad hundredum post Pascha, Et ad proximum hundredum post festum St. Mich.*—*Mon. Angl. 2 par. f.* 293*a.*

An hundred is to have jurisdiction or power to administer justice in 100 vill, or of 100 men, or of 100 parishes. *Br. Court Baron, pl.* 8. cites 8 H. 7. 3. *per Rede*.

Every ward in *London* is an hundred in a county, and every parish in *London* is a vill in an hundred: 9 *Rep.* 66*b.*

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Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, (*viz.* those hundreds which were anciently parcel of the farm of the sheriffs, that the statute 2 Ed. 3. c. 12, speaks of); or else they were such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. *Vent.* 405.

In the time of King Alfred the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the King's relations had the government of them, and therefore they were called *Confranguinei*; (*cousins*) and so are the Earls, (*Comites*) Lord-lieutenants, styled at this day; but when the office became troublesome, there were ordained *Vicecomites*, (*Sheriffs*) which name remains to this day, and the others continue to be called *Confranguinei*, but have no power in the county, having only the honorary name of Earls or *Comites* of such or such a county, &c. For the better government of these counties, the *Vicecomites* had two courts; but out of those the King granted petty leets and courts-baron; but the tourn of the sheriff had yet a superintendant power, they being derived out of the sheriff's tourn. See *Dyer* 13.

The King afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the King utterly, but the hundreds granted in fee were not wholly exempt. On this arose some contention, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of *Linc.* 9 Ed. 2. st. 2; That sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the King and county, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of 2 Ed. 3. cc. 4, 5; That sheriffs should continue but for one year. But this took not away the whole inconvenience: for the Crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made them endeavour to make up their money by unlawful means; and therefore came the statutes 2 Ed. 3. cap. 12: 14 Ed. 3. cap. 9. By the first it was enacted, That all hundreds and wapentakes granted by the King shall be annexed to the county, and not severed. And by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the King granted away hundreds, and abated not the sheriff's farm. *Ang.* 2 *Stow.* 98, 99.

Hundreds are liable to penalty on exportation of wool, 7 & 8 Will. 3. c. 28. § 8.—Liable to damages sustained by riotously pulling down buildings, 1 Geo. 1. st. 2. c. 5. § 6.—By killing cattle, cutting down trees, burning houses, &c. 9 Geo. 1. c. 22. § 7: 29 Geo. 2. c. 36. § 9. By destroying turnpikes, or works on navigable rivers, 8 Geo. 2. c. 20. § 6.—By cutting hop-binds; 10 Geo. 2. c. 32. § 4.—By destroying corn to prevent exportation, 11 Geo. 2. c. 22. § 5.—By wounding officers of the customs, 19 Geo. 2. c. 34. § 6.—Or by destroying woods, &c. 29 Geo. 2. c. 36. § 9.—So in cases of robbery. See title *Hue and Cry*.—So for the destruction of mines or pits of coal. *Burn's J.* title *Hundred*. See this Dict. under the several titles.

HUR

Inhabitants within the hundred may be witnesses for the hundred, 8 Geo. 2. c. 16.

The word *hundredum* is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. *Cowell*.

HUNDRED COURT, Is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here the judges, and the steward the registrar, as in the case of a court-baron. It is not a Court of record, and it resembles a court-baron in all points, except that in point of territory it is of a greater jurisdiction.

According to *Blackstone*, its institution was probably coeval with that of hundreds themselves, introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. See 1 *Comm. Introd.* § 4. and this Dict. titles *County Court*; *Court Baron*; *Court Lieet*; *Constable*, *Hundred*, &c.

HUNDREDORS, *hundredarii*.] Persons serving on juries, or fit to be impanelled thereon for trials, dwelling within the hundred where the land in question lies. *Stat.* 35 H. 8. c. 6. And default of *Hundredors* was a challenge or exception to panels of sheriffs, by our law, till the *Stat.* 4 & 5 Ann. cap. 16. ordained, that, to prevent delays by reason of challenges to panels of jurors for default of *Hundredors*, &c. writs of *venire facias* for trial of any action in the courts at *Westminster*, shall be awarded of the body of the proper county where the issue is triable. See title *Jury* I. II.

Hundredor also signifies him that hath the jurisdiction of the hundred, and is in some places applied to the bailiff of an hundred. See *Stats.* 13 Ed. 1. c. 38: 9 Ed. 2: 2 Ed. 3: *Horn's Mirror*, lib. 1.

HUNDRED-LAGH, from the Sax. *laga*, lex.] Is in Saxon the hundred court. *Manwood*, par. 1. pag. 1.

HUNDRED PENNY. Was collected by the sheriff or lord of the hundred, in *oneris sui subsidium*. *Camd.* and see *Spelm. Gloss.* *Pence* of the hundred is mentioned in *Domesday*. And it is elsewhere called, *hundredfeh*. *Chart. K. Job. Egilii Episc. Heref.*

HUNDRED-SETENA. Dwellers or inhabitants of a Hundred. *Charta Edgar. Reg. Mon. Ang. tom. 1. p. 16.*

HUNGER. According to the present doctrine, *Hunger* will not justify stealing food, to relieve a present necessity. 1 *Hal. P. C.* 54. And the doctrine seems just, as (on conviction) a judge may respite and a King pardon, an advantage which is wanting in many States; particularly those which are democratical. The ancient doctrine, (that it would justify) if now in force, might open a door to many villanies. And, in this commercial state, those who can labour need not fear starving. Those that cannot, and who are poor, the laws have made a provision for. See 4 *Comm.* 31.

HUNTING. By stat. 1 Hen. 7. c. 7. *unlawful hunting*, in any legal forest, park or warren, not being the King's property, by night, or with painted faces declared to be single felony. And by Stat. 9 Geo. 1. c. 22, Appearing armed with faces blacked, or disguised, to hunt, wound, kill, or steal deer, to rob a warren, or steal fish, is felony, without benefit of clergy See titles *Deer Stealers*: *Game*: *Black Act*.

HURDLE, A sledge or Hurdle used to draw traitors to execution. See title *Execution (Criminal)*.

HURDEREFERST,

HUR

HURDERFERST, A Domestick or one of the family, from the Sax. *hyred*, *familia*, and *fæst*, *firms*. *Leg. H. 1. c. 8.*

HURRERS, The cappers and hat-makers of London were formerly one division of the *Haberdaßers*, called by this name. *Stow's Surv. Lond. 312.*

HURST, HYRSI, HERST, from the Sax. *Hyrst*, i. e. a wood or grove of trees.] There are many places in *Kent*, *Suffex* and *Hampshire*, which begin and end with this syllable; and the reason may be, because the great wood called *Andreswold* extended through those counties. *Cowell.*

HURST CASTLE, Is so called, because situated near the woods. So *Hurst* is a woody place; and probably from thence is derived *Hurstley*, now, *Hurley*, a village in *Bedfordshire*. *Cowell.*

HURTARDUS, HURTUS, A ram or wether, a sheep. *Mon. Angl. tom. 2. pag. 666.*

HUS AND HANT, Words used in ancient pleadings.—*Henricus P. captus per querimoniam mercatorum Flandrie & imprisonatus, offert Domino Regi Hus & Hant in plegio ad standum recto, & ad respondendum prædictis mercatoribus & omnibus aliis, qui verius cum loqui voluerint: et dicitur si veniunt qui mancipiant quod dicitur Hen. P. per Hus & Hant venit ad summonitionem Regis vel Concilii sui in Curia Regis apud Shepway, & quod stabit ibi recto, &c. Placit. coram Concilio Dom. Reg. Anno 27 H. 3: Rot. 9. See commune Plegium, sicut Johannes Doe & Richardus Roe. 4 Inst. 72.*

HUSBAND AND WIFE, Are made so by marriage, and being thus joined, are accounted but one person in law. *Lit. 168.* See this Dict. title *Baron and Feme*.

HUSBANDRY AND HUSBANDMAN, There having been great decay of Husbandry and hospitality, it was enacted by *stat. 39 Eliz. c. 1*, now obsolete, that one half of the houses decayed should be erected, and forty acres of arable land laid to them, by the person, his heir, executor, &c. who suffered the decay: and they were to keep the houses and lands in repair.

The decaying of houses of husbandry prohibited, *stats. 4 H. 7. c. 19: 6 H. 8. c. 5: 7 H. 8. c. 1: 27 H. 8. c. 22: 2 & 3 Ph. & Ma. cc. 1, 2: 39 El. c. 1.* All now apparently expired or obsolete.—Wood not to be turned to tillage or pasture. *stat. 35 H. 8. c. 17. § 3.* Land to be re-converted to tillage, *5 & 6 Ed. 6. c. 5: 5 El. c. 2.* repealed by *stat. 35 El. c. 7. § 20.* Who may be compelled to serve in husbandry, *5 El. c. 4. § 7.*—How Husbandmen shall take apprentices. *5 El. c. 4. § 25.* See titles *Labourers: Apprentices.* Arable land not to be converted to pasture, *39 El. c. 2:* but not to extend to *Northumberland* *43 El. c. 9. § 32.*—*Obsolete.*

HUSBRECE, from Sax. *hus*, a house and *brice*, a breaking.] Was that offence formerly which we now call *Burglary*. *Blount.* See title *Burglary*.

HUSCARLE, A menial servant: It signifies properly a stout man, or a domestic; also the domestical gatherers of the *Danes* tributes were anciently called *huscarles*. The word is often found in *Domesday*, where it is said the town of *Dorchester* paid to the use of *huscarles* or *housecarles*, one mark of silver. *Domesday.*

HYTH.

HUSCANS, Fr. *hausrau*.] A sort of boot, or buskin made of coarse cloth, and worn over the stockings, mentioned in the ancient *Stat. 4 Ed. 4. c. 7.*

HUSFASTNE, Sax. *hus*, i. e. domus & *fæst*, fixus.] He that holdeth house and land.—*Bract. lib. 3. tract. 2. cap. 10.* See *Heordfeste*.

HUSGABLE, *husgabulum*.] House-rent, or some tax or tribute laid upon houses. *Mon. Ang. tom. 3. p. 254.*

HUSSELING-PEOPLE, Communicants; from the Sax. *husel* or *hussel*, which signifies the holy sacrament: See title *Hofie*.

HUSTINGS, *hustlingum*, from the Sax. *hustinge*, i. e. concilium, or curia.] A court held before the Lord Mayor and Aldermen of London, and is the principal and supreme court of the city: and of the great antiquity of this court, we find honourable mention made in the laws of King Edward the Confessor: *Debet etiam in London, quæ est caput Regni & Legum, semper Curia Domini Regis singulis septimanis die lune hussings sedere & teneri; fundata enim erat olim & ædificata ad instar, & ad modum & in memoriam veteris Magnæ Trojæ, & usque in hodiernum diem leges & jura & dignitates, & libertates regiasque consuetudines antiquæ magnæ Trojæ, in se continet: et consuetudines suas una semper inviolabilitate conservat, &c.* Other cities and towns have also had a Court of the same name; as *Winchester*, *York*, *Lincoln*, &c. *Flota lib. 2. c. 55: 4 Inst. 247: Stat. 10 Ed. 2. c. 1.* See this Dict. titles *Court of Hustings: London*.

HUTESIUM ET CLAMOR, A HUE AND CRY; See that title.

HUTILAN, Taxes. *Mon. Angl. tom. 1. p. 586.*

HYBERNAGIUM, The season for sowing winter corn, between *Michaelmas* and *Christmas*; as *Tremagium* is the season for sowing the summer corn in the spring of the year: These words were taken sometimes for the different seasons; other times for the different lands on which the several kinds of grain were sowed; and sometimes for the different corn; as *Hybernagium* was applied to wheat and rye, which we still call *winter-corn*; and *tremagium* to barley, oats, &c. which we term *summer-corn*: these words are likewise written *ibernagium* and *thornagium*. *Flota, lib. 2. cap. 73. § 18.*

HYDAGE. See *Hidage*.

HYDE OF LAND, AND HYDEGILD. See *Hide* and *Hidage*.

HYPOTHECA, In the civil law, was where the possession of the thing pledged remained with the debtor. *Inst. l. 4. c. 6. f. 7: 2 Comm 159.* See titles *Bailment*.

To **HYPOTHECATE**, A ship, from the Lat. *hypotheca*, a pledge.] Is to pawn the same for necessities; and a master may hypothecate either ship or goods for relief when in distress at sea; for he represents the traders as well as owners: and in whose hands soever a ship or goods hypothecated come, they are liable. *1 Salk. 34: 2 Lil. Abr. 195.* See titles *Insurance IV: Factor; Merchant; Ship; Mortgage, &c.*

HYTH, A port or little haven to lade or unlade wares at, as *Queen-hyth*, *Lamb-hyth*, &c. *New Book of Entries, fol. 3.*—*De tota medietate bythæ suæ in, &c. cum libero introitu & exitu, &c.* *Mon. Angl. 2 par. fol. 142.* Also a Wharf, &c.

ADDENDA ET CORRIGENDA

IN THIS VOLUME.

TIT. ACCESSARY, II. 4. After the recital of *Stat. 1 Ann. c. 9.* and its effects, add “and by *Stat. 10 Geo. 3. c. 48.* buyers or receivers of stolen jewels, gold or silver plate, where the stealing shall have been accompanied with burglary or robbery, may be tried (and transported for 14 years) before the conviction of the principal.”

ADMIRAL AND ADMIRALTY } In the last column but one of this article, the 4th parag. of the col. after “See the *St. and Dougl. 614.*” add “and *Stat. 33 Geo. 3. cc. 34, 66.* and this Dict. tit. *Navy.*”

ANNUITY.—At the end of this article add “See *Stat. 33 Geo. 3. c. 14.*; as to the Royal Exchange Assurance Annuity Company.”

APPRENTICE.—Before the last par. in the 3d col. of this article “The justices” &c. put II. and in the 3d par. of the next col. line 10, after the word “paid” add “(and by *Stat. 33 Geo. 3. c. 55.* may fine the master for such ill usage)”—In the next par. line 6. for *33 Geo. 3.* read *32 Geo. 3.*

ARREST.—Col. 3. line 23. for “*term*” read “*term.*”

AUCTIONS.—Line 6. after the words “explained by statutes” add “*28 Geo. 3. c. 37.*”

BANK.—Col. 2. after line 24. add “See *Stat. 33 Geo. 3. c. 30.*; as to the forgery of transfers and dividend-warrants, &c.”

BANKRUPT, III. 1. In the last par. of this Division after *Stat. 5 Geo. 2. c. 30.* add “And an action may accordingly be maintained for such debt. *5 Term Rep. 287.*”

BOOKS.—At the end of par. 3. of this article, add “See *Stat. 34 Geo. 3. c. 20.*; and this Dict. title *Literary Property.*”

BREAD.—Par. 2. line 1. after 29. add “(explained and restrained as to the time of prosecution, which is limited to *seven days*, by *Stat. 33 Geo. 3. c. 37.*)”

For CAUTIONE ADMITTENDT read ADMITTENDA.

COALS.—Line 29. after 13. add “(explained as to coals carried coastwise in *Scotland*, by *Stat. 33 Geo. 3. c. 69.*)”

DOWER, IV. Col. 2. par. 2 and 4. for “*1 Inst. 366.*” read “*1 Inst. 36 b.*”

EXECUTION, III. 4. Col. 2. par. 3. line 3. after “*200 l.*” add “and by *Stat. 33 Geo. 3. c. 5.* to *300 l.*”

EXECUTOR, V. 6. Col. ult. par. 2. line 18. for “*rent assets*” read “*real assets.*”

————, V. 8. Par. 3. line 5. for “*attend*” read “*intend.*”

FELONY —Col. 2. line penult. for “Foreign State, serving.” read “Foreign State, going out of the realm to serve, without taking Oath of Allegiance.”

GAOL AND GAOLER.—Line 11. for “*bealed*” read “*treated*”

HIGHWAYS, VI. (A) 1. col. 2. par. 3. line 12-16. *dele* from “Persons above 18—to—six days duty”—that part of the *Stat. 13 Geo. 3. c. 78.* being repealed by *Stat. 34 Geo. 3. c. 74.*

